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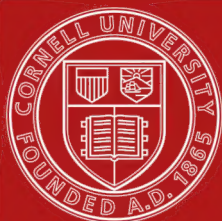
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COMMENTARIES

ON THE LAW OF

PRIVATE CORPORATIONS

BY

SEYMOUR D. THOMPSON, LL. D.

IN SIX VOLUMES.

VOLUME VI.

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CONTENTS OF VOLUME VI.

TITLE SEVENTEEN.

RECEIVERS OF CORPORATIONS.

(CONTINUED.)

CHAPTER CLXXIII.

RECEIVERS OF RAILROADS.

SECTION

7202. Appointing receivers of railroad companies which fail to operate their roads.
7203. Building or completing a railroad.
7204. Performing contracts of corporation.
7205. Court will carry out the construction placed by different railroad companies upon their own contracts.
7206. Payment of rental under "car-trust" leases.
7207. Applications or misapplications of this principle.
7208. Character of such contracts determined by the local law.

SECTION

7209. Vendor or lessor desiring to preserve a lien must comply with local law.
7210. Lien of such leases good as against subsequent mortgagees.
7211. *Status* of rents where the lessor has resumed possession.
7212. Whether authorize receiver to make new car-trust leases.
7213. Purchasing rolling-stock.
7214. How keep accounts in cases of the receivership of a railway having separate divisions.
7215. Powers of receiver appointed by the State.

CHAPTER CLXXIV.

RECEIVERS OF INSURANCE COMPANIES.

SECTION

- 7219. Appointment of receivers of such companies.
- 7220. Circumstances under which appointed.
- 7221. Appointment at the suit of judgment creditors.
- 7222. Appointment at the suit of policy-holders.
- 7223. Impeaching the decree appointing the receiver.
- 7224. Receiver cannot reinsure risks.
- 7225. Cannot waive stipulations in policies.
- 7226. Payment of losses accruing during the receivership.
- 7227. Receiver's right of action on a guaranty where one life insurance company absorbs another and reinsures its risks.
- 7228. Administration of the securities deposited with the Superintendent of Insurance.
- 7229. Proceedings where receiver disallows a claim.
- 7230. Compromising claims.
- 7231. Premium notes in the hands of receiver.
- 7232. Further of premium notes.
- 7233. Assessing the premium notes.
- 7234. Necessity of assessment.
- 7235. Circumstances under which such assessments may be made.
- 7236. Effect of assessments by a former receiver.
- 7237. Extent and proportion of the assessment.

SECTION

- 7238. Valuation of policies in winding up.
- 7239. Rule adopted by statute in England.
- 7240. Manner of making the assessment.
- 7241. Equalizing those who have paid premiums in cash.
- 7242. Particularity in making the assessment.
- 7243. Requisites of notice of the assessment.
- 7244. Notes payable absolutely where no assessment is necessary.
- 7245. Arrangements among the members limiting their liability.
- 7246. Actions to enforce assessments upon premium notes.
- 7247. What the receiver must aver and prove.
- 7248. Recovery of interest on such premium notes.
- 7249. Receiver takes premium notes subject to equities.
- 7250. Illustrations of this principle.
- 7251. Right of set-off in actions on premium notes.
- 7252. Right of set-off under statutes of New York.
- 7253. Defenses to such actions.
- 7254. Priorities in distribution.
- 7255. Receiver may exercise an option possessed by the company.
- 7256. Distribution not made to creditors of creditors.

CHAPTER CLXXV.

RECEIVERS OF NATIONAL BANKS.

SECTION

- 7262. Power of courts to appoint receivers of national banks.

SECTION

- 7263. Cases in which courts will appoint receivers.

SECTION

7264. Appointment of receiver by Comptroller of the Currency under Revised Statutes of the United States.
7265. Circumstances under which Comptroller may appoint receiver under Act of 1876.
7266. Action of Comptroller in appointing receiver conclusive upon debtors.
7267. Evidence of his appointment.
7268. Effect of appointment on rights of action by and against bank.
7269. Effect of judgments against national banks in the hands of receivers.
7270. Right of action of receiver in Federal courts.
7271. Statute forbidding transfers after insolvency.
7272. Fraudulent preferences under this statute.
7273. Further of this statute.
7274. Statute prohibits attachments after insolvency.
7275. Further of attachments against national banks.
7276. Continued: attempted distinction in cases where bank not insolvent.
7277. This distinction repudiated.
7278. Further of such attachments.
7279. Actions by receiver to collect debts.
7280. In whose name action brought by receiver.
7281. Power of receiver to compromise debts.
7282. Whether receiver succeeds to larger rights of action than the corporation possesses.
7283. His right of action against the directors.
7284. His right of action against shareholders.
7285. Necessity of assessment.
7286. Determination of Comptroller in assessing the shareholders conclusive.

SECTION

7287. Parties in equity.
7288. When the action should be at law and when in equity.
7289. Pleading in such actions.
7290. Accruing of interest against stockholders.
7291. Mode of enforcing contribution and securing equality among the stockholders.
7292. Creditor's bill to enforce individual liability of stockholders.
7293. Receiver takes assets *cum onere*.
7294. Must respect valid liens and pledges.
7295. Must restore trust funds.
7296. Must restore money subscribed on scheme to increase capital which has failed.
7297. Must restore money deposited to be loaned to the president of the bank.
7298. What rights of set-off exist against receiver.
7299. The question how viewed on principle.
7300. The question how viewed by other courts.
7301. The same subject continued.
7302. Continued.
7303. Waiver of right of set-off.
7304. Voluntary liquidation of national banks.
7305. When stockholders may elect agent to wind up.
7306. Receiver authorized to purchase property in which bank has equities.
7307. Notice to present claims to receiver.
7308. Proof of claims by creditors.
7309. Dividends by Comptroller in liquidation.
7310. What claims entitled to distribution.
7311. Priorities among creditors in such distribution.
7312. When United States not a preferred creditor.

SECTION

- 7313. Fees and expenses of the winding up and receivership.
- 7314. Creditors entitled to interest.
- 7315. Redemption of circulating notes.
- 7316. Enjoining proceedings by Comptroller and receiver.
- 7317. Actions against national banks after commencement of liquidation.
- 7318. Defenses available to the receiver against actions.
- 7319. State courts no control over receiver.
- 7320. Jurisdiction of State courts of actions by and against such receivers.

SECTION

- 7321. No relief against the United States in actions against the Comptroller or receiver.
- 7322. What actions lie against the Comptroller.
- 7323. Effect of receiver being substituted as defendant.
- 7324. Payment of State taxes.
- 7325. Actions against receiver for taxes.
- 7326. Sales by such receivers.
- 7327. Replevin of property in custody of receiver.
- 7328. Effect of appointment upon the statute of limitations.

CHAPTER CLXXVI.

FOREIGN RECEIVERS.

SECTION

- 7334. Receivers have no extra-territorial power.
- 7335. Cannot sue in a foreign jurisdiction except by comity.
- 7336. This comity generally recognized except as against domestic citizens.
- 7337. This comity does not extend to the prejudice of the State's own citizens.
- 7338. Foreign judicial assignments invalid as against domestic creditors.
- 7339. Actions permitted when not in derogation of domestic rights.
- 7340. For what purposes non-resident receivers permitted to sue.
- 7341. May sue to repossess himself of property removed into the domestic jurisdiction.
- 7342. Illustrations of this principle.
- 7343. Real property situate in the foreign jurisdiction does not vest in receiver.

SECTION

- 7344. Cases refusing to extend this comity.
- 7345. Foreign receivers preferred in contest with the debtor and his privies.
- 7346. Foreign receiver preferred in contest with foreign creditor.
- 7347. Distinction between voluntary assignments and assignments *in invitum* by operation of law.
- 7348. Where the receiver adopts and carries out the contract of the corporation.
- 7349. Not chargeable as garnishee or with trustee process.
- 7350. Attachment in foreign jurisdiction a contempt of court.
- 7351. Appointing a receiver of property situated in a foreign jurisdiction.
- 7352. Auxiliary receivers appointed as a matter of comity.
- 7353. Receiver cannot transfer jurisdiction to foreign court.

TITLE EIGHTEEN.

ACTIONS BY AND AGAINST CORPORATIONS.

CHAPTER CLXXVII.

POWER TO SUE AND BE SUED.

ART. I. IN GENERAL. §§ 7360-7375.

II. ACTIONS BY CORPORATIONS. §§ 7380-7388.

III. WHAT ACTIONS LIE AGAINST CORPORATIONS. §§ 7391-7415.

ARTICLE I. IN GENERAL.

SECTION

7360. Common-law power of corporations to sue and be sued.

7361. Power to sue coextensive with the power to make contracts.

7362. Exception as to liability for breach of corporate duties.

7363. This power conferred by statute and constitutional provisions.

7364. By what statutes.

7365. By what statutes not conferred.

7366. Corporations deemed "persons" for remedial purposes.

7367. Suable in what manner.

SECTION

7368. Power how affected by want of organization.

7369. *De facto* corporations.

7370. Power how affected by dissolution.

7371. What if the State is a member.

7372. Sovereign States may sue as corporations.

7373. Corporation cannot sue as a common informer.

7374. Power to sue exercised by directors.

7375. Corporation may maintain an action against its own members.

ARTICLE II. ACTIONS BY CORPORATIONS.

SECTION

7380. Corporations entitled to what remedies.

7381. May maintain actions of *assumpsit*.

7382. May sue in trespass.

7383. May maintain actions sounding in damages.

7384. May have summary remedies.

SECTION

7385. Special statutory remedies in favor of corporations.

7386. Remedies on commercial paper.

7387. Action by corporation on promise made to its officer.

7388. Demand in actions by corporations.

ARTICLE III. WHAT ACTIONS LIE AGAINST CORPORATIONS.

SECTION	SECTION
7391. What actions will lie against corporations.	7406. Actions for violations of public duties.
7392. When <i>assumpsit</i> will lie against corporations.	7407. Specific performance.
7393. When not.	7408. Mode of compelling performance of agreement to arbitrate.
7394. Trespass.	7409. Bills in equity for discovery.
7395. Case.	7410. Mode of procedure to compel discovery in equity.
7396. Trover.	7411. Further of this subject.
7397. Replevin.	7412. Statutory substitutes for discovery.
7398. Ejectment.	7413. Bill of interpleader by agent of corporation.
7399. Forcible entry and detainer.	7414. Actions to recover payments voluntarily made.
7400. Slander — Libel — Slander of goods.	7415. Demand in actions against corporations.
7401. Book account.	
7402. Account stated.	
7403. Use and occupation.	
7404. Actions on clauses of charter.	
7405. Actions on by-laws.	

CHAPTER CLXXVIII.

JURISDICTION AS DEPENDING UPON RESIDENCE AND CITIZENSHIP.

- ART. I. OF STATE COURTS. §§ 7421-7440.
- II. FEDERAL JURISDICTION AS DEPENDENT UPON DIVERSE CITIZENSHIP. §§ 7447-7458.
- III. REMOVAL OF SUCH ACTIONS FROM THE STATE TO THE FEDERAL COURTS. §§ 7462-7478.
- IV. "INHABITANCY" OF CORPORATIONS FOR THE PURPOSES OF FEDERAL JURISDICTION. §§ 7484-7489.

ARTICLE I. OF STATE COURTS.

SECTION	SECTION
7421. Residence of corporations for the purpose of State jurisdiction.	7423. Corporation resides at its principal office.
7422. Influence on State decisions of the change in Federal doctrine.	7424. Theory that it resides wherever it exercises its franchises.
	7425. Further of this theory.
	7426. Suable in any county in the State.

SECTION

- 7427. Venue the same as in the case of natural persons.
- 7428. In the county where the contract was broken or the injury occurred.
- 7429. The same subject continued.
- 7430. Where the cause of action accrues.
- 7431. Validity of statutes making corporations suable in any county.
- 7432. Local actions.
- 7433. Transitory actions.
- 7434. Changing the venue.
- 7435. Residence of a corporation the residence of its president.

SECTION

- 7436. National banks are State corporations for jurisdictional purposes.
- 7437. Jurisdiction and venue in respect of corporations chartered by the United States other than national banks.
- 7438. State jurisdiction in the case of interstate corporations.
- 7439. Actions against branches of corporations.
- 7440. Actions in the county in which the agent with whom the contract was made resides.

ARTICLE II. FEDERAL JURISDICTION AS DEPENDENT UPON DIVERSE CITIZENSHIP.

SECTION

- 7447. Early doctrine that a corporation was not a "citizen," under Federal Constitution and Judiciary Act.
- 7448. New doctrine that a corporation is a "citizen" of the State creating it, for the purposes of Federal jurisdiction.
- 7449. Conclusively presumed to be a citizen of the State creating it.
- 7450. Effect of this rule on domestic corporations.
- 7451. Further of this rule.
- 7452. Rule where the corporation is

SECTION

- created by the concurrent legislation of two States.
- 7453. All the substantial parties must be of diverse citizenship.
- 7454. Application of this rule of jurisdiction to joint-stock companies.
- 7455. Federal jurisdiction in the case of corporation owned by a State.
- 7456. Manner of pleading Federal jurisdiction.
- 7457. Further of this subject.
- 7458. Manner of averring citizenship.

ARTICLE III. REMOVAL OF SUCH ACTIONS FROM THE STATE TO THE FEDERAL COURTS.

SECTION

- 7462. Right of foreign corporations to remove on the ground of diverse citizenship.
- 7463. Submission to local jurisdiction does not preclude this right of removal.

SECTION

- 7464. Further of this doctrine.
- 7465. This right of removal extends to "tramp corporations."
- 7466. Invalidity of stipulations not to remove.
- 7467. Further of this subject.

SECTION

7468. Right of removal on the ground of prejudice or local influence.
 7469. Authority of the officer to make the affidavit.
 7470. Substance of the affidavit.
 7471. Conclusiveness of the affidavit.
 7472. Right of removal in cases of a corporation created by the concurrent legislation of two or more States.

SECTION

7473. Alien corporations entitled to remove.
 7474. Controversy must be wholly between different parties.
 7475. Removal of actions against corporations organized under a law of the United States.
 7476. Further of this subject.
 7477. Suits arising under the laws of the United States.
 7478. Removal by alien corporations.

ARTICLE IV. "INHABITANCY" OF CORPORATIONS FOR THE PURPOSES OF FEDERAL JURISDICTION.

SECTION

7484. "Inhabitancy" for purposes of Federal jurisdiction.
 7485. Old doctrine that a corporation can have no inhabitancy outside of the State creating it.
 7486. Further of this question.

SECTION

7487. Whether a corporation having an office in another State becomes an "inhabitant," etc.
 7488. Doctrine that inhabitancy and citizenship identical.
 7489. The present Federal doctrine on this subject.

CHAPTER CLXXIX.

JURISDICTION AS DEPENDING UPON PROCESS AND ITS SERVICE.

ART. I. WHAT PROCESS USED IN ACTIONS AGAINST CORPORATIONS. §§ 7495-7498.

II. SERVICE OF PROCESS ON CORPORATIONS GENERALLY. §§ 7502-7547.

SUBDIV. I. Upon Whom Service Made. §§ 7502-7530.

SUBDIV. II. Place and Manner of Service and Return. §§ 7538-7547.

ARTICLE I. WHAT PROCESS USED IN ACTIONS AGAINST CORPORATIONS.

SECTION

7495. Writ of summons.
 7496. Subpœna in equity.

SECTION

7497. *Capias*: warrant of arrest.
 7498. *Distringas* and sequestration.

ARTICLE II. SERVICE OF PROCESS ON CORPORATIONS GENERALLY.

SUBDIVISION I. Upon Whom Service Made.

SECTION

- 7502. State law governs in actions in Federal courts.
- 7503. Statute must be followed in order to give jurisdiction.
- 7504. Legislature may change modes of service.
- 7505. Rule where there is no governing statute.
- 7506. Agency of person on whom process served must appear of record.
- 7507. Whether the return conclusive as to the fact of agency.
- 7508. Service upon directors.
- 7509. Service upon officer after term expires, or after office resigned or abandoned.
- 7510. Further of this subject.
- 7511. Service upon the president.
- 7512. Service on managing agent.
- 7513. Who not managing agents to receive such service.
- 7514. Service on general agent.
- 7515. Service upon secretary, or secretary and treasurer.
- 7516. Service upon any agent or employé.

SECTION

- 7517. Service on station agents of railway companies.
- 7518. Service upon person having property in charge.
- 7519. Service on any agent in actions growing out of the business of his agency.
- 7520. Service upon a railway section foreman.
- 7521. Service upon stockholders.
- 7522. Service upon the cashier of a bank.
- 7523. Service upon receivers.
- 7524. Service upon clerk, book-keeper, etc.
- 7525. Service upon traveling agent.
- 7526. What agent can accept service.
- 7527. Authority to accept service, how shown.
- 7528. Service upon an officer who is plaintiff in the suit.
- 7529. Service upon corporate officer temporarily within the jurisdiction.
- 7530. Substituted service on another officer where proper officer not found.

SUBDIVISION II. Place and Manner of Service and Return.

SECTION

- 7538. Service where made.
- 7539. Further of this subject.
- 7540. Statutory mode of service must be followed.
- 7541. Following the analogy of statutes.
- 7542. Manner of service, delivering copy, etc.

SECTION

- 7543. Service by officer who is a member of the corporation.
- 7544. Service by publication.
- 7545. Form and sufficiency of the return.
- 7546. Objection to service and return, how made.
- 7547. Service of notice of appeal.

CHAPTER CLXXX.

JURISDICTION AS DEPENDENT UPON VOLUNTARY APPEARANCE.

SECTION

7552. Appearance cures defects in service of process and waives jurisdiction over the person.
7553. In case of foreign corporations, waives exemption from being sued.
7554. Application of this principle to Federal jurisdiction.
7555. Waives exemption from being sued in the particular Federal district.

SECTION

7556. What appearance not deemed such a waiver.
7557. Admits that it is sued by the right name.
7558. What is a voluntary appearance for the purposes of the action.
7559. What is not an appearance.
7560. What is an authorized appearance by a corporation.
7561. Waiving service and confessing judgment.

CHAPTER CLXXXI.

PARTIES TO SUCH ACTIONS.

SECTION

7566. Corporation when a necessary plaintiff.
7567. Corporations as joint plaintiffs.
7568. When corporation a defendant in actions at law.
7569. Joinder of several corporations as defendants.
7570. When corporation is a necessary party defendant in equity.
7571. Is a necessary party when holder of legal title.
7572. Corporation when not a necessary party defendant.
7573. Directors parties to actions affecting the trust reposed in them.
7574. President when a necessary party and when not.

SECTION

7575. Directors, trustees, officers, agents, etc., when not necessary or proper parties.
7576. When receivers entitled to be made parties.
7577. When stockholders may be parties defendant.
7578. Further of this subject.
7579. Stockholders for the corporation.
7580. Statutory exceptions permitting stockholders to be summoned.
7581. Other views as to the joinder of stockholders as defendants.
7582. Stockholders when not necessary parties defendant.
7583. What objections may be raised by one having no right to plead.

CHAPTER CLXXXII.

NAME IN WHICH ACTIONS BROUGHT BY CORPORATIONS.

SECTION

7589. Actions to assert corporate rights or to redress corporate injuries brought in corporate name.
7590. Corporation may sue in its own name on promise made to its officers for its benefit.
7591. Distinction between cases where the agency is disclosed and where it is concealed.
7592. Bank may sue on commercial paper made payable to its cashier.
7593. In such cases corporate officer may sue in his own name.
7594. Doctrine that action may be brought either in the name of corporation or agent.
7595. Promise made to trustees of unincorporated concern suable by trustees.

SECTION

7596. When successors in office may sue.
7597. Corporation party to contract in wrong name, suable by it in right name.
7598. If payable to the officer by description, the corporation may sue.
7599. Effect of change of name of corporation.
7600. Member cannot sue for the corporation.
7601. Corporation not affected by judgment in actions against its officers.
7602. Suing or being sued in the name of an officer.
7603. Action in whose name after dissolution.

CHAPTER CLXXXIII.

PLEADINGS IN SUCH ACTIONS.

SECTION

7608. Variance in respect of corporate name.
7609. What variances immaterial.
7610. Misnomer and identity in case of corporations having similar names.
7611. Variance created by using names of the trustees.
7612. Misnomer in actions by or against joint-stock companies and unincorporated associations.
7613. Misnomer must be pleaded in abatement.
7614. Misnomer amendable.

SECTION

7615. Effect of amendment where corporation is sued in wrong name.
7616. Declaring on obligations issued by corporations.
7617. Not necessary to aver that corporation had power to make the contract sued on.
7618. Qualifications of the foregoing.
7619. Pleading the defense of *ultra vires*.
7620. Not necessary to aver election, qualification, appointment, etc., of officer or agent.

SECTION

7621. Charter, when a private act, to be pleaded and proved.
 7622. Declarations upon statutes other than charters.
 7623. Statements before justices of the peace.
 7624. Pleading in actions on by-laws.
 7625. Declarations against corporations for improper or abusive exercise of statutory powers.
 7626. Corporations plead and answer, how.
 7627. Non-joinder of corporation

SECTION

- plaintiff pleadable in abatement.
 7628. Corporation may plead to the jurisdiction by attorney.
 7629. Stage of proceedings at which it may so plead.
 7630. Plea of the dissolution of the corporation.
 7631. Plea of *non est factum* by a corporation.
 7632. Verification of pleadings by corporations.
 7633. Allegation of citizenship of corporations for purposes of Federal jurisdiction.

CHAPTER CLXXXIV.

QUESTIONS RELATING TO CORPORATE EXISTENCE.

ART. I. IN GENERAL. §§ 7641-7652.

II. QUESTIONS OF PLEADING. §§ 7658-7682.

III. PROOF OF CORPORATE CHARACTER. §§ 7689-7713.

IV. EFFECT OF DISSOLUTION. §§ 7720-7724.

ARTICLE I. IN GENERAL.

SECTION

7641. Preliminary.
 7642. Validity of corporate existence not questioned collaterally.
 7643. Not even in case of a fraudulent organization.
 7644. Suing a corporation as such admits its corporate existence.
 7645. A general appearance by a corporation admits corporate existence.
 7646. Corporate existence admitted by taking an appeal.
 7647. Defendant contracting with

SECTION

- plaintiff as a corporation estopped to deny that it is such.
 7648. Extent and illustrations of this estoppel.
 7649. Cases denying this principle.
 7650. Assumed corporation contracting as such estopped to deny its own existence.
 7651. This estoppel extends to officers, directors, and members.
 7652. The question of corporate existence in criminal proceedings.

ARTICLE II. QUESTIONS OF PLEADING.

SECTION

- 7658. When not necessary to allege corporate existence.
- 7659. Doctrine that it is necessary to allege corporate existence.
- 7660. Necessary when suing for rights which can only inhere in a corporation.
- 7661. What averments of corporate existence sufficient.
- 7662. Whether necessary to repeat averment of corporate existence in successive counts.
- 7663. Declaring against a corporation which has changed its name.
- 7664. Question of corporate existence must be raised by defendant.
- 7665. Plea to the merits admits corporate existence.
- 7666. How question of corporate existence raised in pleading.
- 7667. Statutory rule in New York requiring plea in abatement or in bar.
- 7668. When must be raised by a denial under oath.
- 7669. Question raised by plea of *nul tiel corporation*.
- 7670. This plea raises only question

SECTION

- of existence *de facto* of corporation.
- 7671. *Nul tiel corporation*, how pleaded.
- 7672. Further as to particularity of averment in raising question of corporate existence.
- 7673. Particularity of statement where defendant pleads corporate existence.
- 7674. Particularity in replication to plea of *nul tiel corporation*.
- 7675. Burden of proof under this plea.
- 7676. Plea of *nul tiel corporation* defendant.
- 7677. *Nul tiel corporation* defendant, how pleaded.
- 7678. Stage of the proceedings at which defense of *nul tiel corporation* pleadable.
- 7679. Amendments in case of failure to plead corporate existence.
- 7680. Defense that plaintiff corporation was organized for unlawful purposes.
- 7681. Corporate existence how put in issue in actions before justices of the peace.
- 7682. Manner of pleading dissolution.

ARTICLE III. PROOF OF CORPORATE CHARACTER.

SECTION

- 7689. By proving charter and user thereunder.
- 7690. Proof of the charter.
- 7691. Judicial notice of charters and general statutes of incorporation.
- 7692. Distinction between judicial notice of charter and judicial notice of corporation.
- 7693. Presumption of ancient charter.
- 7694. Proof of corporate existence by reputation.

SECTION

- 7695. Proof under statutes by showing that the body acted as a corporation.
- 7696. Proof of user under a charter.
- 7697. User proved by proving a corporation *de facto*.
- 7698. User under a general law.
- 7699. Proving corporate existence where corporation is organized under general laws.
- 7700. Filing of articles and election of officers.

SECTION

7701. Organization in fact and user thereunder.
 7702. Corporate books and records as evidence of organization and user.
 7703. Records need not show acceptance of charter.
 7704. Proof by witnesses under notice to produce corporate books.
 7705. Where the corporation is unconditionally incorporated.
 7706. Judicial notice of the existence of corporation.
 7707. Proof by acts or admissions by the opposite party.

SECTION

7708. Letters patent, certificate of incorporation, articles of association, etc.
 7709. Conclusiveness of certificate issued by public official.
 7710. Certificate of commissioners that conditions precedent have been performed.
 7711. Presumptions in favor of the regularity of organization.
 7712. Proof of the existence of a foreign corporation.
 7713. Proof of corporate existence in criminal cases.

ARTICLE IV. EFFECT OF DISSOLUTION.

SECTION

7720. Effect of dissolution of the corporation.
 7721. Insolvency of corporation no defense to actions against it.

SECTION

7722. Dissolution by reason of non-user not pleadable.
 7723. What actions abate and what survive.
 7724. Effect of dissolution on suits commenced by attachment.

CHAPTER CLXXXV.

EVIDENCE IN SUCH ACTIONS.

ART. I. CORPORATE BOOKS AND RECORDS. §§ 7728-7741.

II. OTHER MATTERS OF EVIDENCE. §§ 7746-7750.

ARTICLE I. CORPORATE BOOKS AND RECORDS.

SECTION

7728. Corporate books and records admissible against the corporation.
 7729. Admissible between the corporation and its members.
 7730. Admissible in a controversy between members.
 7731. How far evidence against stockholders.

SECTION

7732. Exceptions and contrary holdings.
 7733. Books of account.
 7734. Corporate books and records admissible to prove their acts and proceedings.
 7735. Consequences of the rule that the corporate books are the best evidence.

SECTION

7736. Such records admissible to prove corporate existence.
 7737. Evidence that the books are the books of the corporation.
 7738. Secondary evidence of the contents of such books and records.

SECTION

7739. Such books and records *prima facie* evidence only.
 7740. When not evidence as against strangers.
 7741. Corporate records evidence against receiver of corporation.

ARTICLE II. OTHER MATTERS OF EVIDENCE.

SECTION

7746. Presumptions respecting corporations.
 7747. Parol evidence of corporate acts.
 7748. Illustrations of the foregoing.

SECTION

7749. Effect of by-laws as evidence.
 7750. Evidence of customs of private corporations.

CHAPTER CLXXXVI.

VARIOUS MATTERS OF PRACTICE IN SUCH ACTIONS.

SECTION

7754. Arbitration by corporations.
 7755. Disqualification of a judge who is a member of a corporation litigant.
 7756. Disqualification of jurors by reason of membership in corporations.
 7757. Disqualification of a juror by reason of being related to a shareholder.
 7758. Enforcement of mechanics' liens

SECTION

- against the property of corporations.
 7759. Corporations may enforce mechanics' liens.
 7760. Who may appeal from judgments against corporations.
 7761. Questions which may be considered on such appeals.
 7762. *Status* as suitors of corporations owned by the State.

CHAPTER CLXXXVII.

INJUNCTIONS IN SUCH ACTIONS.

SECTION

7767. Scope of this chapter.
 7768. Restraining *ultra vires* acts of corporations injurious to private right.
 7769. Injunctions against breaches of contracts.

SECTION

7770. Enjoining a corporation from breaking the contracts of its stockholders.
 7771. Enjoining corporations from committing trespasses upon property.

SECTION

7772. Enjoining the unlawful appropriation of private property for public purposes.
7773. Whether such an injunction ought to be denied on the ground of adequate remedy at law.
7774. Enjoining the *ultra vires* acts of corporations injurious to public right.
7775. Such jurisdiction supported upon the ground of trust.
7776. Injunctions to restrain invasions of corporate franchises.
7777. When not necessary to establish the franchise in a trial at law.
7778. To enjoin State railroad commissioners from establishing rates and charges.

SECTION

7779. To enjoin State railroad commissioners from enforcing unreasonable rates.
7780. Whether a bill for an injunction against railway commissioners is a suit against the State.
7781. At the suit of private persons to compel corporations to perform their public duties.
7782. Injunctions against strikes, boycotts, and other combinations among workingmen.
7783. Other decisions illustrating the use of injunctions in the case of corporations.
7784. Cases where such injunctions not granted.

CHAPTER CLXXXVIII.

ATTACHMENTS AGAINST CORPORATIONS.

SECTION

7790. Corporations are "persons" within the attachment laws.
7791. Corporations not attachable in actions against shareholders.
7792. Grounds of attachment against corporations.
7793. Lien of attachments against corporations.
7794. Attachments not leviable after appointment of receiver.

SECTION

7795. Attaching creditors entitled to preference in distribution.
7796. Attachments by directors.
7797. What property attachable.
7798. Bond for attachment.
7799. Liability to attachment of corporations formed by the concurrent legislation of different States.

CHAPTER CLXXXIX.

GARNISHMENT OF CORPORATIONS.

SECTION

7804. Corporations may be summoned as garnishee.
7805. Whether corporate officers subject to garnishment.

SECTION

7806. Service of the garnishment upon what officer.
7807. Proof *aliunde* of official character.

SECTION

- 7808. When statute relating to service of ordinary process governs.
- 7809. Officer to make disclosure not necessarily officer to receive service.
- 7810. Authority of officer or agent to make disclosure.
- 7811. Process directed to corporation and not to agent.
- 7812. Garnishment of receivers of corporations.
- 7813. Attachment of shares by garnishment against corporation.
- 7814. Garnishment of member of mutual insurance company.

SECTION

- 7815. Garnishment of insurance companies before adjustment.
- 7816. Garnishment of such companies where the policy has been assigned.
- 7817. Garnishment of corporation formed by concurrent action of different States.
- 7818. Answer of the garnishee.
- 7819. Relief in equity against garnishee.
- 7820. Other matters relating to the garnishment of corporations.

CHAPTER CXC.

MANDAMUS AGAINST CORPORATIONS.

SECTION

- 7826. *Mandamus* against corporations to compel performance of public duties.
- 7827. When not issued to compel the performance of public duties.
- 7828. Doctrine that the public duty must be enjoined by statute.
- 7829. Does not lie to compel the per-

SECTION

- formance of discretionary acts.
- 7830. Who apply for the writ: plaintiff in the action.
- 7831. Against corporation in corporate name.
- 7832. Corporation may appeal where the writ runs against its officers.

CHAPTER CXCI.

LIMITATION AND LACHES.

SECTION

- 7837. Corporations may acquire title by adverse possession.
- 7838. Limitation of actions to forfeit charters.
- 7839. Limitation of actions by creditors against trustees of corporations.

SECTION

- 7840. Part payment to take the case out of the statute.
- 7841. Limitation of actions against foreign corporations.
- 7842. Equitable doctrine of *laches*.

CHAPTER CXCII.

EXECUTIONS AGAINST CORPORATIONS.

ART. I. IN GENERAL. §§ 7847-7860.

ART. II. THE WRIT AND PROCEEDINGS THEREUNDER. §§ 7865-7869.

ARTICLE I. IN GENERAL.

SECTION,

7847. General rule that corporate property subject to execution.

7848. Otherwise as to property of corporations created for public objects.

7849. Sequestration of earnings.

7850. Liens of judgments upon railroad property.

7851. Rolling stock vendible under execution.

7852. Alienation through sales to enforce mechanics' liens.

7853. Corporate franchises not subject to execution.

7854. Nor is property necessary to enjoyment of corporate franchises.

SECTION

7855. Cases to which this exemption does not extend.

7856. Decisions denying this exemption.

7857. Statutes abolishing this exemption.

7858. Levying upon a franchise of taking tolls and upon tolls to accrue under a franchise.

7859. Effect of levy upon personal property subject to existing mortgages.

7860. Levying upon the assets of a dissolved corporation, or a corporation in liquidation.

ARTICLE II. WRIT AND PROCEEDINGS THEREUNDER.

SECTION

7865. Misnomer in the writ.

7866. Sales under such executions.

7867. Distribution of the proceeds of the sale.

SECTION

7868. Right of a stockholder to redeem.

7869. Other questions arising under such executions.

TITLE NINETEEN.

FOREIGN CORPORATIONS.

CHAPTER CXCIH.

STATUS AND POWERS OF IN GENERAL.

SECTION

7875. *Status* of foreign corporations as settled by Federal decisions.
7876. Not entitled to the privileges and immunities of citizens in the several States.
7877. Whether entitled to the "equal protection of the laws" of the State within which it is permitted to do business.
7878. Federal protection of foreign corporations engaged in interstate commerce.
7879. What is interstate and foreign commerce within this prohibition.
7880. What is not interstate commerce within this prohibition.
7881. Cannot migrate, but must dwell in place of its creation.
7882. May make and take contracts in other States and countries except where prohibited.
7883. Presumptions arising in support of the validity of the contracts of foreign corporations.
7884. Cannot exercise corporate franchises in a foreign jurisdiction except by comity.
7885. Cases to which this comity does not extend.
7886. All their rights subject to the domestic law.

SECTION

7887. States may impose conditions upon which they may do business.
7888. May be required to appoint a resident agent upon whom process may be served.
7889. May establish agencies and do business in the domestic State unless prohibited.
7890. Foreign corporations made domestic corporations *quoad hoc*.
7891. When deemed to have been made such, and when not.
7892. Instances where such adoption and domestication were held to have taken place.
7893. Instances where such adoption and domestication held not to have taken place.
7894. Statutes subjecting foreign corporations to the same liabilities and restrictions as domestic corporations.
7895. *Status* of "tramp corporations."
7896. Further of "tramp corporations."
7897. To what extent may act in other States.
7898. *Status* of foreign insurance companies.
7899. *Status* of corporations created by the Congress of the United States.

SECTION

7900. Foreign corporations when deemed "persons."
 7901. When the word "corporation" used in statutes, applies to foreign corporations.
 7902. *Mandamus* to compel issuing of license to foreign corporation.
 7903. Foreign corporation doing busi-

SECTION

- ness under the same name as a domestic corporation.
 7904. Courts will not interfere with internal management of foreign corporations.
 7905. But will settle ordinary questions depending upon the construction of foreign charters.

CHAPTER CXCIV.

POWERS OF FOREIGN CORPORATIONS RELATING TO LAND.

SECTION

7913. Power to acquire and hold land.
 7914. Decisions considering the question as one of public policy.
 7915. Decisions conceding the power.
 7916. May acquire and hold real estate for office purposes, etc.
 7917. Whether this power exists in a foreign corporation organized for the purpose of dealing in real estate.
 7918. Doctrine that such power is pre-

SECTION

- sumed to exist until the State interferes.
 7919. Power to take and hold lands by devise.
 7920. Power limited by charter of corporation.
 7921. Such charter construed according to the *lex rei sitæ*.
 7922. Power to take and foreclose mortgages.
 7923. Power to mortgage and incumber their lands.

CHAPTER CXCV.

STATE LAWS IMPOSING CONDITIONS UPON FOREIGN CORPORATIONS.

ART. I. IN GENERAL. §§ 7928-7944.

II. EFFECT OF VIOLATING THESE RESTRAINTS UPON CONTRACTS AND RIGHTS OF ACTION THEREON. §§ 7950-7970.

ARTICLE I. IN GENERAL.

SECTION

7928. Constitutional limitations upon the State legislatures.
 7929. Statutes providing that foreign corporations shall enjoy no greater rights than domestic corporations.

SECTION

7930. Retaliatory statutes.
 7931. Distinction between statutes of retaliation and statutes of reciprocity.
 7932. Restrictions upon exercising the right of eminent domain.

SECTION

7933. Statutes requiring foreign corporations to file charter, certificate of incorporation, articles of association, etc.
7934. Statutes requiring agents of such corporations to file evidence of their authority.
7935. Statutes requiring such corporations to keep known place of business and resident agent.
7936. What constitutes "doing business" in violation of such prohibitions,
7937. Citizens of the State procuring insurance from foreign companies.

SECTION

7938. Evidence of compliance with such statutes.
7939. Proceedings against agents for penalties for doing business in violation of such statutes.
7940. Restrictions upon foreign insurance companies.
7941. Whether such statutes apply to foreign mutual benefit companies.
7942. Statutes prohibiting the dealing in bank bills of corporations created in other States.
7943. State statutes not applicable to corporations vending patented articles.
7944. Ousting foreign corporations by *quo warranto*.

ARTICLE II. EFFECT OF VIOLATING THESE RESTRAINTS UPON CONTRACTS AND RIGHTS OF ACTION THEREON.

SECTION

7950. Foreign corporations cannot recover on contracts made in violation of such restrictions.
7951. Doctrine that domestic citizen may treat the contract as void and recover what he has advanced thereon.
7952. Doctrine that domestic citizen may defend against the contract so far as unexecuted on his part.
7953. Illustration in the case of premium notes of foreign insurance companies.
7954. Exception in case of *bona fide* holders of such notes for value.
7955. Illustration in the case of mortgages taken by foreign corporations.
7956. Doctrine that the failure of the foreign corporation to comply with domestic statutes merely suspends its remedy on contracts until compliance.

SECTION

7957. Doctrine that failure to comply with such statutes does not render contracts void.
7958. Doctrine where the statute gives a specific penalty.
7959. Doctrine that neither party can set up his own violation of law.
7960. Corporation estopped to set up its want of compliance with such statutes in avoidance of its own contracts.
7961. Whether agent of foreign corporation can defend on this ground against an action by the corporation on his bond.
7962. Non-compliance with such statutes prevents agent from recovering commissions.
7963. Legislature may validate such contracts.
7964. Foreign corporation can acquire and transmit valid titles without complying with local law.

SECTION

7965. Whether necessary for foreign corporation plaintiff to aver and prove compliance with such statutes.
7966. Further of this subject.
7967. Rule where the foreign corporation is sued.
7968. Effect of non-compliance upon

SECTION

- the interpretation of contracts.
7969. Effect of withdrawing agency from the State.
7970. *Situs* of the contracts of foreign corporations for purposes of jurisdiction.

CHAPTER CXCVI.

ACTIONS BY FOREIGN CORPORATIONS.

SECTION

7977. Power of foreign corporations to sue.
7978. For what causes of action.
7979. Rights of action how affected by failing to comply with statutes prescribing conditions upon which it may enter the State to do business.
7980. Further of this subject.
7981. Alleging compliance with statute permitting foreign cor-

SECTION

- porations to do business within the State.
7982. Pleading statutes invalidating contracts of foreign corporations not authorized to do business in the State.
7983. Power to buy at execution sales.
7984. Allegation of corporate existence in actions by and against foreign corporations.

CHAPTER CXCVII.

ACTIONS AGAINST FOREIGN CORPORATIONS.

SECTION

7988. Summary statement of the cases in which a foreign corporation may be sued.
7989. Early doctrine that actions *in personam* did not lie against foreign corporations.
7990. How under the English law.
7991. Doctrine that express legislative sanction is necessary.
7992. Corporation can contract for service of process in a foreign country.
7993. Progress of statutory changes

SECTION

- domesticating foreign corporations for jurisdictional purposes.
7994. May be sued through their agents in any State into which they migrate.
7995. Must do business within the State and be served by an authorized agent.
7996. Jurisdiction as depending upon the amount and kind of business done by the officer or agent within the State.

SECTION

7997. Statutes creating or extending the right of action against foreign corporations.
7998. Modern doctrine that corporations may establish domiciles in other States.
7999. Modern rule as to residence of corporations for purposes of jurisdiction.
8000. Modern rule that trading corporation may be sued wherever it has a place of trade.
8001. Non-residents have no constitutional right of action against foreign corporations.
8002. Further as to actions by non-residents against foreign corporations.
8003. Foreign corporations not suable by non-residents on foreign contracts.
8004. *Contra*, that non-residents may

SECTION.

- sue foreign corporations on foreign contracts.
8005. Foreign corporations not suable for torts committed in foreign States.
8006. But suable for torts committed in domestic States.
8007. For what causes residents may sue foreign corporations.
8008. Foreign corporations not suable *ex contractu* except upon domestic contracts.
8009. Actions against foreign corporations.
8010. Actions against foreign corporations which have migrated from the domestic State.
8011. Jurisdiction of actions by stockholders to redress grievances in corporate management.
8012. Actions against corporations created by the concurrent legislation of several States.

CHAPTER CXCVIII.

SERVICE OF PROCESS ON FOREIGN CORPORATIONS.

SECTION

8019. What statutes relating to service of process include foreign corporations.
8020. Service upon corporations created by the concurrent action of two or more States
8021. Statutory modes of acquiring jurisdiction exclusive.
8022. State statutes providing this mode of service applicable in the Federal courts.
8023. Conditions of Federal jurisdiction in actions against non-resident corporations.
8024. Validity of statutes providing for service of process upon any officer or agent.
8025. Where foreign corporation has

SECTION

- appointed an agent to receive service under the local statute.
8026. Proof of appointment of such an agent.
8027. Where it has appointed a State officer as such agent.
8028. Judgments against foreign corporations founded on process served upon agents appointed under statutes to receive service of process, good everywhere.
8029. Service on agent with whom the contract was made.
8030. Service upon officer or agent casually within the State.

SECTION

8031. Doctrine not applicable to agents appointed to do business for the corporation within the State.
8032. Not necessary that agent should reside continuously within the State.
8033. Agent must be representing corporation as matter of fact.
8034. Service upon sub-corporations organized by the foreign corporation to carry on its business in the domestic State.
8035. Service upon a director.
8036. Service upon the "principal officer."
8037. Service upon "managing agent."
8038. Service upon any agent by whom the corporation does its business in the domestic State.

SECTION

8039. Service upon any person doing business for the corporation.
8040. Agency expired, but business not wound up.
8041. Service upon stockholders.
8042. Alternative service.
8043. Service upon vice-president.
8044. Service upon mere clerk.
8045. Service upon receivers.
8046. Where a railroad company has leased its road to another company.
8047. Service upon the agent who is himself plaintiff in the action.
8048. Evidence of service of process.
8049. Construction of particular statutes relating to service of process on foreign corporations.
8050. Notice by publication in lieu of personal service.

CHAPTER CXCIX.

PROCEEDINGS AGAINST FOREIGN CORPORATIONS BY ATTACHMENT.

SECTION

8059. Proceedings *in rem* against foreign corporations.
8060. Foreign corporations when not deemed non-residents within the meaning of attachment laws.
8061. Statutes giving such attachments may be retroactive.

SECTION

8062. Effect of a dissolution of corporation upon the attachment.
8063. Deposit of foreign insurance company not attachable by foreign creditor.
8064. Attachments in courts of the United States.
8065. Attachments by non-resident creditors.

CHAPTER CC.

PROCEEDINGS AGAINST FOREIGN CORPORATIONS BY GARNISHMENT.

SECTION

8069. Garnishment of funds held by foreign corporations for others.

SECTION

8070. Circumstances under which foreign corporations not subject to garnishment.

SECTION

8071. Garnishment of the funds of foreign corporations in the hands of resident custodians.
8072. Attachment of a debt due from a citizen of another State to a foreign corporation of a third State.
8073. *Situs* of a debt due by a foreign corporation for the purpose of garnishment.
8074. Injunctions restraining domestic citizens from proceeding in a foreign State to subject exempt wages due from foreign corporation.
8075. Garnishment of the wages due

SECTION

- by foreign corporations to non-resident employes, exempt in State of residence.
8076. Garnishee may plead exemption of principal debtor.
8077. Theory that it is the duty of the garnishee to plead the exemption.
8078. Duty of the garnishee to notify creditor.
8079. Necessary that the garnishee should have notice.
8080. Service of the garnishment.
8081. Compelling disclosures by the officers of foreign corporations.

CHAPTER CCI.

TAXATION OF FOREIGN CORPORATIONS.

SECTION

8087. General power of States to tax foreign corporations.
8088. Whether protected from unequal taxation by the Fourteenth Amendment.
8089. Further of this subject.
8090. Doctrine that States cannot tax foreign corporations differently from domestic corporations.
8091. Application of provisions in State constitutions requiring all taxation to be uniform.
8092. States cannot tax foreign corporations which are agencies of the United States.
8093. State taxation of property invested in securities of the United States.
8094. Taxing power over the property of foreign corporations as affected by the *situs* of their property.
8095. *Situs* of interstate property for the purposes of taxation.

SECTION

8096. *Situs* of ships at sea.
8097. *Situs* of the rolling stock of interstate railway companies.
8098. Taxing the capital of foreign corporations.
8099. Further of this subject.
8100. Taxing the capital employed by foreign corporations within the State.
8101. Taxing foreign corporations having agencies within the State.
8102. Taxing foreign corporations "doing business in this State."
8103. Taxing capital of foreign corporations domiciled within the State, but doing business without the State.
8104. Interpretation of words and phrases in statutes laying taxes upon foreign corporations.
8105. Taxation of foreign corporations when engaged in interstate commerce.

SECTION

8106. Taxation of domestic corporations engaged in interstate or foreign commerce.
8107. State license or privilege taxes upon foreign corporations engaged in interstate commerce.
8108. Further of this subject.
8109. License taxes distinguished from licenses of occupations.
8110. Taxes upon the receipts of transportation companies derived from interstate commerce.
8111. Taxation of goods in interstate transit.
8112. Taxation of goods in transit through the State.
8113. Immaterial how the tax is laid.
8114. When interstate transit commences so as to exempt the property from State taxation.
8115. Taxing sales made within the State by non-resident corporations.
8116. Taxation of gross receipts.
8117. The question how judicially settled.
8118. A further explanation of these decisions.
8119. The present doctrine restated.
8120. Validity of a tax upon the franchise of foreign corporations.
8121. Franchise taxes upon domestic

SECTION

- corporations doing business wholly in foreign countries.
8122. Taxation of telegraph companies.
8123. Taxation of foreign telephone companies having domestic companies as licensees.
8124. Taxation of express companies.
8125. Taxation of sleeping-car companies.
8126. Taxation of ferry companies incorporated in other States.
8127. Taxation of foreign railroad companies operating domestic railroads under a lease.
8128. Taxation of interstate bridge companies.
8129. Methods of assessment of interstate bridges.
8130. Taxation of property of railroads consolidated with foreign railroad companies.
8131. Exemption of foreign corporations from taxation.
8132. Retaliatory taxation of foreign corporations.
8133. Taxes or tolls for the use of improved facilities of navigation.
8134. Excise taxes upon foreign corporations in Massachusetts.
8135. Actions by foreign corporations to recover back taxes.

TITLE SEVENTEEN.

(CONTINUED.)

RECEIVERS OF CORPORATIONS.

CHAPTER CLXXIII.

RECEIVERS OF RAILROADS.

SECTION

7202. Appointing receivers of railroad companies which fail to operate their roads.
7203. Building or completing a railroad.
7204. Performing contracts of corporation.
7205. Court will carry out the construction placed by different railroad companies upon their own contracts.
7206. Payment of rental under "car-trust" leases.
7207. Applications or misapplications of this principle.
7208. Character of such contracts determined by the local law.

SECTION

7209. Vendor or lessor desiring to preserve a lien must comply with local law.
7210. Lien of such leases good as against subsequent mortgages.
7211. *Status* of rents where the lessor has resumed possession.
7212. Whether authorize receiver to make new car-trust leases.
7213. Purchasing rolling-stock.
7214. How keep accounts in cases of the receivership of a railway having separate divisions.
7215. Powers of receiver appointed by the State.

§ 7202. Appointing Receivers of Railroad Companies Which Fail to Operate their Roads.—A statute of New Jersey provided that if any railroad company should fail to run its trains on any part of its road for ten days, the Chancellor might appoint a receiver.¹ A later statute of the same State provided that any railroad company whose road was constructed at any seaside resort, not exceeding four miles in length, should be exempt from the provisions of this statute. It was held by Vice-Chancellor Bird, that this latter act was *unconstitutional*, because it was within the provision of the constitution of New Jersey, that the legislature shall not pass any private, special or local law, "granting to any corporation, association, or individual, any exclusive privilege, immunity, or franchise whatever."² He also held that it did not

¹ N. J. Rev., p. 943, § 160.

² Const. N. J., art. 4, § 7.

apply to roads which had been built previous to its passage, and he ordered that unless the defendant railroad company, which was such a road as described in the amendatory statute, commence to operate its trains for both freight and passengers within five days from the service of a copy of his order, a receiver would be appointed;¹ but this decision, which was plainly untenable on both grounds, was reversed on appeal.²

§ 7203. **Building or Completing a Railroad.**—We have already seen that, although some of the courts have gone quite extensively into railroad building and railroad operating, there is a *consensus* of judicial opinion to the effect that a court of equity ought not to undertake, by the arm of a receiver, to complete or build a railroad, except where there is an irresistible necessity for it to do so;³ and circumstances which will justify such a stretch of power have been considered.⁴ Unforeseen complications have arisen from such an exercise of power, especially in one case where the *order* of the court *appointing* the *receiver* was *reversed*. The order was a *consent order*, so-called, but certain of the bondholders objected, and, on appeal to the Supreme Court, the order was pronounced unauthorized. But, in the mean time, the receiver had caused an extension of the road to be constructed under the order, though at a cost exceeding the amount named in the order, which amount the order authorized the receiver to pay out of the surplus income, the extension to stand pledged for such payment. It was held that the receiver, in building the extension, acted only as *agent* of the consenting *bondholders*, but that the extension became subject to an equitable lien, superior to existing liens, in favor of those who furnished the money to build it, and that they were entitled to such ratable proportion of the proceeds of the sale as the value of the extension bore to the

¹ Re Delaware Bay &c. R. Co., 11 Atl. Rep. 261; s. c. 9 Cent. Rep. 489.

² Delaware Bay &c. R. Co. v. Mark-
ley, 45 N. J. Eq. 139; s. c. 16 Atl. Rep. 436.

³ *Ante*, § 7177; Kennedy v. St. Paul &c. R. Co., 5 Dill. (U. S.) 519.

⁴ *Ante*, § 7178.

value of the entire road, considered only with reference to the purchase-money of the whole.¹

§ 7204. **Performing Contract of Corporation.**—As the receiver represents the bondholders and others having liens on the property, there is no principle of equity which will oblige him to perform the *unexecuted contracts* of the corporation.² But he cannot insist on the performance of such contracts by the other contracting party, without performing on his own part according to the terms of the contract. For instance, if he elects to retain the possession of property which has been *leased* to the corporation, he must *pay rent* according to the lease.³

§ 7205. **Court will Carry out the Construction Placed by Different Railroad Companies upon their Own Contracts.**—A court, holding and operating a railroad by means of its receiver, will, in giving effect to contracts entered into by the company, apply, in doubtful cases, the interpretation upon which the parties themselves have acted,⁴—the principle being that where contracts are executory, the *practical construction* adopted by the parties thereto and by their successors during a period of years, is entitled to great, if not controlling, influence, in determining its proper interpretation.⁵ When, therefore, a contract between two railway companies operating a *joint line*, did not expressly provide how cars should be obtained or supplied for the use of the continuous line, the fact that one company had, for several years after the contract was entered into, paid the other for the use of its cars, was considered as the construction placed upon the contract by the parties, such as the court, holding one of the lines by its receiver, ought to enforce on an intervening petition by the owner of the other line.⁶

¹ *Hand v. Savannah &c. R. Co.*, 17 S. C. 219.

² *Central Trust Co. v. Wabash &c. R. Co.*, 32 Fed. Rep. 566.

³ *Ante*, § 6998.

⁴ *Central Trust Co. v. Wabash &c. R. Co.*, 34 Fed. Rep. 254.

⁵ *Topliff v. Topliff*, 122 U. S. 121; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 54.

⁶ *Central Trust Co. v. Wabash &c. R. Co.*, 34 Fed. Rep. 254.

§ 7206. Payment of Rental under "Car Trust" Leases.

What are known as "*car trust leases*" are a peculiar species of security, by which the manufacturers of railway rolling stock, in substance and effect, *sell* the cars to railway companies of doubtful solvency, but by a species of *conditional sale* known as a "*car trust*," under which they reserve title, and, in form, *lease* them to the railway company. It is thus a sale and not a sale,—a sale if the company pays, but a lease with the right of re-possession if the company does not pay. It does not seem to differ essentially from many other contracts of conditional sale of personal property, where the vendor seeks to acquire the benefits of a sale, and at the same time not take the risk of it, by holding the property with a string.¹ It seems very clear that, when a receiver takes possession of the property of a railroad company, some of which consists of rolling stock held under such a lease, he occupies the position which a receiver occupies in regard to any other leased property held by the debtor: he is not bound to burden the creditors whom he represents with the custody of onerous property; he is not bound by the covenants in any lease made by the debtor whose property has come into his hands; but he has his election to retain or reject the possession of the property under the lease. His position is analogous to that of a principal in regard of the unauthorized acts of his agents. He may elect to affirm or disaffirm, but he cannot affirm in part and disaffirm in part. He cannot keep the property which is the subject of the lease, without performing the covenants of the lessee. He cannot hold on to the property and refuse to pay the rent in full as it accrues, but say to the lessor, "You must file your intervening claim and get your *pro rata* with other creditors."²

¹ In a paper read before the American Bar Association by Francis Rawle, Esq., of Philadelphia, there is a very intelligent and detailed statement of this species of security, and of the conflicting and unsatisfactory manner in which the courts have dealt with it. See transactions of the Am. Bar Assn. for the year 1885. Statutes

governing this subject have been enacted in many of the States at the instance of Mr. Rawle.

² "In such cases, the vendor's title or lien is unaffected by the appointment of the receiver, that officer acquiring no better title to the rolling stock than that of the company." High on Receivers (2d ed.), § 394 f.

All this seems very clear, both on principle and authority.¹ In a leading Federal case on the subject, it was held that the payment by the receiver, out of the earnings of the road, of the rent reserved for the use of the cars under the so-called contract of lease, for the period during which they were used by him, was a proper payment.²

§ 7207. Applications or Misapplications of This Principle.

Such being the governing principle, a decision of Mr. Circuit Judge Gresham relating to the species of lease known as a "*car trust lease*," does not seem clear. In that case, the property of a railroad company was in the hands of a receiver pending proceedings to foreclose a mortgage thereon. A corporation had furnished rolling stock to the company under such a lease, the lessor reserving to it the right to reclaim the property upon any default in the payment of rent. Upon the appointment of the receiver, the railroad company being in default, the rolling-stock company filed an intervening petition demanding that the receiver be directed to return its cars within thirty days. They were not returned, but were continuously used by the receiver without the objection of the bondholders or trustee in the mortgage, and payments were made on the rental by the application thereto of the freight earned by transportation for the petitioner. After the lapse of three months, the rolling-stock company filed a second intervening petition, stating the facts, and asking that the receiver be directed to pay the rent due under the car-trust contract, and that the same be declared a prior lien upon the earnings as well as upon the property embraced in the mortgages. The learned judge held that the retention and use of the cars by the receiver and the non-action of the bondholders did not amount to a *conversion*; that the intervening petitioner was not entitled to the payment of rent, according to the terms of the car-trust lease, out of the *corpus* of the estate, but only to the return of the cars within a reasonable time, if so demanded, and a *quantum meruit* for the use of them.³ So far as related to any claims for rent accruing

¹ Kneeland v. American Loan & Co., 136 U. S. 89.

² Fosdick v. Schall, 99 U. S. 235.

A similar order was made in Miltenberger v. Logansport R. Co., 106 U. S. 286, though the facts are somewhat complicated and obscure.

³ Farmers' Loan & Trust Co. v. Chicago & C. R. Co., 42 Fed. Rep. 6; s. c. 8 Rail. & Corp. L. J. 184; 43 Am. & Eng. Rail. Cas. 436.

prior to the time when the receiver took possession, the decision is possibly supportable, — though even then it is difficult to see how the court could retain the property while disaffirming the lease in part. But the decision seems to be contrary to the most elementary notions, in so far as it empowers the receiver to retain the property against the will of the lessors, and contrary to the provisions of the lease, without paying rent according to the terms of the lease.¹ - - - In an unpublished decision cited by Mr. High,² rendered in the United States Circuit Court at Indianapolis, in June, 1885, by Mr. Circuit Judge Gresham, — Mr. Circuit Justice Woods concurring, — it was ordered that the rentals of rolling stock held by the railway company under car-trust leases, should, for the period of use by the receiver, be paid as a *first lien* out of the receiver's income, or out of proceeds of the foreclosure sale, before distribution to the mortgage bondholders; and that rentals for six months prior to the receivership should be paid out of the net income of the receiver.³ It is not understood upon what principle the court could cut down the period of rentals prior to the receivership to six months, provided the receiver took possession without a new contract; for, if he took possession without a new contract, his taking possession would clearly be an affirmation of the old contract, and it would have to receive effect as a whole, and could not properly be split into parts. Of course, if a receiver, within a reasonable time after taking possession of the general property, should enter into a *new contract* with the owners of the rolling stock, for its use pending the receivership, this would not be an election to take possession under the previous contract, but would amount to a disaffirmance of that contract, such as would remit the lessors to the position of general creditors, under the doctrine of *Fosdick v. Schall*,⁴ unless they should be let in as lien creditors in respect of rents accruing for the short period prior to the appointment of the receiver. A decision of Chancellor Runyon, of New Jersey, upon this subject, seems to be clearly destitute of equity. A receiver appointed by him went into possession, and found, in the custody of the railroad company, a mass of rolling stock held by the company under these so-called car-trust leases. He requested the lessors to leave the locomotives and their tenders in his possession for use on the road, and he guaranteed that he

¹ Compare *ante*, § 6998.

² Central Trust Co. v. Railway Co.,

³ High on Receivers (2d ed.), p. MS.
340, note.

⁴ 99 U. S. 235.

would keep them in order, and promised to apply to the Chancellor for authority to pay their claim for rent under the lease. On the faith of this, they permitted the property to remain in his hands. On their subsequent intervening petition, the Chancellor decided that they were not entitled to rent according to the terms of the lease, during the time the property so remained in the hands of the receiver, but that they were entitled to no more than a *quantum meruit*, — that is to say, that they were entitled to what the Chancellor, upon the evidence before him, might consider the use of the locomotives and tenders to be reasonably worth.¹ It is perceived that there was no new contract whatever that the rolling stock should remain in the custody of the receiver upon the payment of what the Chancellor might deem a *quantum meruit*; but the Chancellor put his decision upon the ground that the lessors had a right to resume possession, and that when they failed to exercise it, they submitted to the discretion of the court as to what would be equitable compensation. The decision deserves the animadversion of Mr. District (now Circuit) Judge Caldwell, in a case which has been very much cited. “In its effort to coerce a corporation to pay its debts, a court should not contract obligations of its own and neglect to make provision for their payment. It would be a scandal to do so. Courts should pay their debts, if nobody else does.”²

§ 7208. Character of Such Contracts Determined by the Local Law. — The validity and effect of these contracts are to be determined by *the law of the State within which the receiver is appointed*, and not by the law of the State of the domicile of the vendor or lessor. The governing principle is, that the liability of property to be sold under legal process issuing from the court of the State where it is situated, must be determined by the laws in force therein, rather than by the laws of the jurisdiction where the owner lives. The reason is, that every State has a right to regulate the transfer of property within its own limits, and that whoever sends property within those limits, impliedly submits to the regulations concerning its transfer which are there in force, although a different rule of transfer may prevail in the jurisdiction where he resides. He has no

¹ *Coe v. New Jersey Midland R. Co.*, 27 N. J. Eq. 37.

² *Dow v. Memphis &c. R. Co.*, 20 Fed. Rep. 260, 269.

absolute right to have a transfer of property, lawful in his own jurisdiction, respected in the courts of the State where the property is found; and it is said to be only on the principle of comity that this is ever allowed. This principle of comity yields when the laws and policy of the State where the property is found conflict with those of the State of the domicile of the vendor or lessor.¹ The taking possession of such property by a receiver is tantamount to a seizure under judicial process; so that, where the property consists of railway rolling stock in the possession of a railway company under these car-trust conditional sales or leases, the validity and effect of the contract are to be determined by the local law of the State within which the court sits which has appointed the receiver.²

§ 7209. Vendor or Lessor Desiring to Preserve a Lien must Comply with Local Law.—The leading consequence of this principle, in so far as it applies to these car-trust leases, is, that if a vendor or lessor, by whatever name called, desires to preserve a specific lien upon the property which is the subject of the contract, he can only do it by complying with the local law. If, therefore, the local law treats a conditional sale, by which the vendor undertakes, by a secret contract, to reserve the title to himself until the purchase-money is paid, while at the same time delivering the chattel to the purchaser and investing him with the ostensible ownership, as *constructively fraudulent* as against creditors, the contract will be so treated in a court of the United States.³ “Nor

¹ Green v. Van Buskirk, 5 Wall. (U. S.) 307; 7 Wall. (U. S.) 139.

² Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; Fosdick v. Schall, 99 U. S. 235, 250. That courts generally respect the law of the place of the contract, but only on the principle of *comity*,—see Taylor v. Boardman, 25 Vt. 581, 589; Milne v. Moreton, 6 Binn. (Pa.) 353, 361; Ward v. Morrison, 25 Vt. 593; Emerson v.

Patridge, 27 Vt. 8; Oliver v. Townes, 2 Mart. (La.) (N. S.) 93; Norris v. Mumford, 4 Mart. (La.) (O. S.) 20.

³ Hervey v. Rhode Island Locomotive Works, 93 U. S. 664. Such is the policy of the law of the State of Illinois. McCormick v. Hadden, 37 Ill. 370; Ketchum v. Watson, 24 Ill. 591; Hervey v. Rhode Island Locomotive Works, *supra*.

is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the purchaser who is in possession of it.”¹ This principle has been held to apply to a car-trust lease, where the contract described the transaction as a *lease*, and installments were to be paid, described as *rent*, but when a given number of installments had been paid, the legal title was to pass to the lessee. Speaking with reference to the facts of such a case, where the subject of the so-called lease was a locomotive-engine, the price of which, \$12,093.96, was to be paid in installments in the course of one year, — Mr. Justice Davis said: “It was evidently not the intention that this large sum should be paid as rent for the mere use of an engine for one year. If so, why agree to sell and convey the full title on payment of the last installment?”² In both cases, the stipulated price of the property was to be paid in short installments, and no words employed by the parties can have the effect of changing the true nature of the contracts.”³ It was accordingly held that, as the instrument had not been recorded, as required by the chattel mortgage act of Illinois,⁴ the lien attempted to be reserved thereon had no validity as against third persons, and that the instrument in question was void as to an attaching creditor and a purchaser claiming through him.⁵

§ 7210. Lien of Such Leases Good as against Subsequent Mortgagees. — But it is nevertheless clear that notwithstanding such a statute as that referred to in the preceding section, such a contract, as between the parties to it and their privies,

¹ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 672; citing *Murch v. Wright*, 46 Ill. 487; *s. c.* 95 Am. Dec. 455. So held in *Kneeland v. American Loan & Co.*, 136 U. S. 89, 95.

² Referring to the case of *Murch v.*

Wright, *supra*, where the transaction was a lease or conditional sale of a piano.

³ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 673.

⁴ Rev. Stat. Ill. 1874, pp. 711, 712.

⁵ *Ibid.*

is just what it purports to be on its face; and one such contract was described as "a conditional sale with a right of rescission on the part of the vendor in case the purchaser shall fail in payment of his installments, — a contract legal and valid as between the parties, but made with the risk on the part of the vendor of his losing his lien if it works a legal wrong to third parties."¹ Subsequent mortgagees do not occupy the position of *third parties*, within the meaning of the term as used in the statute referred to. Said Mr. Chief Justice Waite: "They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are 'after-acquired' property of the company; but as to that class of property, it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were 'loose property' susceptible of separate ownership and separate liens, and 'such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto.'² The title of the mortgagees in this case, therefore, is subject to all the rights of [the vendor] under his contract. The possession taken by the receiver is only that of the court whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever, in the end, it shall be found to concern; and in the mean time the court proceeds to determine the rights of the parties, upon the same principles it would if no change of possession had taken place."³ But if rolling stock is purchased by the receiver out of earnings of the road, and sold with the rest of the property at foreclosure sale, and if the mortgage under which the sale takes place covers after-acquired property, the purchaser at

¹ Fosdick v. Schall, 99 U. S. 235, 250, 251; quoting the language of the Supreme Court of Illinois in Murch v. Wright, 46 Ill. 487; s. c. 95 Am. Dec. 455.

² Citing United States v. New Orleans Railroad, 12 Wall. (U. S.) 362.

³ Fosdick v. Schall, 99 U. S. 235, 251; Fosdick v. Car Company, 99 U. S. 256.

the sale will be entitled to the rolling stock as against the mortgagees.¹

§ 7211. **Status of Rents where the Lessor has Resumed Possession.** — It seems clear that if, prior to the date of the appointment of the receiver or afterwards, the lessor holding the title and right to resume possession under one of these so-called *car-trust leases*, exercises his privilege of resuming possession, so much of the rentals for the cars as may have accrued prior to the receivership becomes thereby remitted, *prima facie* at least, to the *status of unsecured debts*, not payable out of the fund accruing from the sale to foreclose the mortgage, unless such fund is in excess of the mortgage debt, the other preferred debts, and the costs;² though circumstances may exist which will give the lessor a preference, even in respect of rents accruing prior to the receivership, where the possession of the rolling stock has been necessary to keep the railroad a going concern.³ But, on the principle already stated, if the receiver elects to retain possession of the rolling stock, and no new contract is made or understanding had, and no order of the court is entered disaffirming the terms of the lease, to which the lessor assents, the income in the hands of the receiver will be liable to pay, without any abatement, the rents accruing while the receiver holds possession, which rents should be estimated according to the terms of the lease, and should not be reduced to what may be regarded by the judge as a *quantum meruit*; and these rents are to be paid in full as a preferred claim, on the footing of being a part of the expenses of the administration, and on the further ground that the court has, through its officer, affirmed the lease. This being clear, the decision of the Supreme Court of the United States, that where, owing to a deficit in the receipts coming into the hands of the re-

¹ *Strang v. Montgomery & Co. R. Co.*, 3 Woods (U. S.), 613.

² *Fosdick v. Schall*, 99 U. S. 235, 255.

³ Such seems to have been the idea of Mr. Circuit Judge Gresham and Mr. Circuit Justice Woods, in *Cen-*

tral Trust Co. v. Railroad Company, cited in *High on Receivers* (2d ed.), p. 340, *n.*, where they ordered that rentals for *six months* prior to the receivership should be paid out of the net income in the hands of the receiver.

ceiver from the operation of the road, the rental is not paid, and, four months after the appointment of the receiver, the lessor resumes possession of the rolling stock, his claim for rent is not entitled to priority over the mortgage creditors,¹ — cannot be supported upon any theory of equity. There seems to be no principle, under the operation of which the election of the lessor to resume possession after the receiver had used his property for four months, under the lease, and had made default in the payment of rent, can be regarded as a waiver of his right to priority attaching to rent already accrued. The same case holds, as the writer reads the opinion, that, but for the taking of the possession, there would be a right of priority over the mortgages sought to be foreclosed. If the fact of the receiver retaining possession gives the lessor a first lien for his rent, that lien could no more be impaired by the act of his resuming possession because of the default of the receiver in paying the rent, so far as regards the rental accruing from the time of the appointment of the receiver and the date of his resuming possession, than could the lien of a mortgage creditor be impaired by the fact of his taking possession of the property under a power given in the mortgage.

§ 7212. **Whether Authorize Receiver to Make New Car-trust Leases.** — There is a sound and conservative decision by Mr. District Judge Butler, concurred in by Mr. Circuit Judge McKennan, to the effect that where the net earnings of a railroad in the hands of a receiver of a court are sufficient to pay for the rolling stock necessary to maintain the property in the *status* in which the court found it, the court will not authorize the receivers to protect such rolling stock by creating *car-trust leases*, and issuing *car-trust certificates* extending over a period of *ten years*, so as to reserve the greater portion of the current earnings of the road for the bondholders and other creditors. The court took the just view that this was tantamount to borrowing money to be applied to the payment of the bonded creditors in the discharge of interest,

¹ Kneeland v. American Loan & Co., 136 U. S. 89.

and the court deemed it wiser to allow such interest to go unpaid, rather than discharge it by means of borrowing money, which might tend to mislead creditors and others respecting the actual condition of the road and its earnings. And the court dwelt upon the proposition that its custody was temporary; that the foreclosure proceedings should be speeded so that the property might pass as quickly as possible into the hands of its owners; and that, to the extent that the earnings of the road might be required to keep it up in stock and equipment and to preserve the property, the receivers had authority to apply them.¹

§ 7213. Purchasing Rolling Stock.—Where the property of a railroad company was placed in the hands of a receiver, who, on taking possession, found, on the railroad, certain rolling stock, which had been placed there by another corporation, the principal stockholders of which were also the controlling stockholders in the railroad company, and the rolling stock was claimed by the corporation placing it upon the road, and no contract of sale was shown,—the court authorized him to purchase the same and pay the value of it, estimated at the time when the road went into the receiver's hands.² But, on an appeal to the Circuit Court of Appeals, the facts were developed by the court in a very different manner, so as to make it appear that an improvement company, interested in the construction of the railroad, whose president was a stockholder in the railroad company and largely interested as a director in the construction of its road, equipped the railroad with the rolling stock and caused the same to be marked with the name of the railroad company; that the intent of the improvement company was to enable the railroad

¹ Taylor v. Philadelphia &c. R. Co., 9 Fed. Rep. 1. In the course of his opinion Mr. District Judge Butler used the following language: "The modern practice, prevailing to some extent, of transferring corporate property to the custody of the courts, to be thus held and managed for an in-

definite period of years, to suit the convenience of parties (whereby general creditors are kept at bay), I regard as a mischievous innovation." *Ibid.*

² Central Trust Co. v. Marietta &c. R. Co., 48 Fed. Rep. 32.

company to issue bonds, secured by a mortgage on its road, as an equipped railroad; and that such bonds were issued and marketed, through the instrumentality of the president of the improvement company. It was held that the improvement company and its assignee were estopped to allege that the transaction constituted a gratuitous loan of the rolling stock, or to deny the title of the railway company thereto, as against the holder of bonds secured by the mortgage, which had been placed on the property on the faith of the ownership of the rolling stock by the company.¹

§ 7214. How Keep Accounts in Cases of the Receivership of a Railway having Separate Divisions.—It has been held that an order appointing receivers of the earnings of a railway company, directing them to keep their accounts so as to show the earnings and expenses of the separate divisions, and instructing the auditor to keep the accounts on a mileage basis, is proper, when that is shown to have been the basis upon which the company computed the earnings before the receivership. This was presumably a true and equitable basis between the divisions, in the absence of any showing that it was not just.²

§ 7215. Powers of Receiver Appointed by the State.—A receiver appointed under the provisions of a statute of Tennessee,³ is vested with the powers and duties of the board of directors in managing the affairs of the company, and is a *public agent of the State*.⁴ It is to be observed that this statutory receiver was appointed by the Governor to take charge of a railroad which had received aid from the State, for the purpose of protecting the State's lien.

¹ Central Trust Co. v. Marietta &c. R. Co., 48 Fed. Rep. 850.

² Mercantile Trust Co. v. Missouri &c. R. Co., 7 Rail. & Corp. L. J. 30. The subject of the *accounts of receivers* relates to the subject of receivers generally, and not specially to the accounts of receivers of corporations,

and, therefore, the writer will do no more than add a reference to the excellent chapter of Mr. High on that subject: High on Receivers (2d ed.), § 797, *et seq.*

³ Tenn. Code, § 1101.

⁴ Erwin v. Davenport, 9 Heisk. (Tenn.) 44.

CHAPTER CLXXIV.

RECEIVERS OF INSURANCE COMPANIES.

SECTION

- 7219. Appointment of receivers of such companies.
- 7220. Circumstances under which appointed.
- 7221. Appointment at the suit of judgment creditors.
- 7222. Appointment at the suit of policy-holders.
- 7223. Impeaching the decree appointing the receiver.
- 7224. Receiver cannot reinsure risks.
- 7225. Cannot waive stipulations in policies.
- 7226. Payment of losses accruing during the receivership.
- 7227. Receiver's right of action on a guaranty where one life insurance company absorbs another and reinsures its risks.
- 7228. Administration of the securities deposited with the superintendent of insurance.
- 7229. Proceedings where receiver disallows a claim.
- 7230. Compromising claims.
- 7231. Premium notes in the hands of receiver.
- 7232. Further of premium notes.
- 7233. Assessing the premium notes.
- 7234. Necessity of assessment.
- 7235. Circumstances under which such assessments may be made.
- 7236. Effect of assessments by a former receiver.
- 7237. Extent and proportion of the assessment.

SECTION

- 7238. Valuation of policies in winding up.
- 7239. Rule adopted by statute in England.
- 7240. Manner of making the assessment.
- 7241. Equalizing those who have paid premiums in cash.
- 7242. Particularity in making the assessment.
- 7243. Requisites of notice of the assessment.
- 7244. Notes payable absolutely where no assessment is necessary.
- 7245. Arrangements among the members limiting their liability.
- 7246. Actions to enforce assessments upon premium notes.
- 7247. What the receiver must aver and prove.
- 7248. Recovery of interest on such premium notes.
- 7249. Receiver takes premium notes subject to equities.
- 7250. Illustrations of this principle.
- 7251. Right of set-off in actions on premium notes.
- 7252. Right of set-off under statutes of New York.
- 7253. Defenses to such actions.
- 7254. Priorities in distribution.
- 7255. Receiver may exercise an option possessed by the company.
- 7256. Distribution not made to creditors of creditors.

§ 7219. **Appointment of Receivers of Such Companies.**—Corporations organized for conducting the business of insurance in all its branches, have become the subject of elaborate statutory regulation (it may be assumed) in all the States of the American Union; and the circumstances under which receivers may be appointed to wind up such corporations in the event of their insolvency, or in the event of their assets shrinking to such a limit as to render it unsafe to the public for them to continue their business, are *generally the subjects of statutory definition and regulation*. An attempt to collect and classify these statutes would be beyond the plan of the present work, and they are noticed only where they incidentally become the subject of judicial exposition.¹ Statutes like that of New York,² providing for arresting the business of an insurance company and appointing a receiver when the further prosecution of its business will be injurious to the public interests, are not repugnant to the provisions of State and Federal constitutions prohibiting the deprivation of a person of property without due process of law.³ Under some of

¹ As to receivers of fire insurance companies in New York, see 2 Rev. Stat. N. Y. (7th ed.), pp. 1482–1485. As to receivers of marine insurance companies in the same State, see *Ibid.*, pp. 1467–1471. A receiver of the assets of an insolvent insurance company, appointed under New York Laws of 1853, chapter 463, section 17, is governed, in respect of the duties of his office, by the provisions of the Revised Statutes relating to corporations, and by the practice of courts of equity. *People v. Security Life Ins. Co.*, 78 N. Y. 114; *s. c.* 34 Am. Rep. 522.

² New York Laws 1869, ch. 90, § 7.

³ *Attorney-General v. North America Life Ins. Co.*, 82 N. Y. 172, 183. It is pointed out in the opinion that the proceedings are not arbitrary; that there is, first, the judgment of the Superintendent of Insurance, and then

a hearing before a court, subject to a right of final appeal to the Court of Appeals. See *People v. Atlantic Mut. Life Ins. Co.*, 74 N. Y. 177. It is also pointed out in the case just cited that the decision of the Supreme Court at Special Term, restraining a life insurance company from the further prosecution of its business, and appointing a receiver upon an application of the Attorney-General under the statute, is not final; but that it is for the General Term, and afterwards for the Court of Appeals, to scrutinize all proceedings in every case, and to determine whether a cause existed for the interference, and whether there was sufficient reason for continuing it; and that the controlling question for decision in such case is, Are the assets of the corporation sufficient to justify the belief that it may continue the business of life insurance with

these statutes, a receiver may be appointed *on the application of the State Commissioner of Insurance*, or State Superintendent of Insurance, by whatever name called, on his finding that the assets of an insurance company have fallen below a prescribed statutory limit.¹ Unless the governing statute enacts or implies the contrary, a receiver of an insurance company may be appointed *on an application of one of its stockholders*, as in the case of other corporations.²

§ 7220. **Circumstances under Which Appointed.** — The mere fact that the assets of an insurance company have *fallen*

safety to the public? In Wisconsin, jurisdiction of an action by a creditor or a stockholder to wind up the business of an insolvent mutual insurance company, and, as incidental thereto, to grant an injunction restraining the continuance of its business and the disposing of its property, and to appoint a receiver, is conferred by Wisconsin Revised Statutes, sections 3218, 3219, which apply to mutual as well as other insurance companies. *Re Oshkosh Mut. Fire Ins. Co.*, 77 Wis. 366; *s. c.* 9 L. R. A. 273; 46 N. W. Rep. 441.

¹ Thus, by the Connecticut Statute 1875, page 12, the Insurance Commissioner, on finding that the assets of any life insurance company of that State are less than three-fourths of its liabilities, is to apply to the Superior Court for the appointment of a receiver and the annulling of its charter. It is no answer to a petition for this purpose that the respondents had, by legislative permission, transferred all their assets to another company, which had assumed all their liabilities, so long as the holders of their policies had not assented to the arrangement. *Stedman v. American Mut. Life Ins. Co.*, 45 Conn. 377.

² *Ante*, § 6878. Thus, under the provisions of the Revised Statutes of New York relating to proceedings by

and against corporations (2 Rev. Stat. N. Y., 463, § 39, *et seq.*), an application may be made by a stockholder, without the intervention of the Attorney-General, to restrain an insolvent insurance company from exercising its corporate rights and franchises, and for the appointment of a receiver. *Osgood v. Maguire*, 61 N. Y. 524. The court say that "the practice and decisions are in accordance with this view of the law: *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Re Franklin Bank*, 1 Paige (N. Y.), 85; *Hill v. Nautilus Ins. Co.*, 4 Sandf. Ch. (N. Y.) 577, 580; *Verplank v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 46; *s. c.* 2 Paige (N. Y.), 438." *Effect of a statute avoiding transfers after petition for receiver*: *Sands v. Hill*, 55 N. Y. 18. *Status of checks given to settle losses prior to appointment of receiver*: *Merrill v. Anderson*, 10 Hun (N. Y.), 604. Reduction of contracts of life insurance in place of winding up, under English statute, — see Stat. 33 & 34 Vict., ch. 61, § 22. This statute includes *mutual* life insurance companies: *Re Great Britain Mut. Life Ins. Soc.*, 16 Ch. Div. 246; *Lind. Comp. Law* (5th ed.), p. 635; *Re Great Britain Mut. Life Ins. Soc.*, 19 Ch. Div. 39; *s. c.* affirmed, 20 Ch. Div. 352.

below the statutory limit, so that it is prohibited from continuing its business, does not, under all statutory systems, demand the appointment of a receiver; but, in the absence of special circumstances requiring such an appointment, the directors may wind up the affairs of the company, reinsure its risks, and go out of business; and it may go out of business without the interference of a court of equity by such an appointment.¹ The governing principle applicable to such cases is, that the *mere fact of insolvency* does not require the appointment of a receiver, unless it appears that prejudice will ensue to parties in interest from allowing the affairs of the corporation to remain in the hands of its directors, to be wound up by them.² Some of the statutes confer upon the court superintending the administration, through its receiver, power to direct the receiver to *continue the business*. Under such a statute,³ the court will not make such a direction, where it is apparent that very few of the policy-holders will, in fact, pay any future premiums.⁴ When an application is made by the Attorney-General, under the New York statute for the appointment of a receiver to wind up a life insurance company, the question for decision is said to be, whether the assets of the corporation are sufficient to justify the belief that it may continue the business of life insurance with safety to the public; and where it appeared, from the evidence adduced upon such an application, that the assets of the company

¹ *Streit v. Citizens' Fire Ins. Co.*, 29 N. J. Eq. 22.

² See *Rawnsley v. Trenton Mut. &c. Ins. Co.*, 9 N. J. Eq. 347. So, as to a railroad company, see *Union Trust Co. v. St. Louis &c. R. Co.*, 4 Dill. (U. S.) 114. Under some statutory schemes, *actuaries* are also appointed, presumably for the purpose of investigating, on mathematical lines, the affairs of the company, and ascertaining how much it will take to restore it to a safe basis, and whether or not it can go on. The duties of an actuary appointed by a receiver of an

insurance company pursuant to the provisions of New York Laws, 1869, chapter 902, relate only to those specified in section 8, of the act, and terminate with his report, unless such duties are continued by the court; and the *compensation* which is to be paid must be fixed by the court, and is not under the control of the receiver, Superintendent of Insurance, or actuary. Re *North American Life Ins. Co.*, 55 How. Pr. (N. Y.) 465.

³ New York Stat. 1869, p. 902.

⁴ *People v. Atlantic Mut. Life Ins. Co.*, 15 Hun (N. Y.), 84.

were less than the amount of the values of the outstanding policies by about one-tenth of that amount; that the capital was entirely sunk; that the assets were of a kind not readily convertible or available; that a portion of the assets had been kept as a cash deposit with a private banker who was an officer of the company, without any agreement as to interest, and without security against losses; that the trustees were not in the practice of holding regular meetings, or of supervising the affairs of the company; that dividends were paid without a regular meeting or vote of the board of trustees, when there had been losses and depreciation in the value of the assets, and when it was impossible to know whether or not the capital had been impaired;—it was held that there was sufficient cause for interference, and that an order granting a receiver, and enjoining the company from the further prosecution of its business, would not be reversed; but that a clause in the order dissolving the corporation itself, was improper.¹

§ 7221. Appointment at the Suit of Judgment Creditors. Receivers of insolvent insurance companies may be appointed *at the suit of judgment creditors*, unless the statutory system by which such companies are governed, enacts or implies some other mode of winding them up and of satisfying the demands of their creditors and policy-holders. In New York, an insolvent mutual insurance company could be wound up by means of a receiver, appointed at the suit of a judgment creditor, under the provisions of the Revised Statutes authorizing the property of insolvent corporations so to be sequestered. But it was held necessary to pursue the provisions of the statute strictly; and therefore, before the court could lawfully order sequestration and appoint a receiver, it must have a petition before it from a judgment creditor, or his legal representatives, setting forth the due recovery of a judgment in a court of law or of a decree in equity, with the due return of an execution issued thereon, unsatisfied in whole or in part. This was essential to confer upon the court the slightest power

¹ *People v. Atlantic Mut. Life Ins. Co.*, 74 N. Y. 177.

or authority to proceed in the case.¹ The court pursued this doctrine to an untenable degree of strictness and nicety. A petition signed by and in the name of *the attorney* for the judgment creditor, was not sufficient to confer jurisdiction; and an order made thereon for the sequestration of the property of the corporation and the appointment of a receiver, was unauthorized and void. Nor could this be cured by an order subsequently made by a judge at Special Term, granting leave to amend the petition. Nor did an amendment, in pursuance of such an order, cure the defect, but it was held to be merely adding nullity to nullity. The reason was, that a petition complying with the statute was necessary to the *jurisdiction* of the court in the first instance, and that the court could not make any order amending its process or its pleadings until it had acquired jurisdiction; it could not make a void proceeding valid by an amendment in the same proceeding or matter.²

§ 7222. **Appointment at the Suit of Policy-holders.** — Unless there is a statutory scheme of procedure which displaces the ordinary jurisdiction of equity, there is no room to doubt that a bill may be filed *by a policy-holder*, on behalf of himself and other policy-holders, to procure the appointment of a receiver; and upon such a bill, charging a loss of the funds of the society, through the negligence of the directors, and on an answer and affidavit showing that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances, — it was held by the English Court of Appeal in Chancery, in 1854, that a receiver ought to be appointed and the society enjoined from the further prosecution of its business.³

§ 7223. **Impeaching the Decree Appointing the Receiver.** It seems very clear that in such an action the defendant cannot, by way of defense, impeach the validity of the proceed-

¹ *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591. ² *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

³ *Evans v. Coventry*, 5 De Gex, M. & G. 911.

ings appointing the receiver upon any ground less than a want of jurisdiction in the court to make the appointment.¹ An answer that the officers of the company had entered into a fraudulent combination with A. and B., and procured the institution by A. and B. of the suit against the company in which the receiver was appointed, and in which the assessment sued for was made; and that they had, by fraud, collusion, improper admissions, and false testimony, procured the decree of appointment of the receiver and the making of the assessment, — has been held bad on this ground, and also on the further ground of failing to allege any material facts constituting the fraud.²

§ 7224. **Receiver cannot Reinsure Risks.**—The receiver of an insolvent insurance company will not be authorized to reinsure its risks, and to that end, to pay a new premium out of the assets of the company; but his proper course is to refund the unearned portion of the premiums received, where the assured are willing to receive them, and let them reinsure for themselves, if they see fit.³

§ 7225. **Cannot Waive Stipulations in Policies.**—It is clear that a receiver cannot waive a stipulation in a policy of insurance which the terms of the policy prohibit the officers of the company from waiving, — at least, under a view that where such a stipulation in a policy is valid, a waiver of it by the officers of the company does not estop the company, in the face of such a stipulation.⁴ Similarly, it was held by Chan-

¹ *Ante*, §§ 6864, 6929.

² Boland *vs.* Whitman, 33 Ind. 64.

³ Re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642.

⁴ Evans *v.* Trimountain Mut. Fire Ins. Co., 9 Allen (Mass.), 329. In a *per curiam* opinion, the court say: "We cannot say that a mutual insurance company, which wishes to prevent the possibility of controversy as to the terms of supplementary agreements, may not provide that it will

not be bound by any oral consent which its officers may give to a variation in the terms of the liability which it has assumed. This is what the present company has undertaken to do. And, although the case, upon the agreed facts, is one of hardship to the plaintiff, the rule of law cannot be varied on that account, and the receiver had no right to dispense with these rules and determine the case upon principles of equity."

cellor Walworth that it is the duty of receivers of corporations, proceeding under the Revised Statutes of New York, to allow all claims against the corporation which they shall be satisfied are legal and just; but that they should allow no claim which could not have been the ground of a recovery against the corporation, either at law or in equity.¹ It was held by Assistant Vice-Chancellor Hoffman in 1839, that a receiver of a life insurance company has no authority to *wave* a defect in *preliminary proofs of loss*, required to be made by a policy of insurance, in order to entitle the insured to the indemnity thereby secured.² It is doubtful whether this decision ought to be quoted as authority for such a proposition. It was rendered at a time when it was the law of New York that even the *president* of a fire insurance company could not, without special authority in its charter, waive the full preliminary proofs of loss required by its policies, but that such waiver required the action of the board of directors, or of a committee of the directors authorized to settle the claim.³ This decision is believed not to express the modern law; but that law is believed to be that such a waiver may be made by whatever officer of the corporation acts as its agent and mouth-piece in corresponding or dealing with the insured in respect of his proofs of loss. To the acts and representations of the agent, or to his failure to act or speak, the insured is entitled to give credit, and he cannot, in general, look beyond that agent or fish out the board of directors, which, in many cases, is practically a non-existent body, committing all the details of the business to ministerial officers. More recently it has been conceded that a receiver of a fire insurance company, appointed under the laws of New York, has the same right as the company would have had to *wave a clause of forfeiture* in a policy of insurance founded on the death of the insurer, and to consent to a continuation of the policy after his death.⁴

¹ Attorney-General v. Life &c. Ins. Co., 4 Paige (N. Y.), 224.

² McEvers v. Lawrence, 1 Hoff. (N. Y.) 172, 175.

³ Dawes v. North River Ins. Co., 7 Cow. (N. Y.) 462.

⁴ Hine v. Homestead Fire Ins. Co., 29 Hun (N. Y.), 84, 85.

§ 7226. **Payment of Losses Accruing During the Receivership.**—In the case of a *strictly mutual insurance company*, it is to be kept in mind that the policy-holders are the only *members* of the company,¹ and that, when their policies expire by their own limitation, their holders cease to be members.² There is no joint-stock or other common fund than such as accrues from the payments of assessments laid against the members on the premium notes, which are usually given by them as a sort of mutual guaranty fund. The contract of insurance in such a company is, in substance and effect, a multipartite contract among all its members, under which each one agrees to pay such a ratable assessment laid by the directors as may be necessary to provide a fund for the payment of any losses which may accrue to any of the members under his policy of insurance. It necessarily follows that, when such a company, by reason of its inability to continue its business, passes into the hands of a receiver for the purpose of a judicial winding-up, this is tantamount to a *breach* of this multipartite *contract* subsisting among its members. Unless there is a statute, such as is believed to exist in some States, applicable to some conditions, allowing a receiver, under the order of the court, to continue the business of the company, the necessary effect of the judicial proceeding to wind up is to cancel and put an end to every one of its contracts of insurance, and to leave the holders of the policies entitled, at most, to *damages for the breach of the contract* made by the other members, through the corporation, with himself.³ The measure of

¹ *Mygatt v. New York Protection Ins. Co.*, 21 N. Y. 53. This is, in some cases, declared by statute, though unnecessary. Thus, a statute of New Jersey (Pub. Laws N. J. 1863, p. 395), enacts, "that all persons who shall insure in or with the corporation, shall, while they continue so insured, be deemed and taken as members of said corporation."

² *Mayer v. Attorney-General*, 32 N. J. Eq. 815.

³ That what the policy-holder is entitled to may be placed on the footing of *damages for the breach of the contract* embodied in his policy, is not a fantastic conception, will appear from an opinion of the Court of Appeals of New York, written by Earl, J., in which he said: "The company is the creature of statute, and its mode of action for the protection of the policy-holders is regulated by statute. From the nature of the

damages for the breach of this contract is called the *surrender value* of the policy.¹ It is a necessary conclusion from this that such a judicial sequestration of the assets of the corporation *terminates its liability for future losses*, so that the receiver cannot pay any loss happening after the date of the order enjoining the company from continuing its business.²

case, the agreement must also be implied that it will obey the statute, the law of its creation, and of its existence; that it will do its business as required by the statute; that it will properly keep and invest its funds, and be in a condition at all times, as the statute requires, to discharge all its liabilities. Therefore, when it violates the law, fails to keep on hand funds required by law, and becomes insolvent, discontinues business, makes it impossible for the assured to pay premiums, and fails to carry the policies, it has broken its engagements with its policy-holders, and becomes liable to them on account of such breach. The policy-holders then have a claim for damages, just as they would have if, while doing business, it had, without just cause, refused to receive the payment of premiums and to continue the policies in life." *People v. Security Life Ins. Co.*, 78 N. Y. 114, 125; *s. c.* 34 Am. Rep. 522. The learned judge cites, as to the general nature of the contract of insurance, and the damages accruing from its breach, commonly called the *surrender-value*,—*New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Bell's Case*, L. R. 9 Eq. 706; *Cook's Case*, L. R. 9 Eq. 703; *Holdich's Case*, L. R. 14 Eq. 72.

¹ *People v. Security Life Ins. Co.*, 78 N. Y. 114, 125; *s. c.* 34 Am. Rep. 522; *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 200; *s. c.* 48 N. W.

Rep. 772; *Carr v. Union Mut. Fire Ins. Co.*, 33 Mo. App. 291 (under a statute).

² *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 200; *s. c.* 48 N. W. Rep. 772; *Com. v. Massachusetts Mut. Ins. Co.*, 119 Mass. 51; *Mayer v. Attorney-General*, 32 N. J. Eq. 815, 824. A statute of Missouri enacts as follows: "Unless, under the provisions of this chapter, reinsurance of a dissolved company is effected and its assets conveyed to the reinsuring company, the Superintendent of the Insurance department, under the direction of said court, shall apply the sums realized from the assets of such dissolved company: *fourthly*, to the payment of the debts and claims allowed against such company, and the unearned premiums and the surrender-values of its policies, in proportion to their respective amounts." Rev. Stats. Mo. 1879, § 6047; *Ibid.* 1889, § 5948. Under this statute it is held that "when a mutual fire insurance company is dissolved, the claimants of unearned premiums and of the surrender-values of policies stand on an equal footing with general creditors whose claims have been duly allowed: and that a judicial order directing payment of all the balance remaining on hand to a creditor whose allowed claim is larger than such balance, is erroneous, because contrary to the statute, provided there are unearned premiums and surrender-values remaining due and unpaid." *Carr v.*

§ 7227. **Receiver's Right of Action on a Guaranty where One Life Insurance Company Absorbs Another and Reinsures its Risks.** — In an infamous transaction, which took place in the State of New York, one life insurance company absorbed another, in the customary manner of purchasing, through its own officers, a majority of the shares of the victim company, and then putting its own men in as directors of that company. In carrying out the scheme, certain individuals, interested in the dominant company, executed a written guaranty that the dominant company would carry out the contracts of the victim company. It was held that the effect of this agreement was not to guarantee the future solvency of the victim company against losses from misfortune, errors of judgment, or mutations of business, or of markets, under all circumstances; but that it was the duty of the new managers of the victim company to keep intact its reserve, and when they, in point of fact, used this reserve to repay the money which they had borrowed in order to purchase these shares, thereby reducing its reserve below the statutory limit, the contract of guaranty was broken, and the receiver of the victim company might maintain an action thereon.¹ The court proceeded upon the doctrine laid down in one of its previous decisions, that the contract of an insurance company with its policy-holders implies that it will retain its assets in its own possession and continue its business; that if it reinsures its risks and parts with its reserve, its contract is at once broken at the option of the assured; that its policy-holders are not to be turned over to another company without their consent, and are not obliged to pay premiums to the company which has parted with its

Union Mut. Fire Ins. Co., 33 Mo. App. 291. This view was adopted by the Supreme Court of Minnesota in *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 200; *s. c.* 48 N. W. Rep. 772; 20 Ins. L. J. 562. It is held in the Missouri case that the right to the surrender-values of policies and to unearned premiums attaches to those who have paid their entire premiums

in cash, as well as to those who have given premium notes. *Carr v. Union Mut. Fire Ins. Co.*, *supra*.

¹ *Mason v. Cronk*, 125 N. Y. 496; *s. c.* 35 N. Y. St. Rep. 859; 28 N. E. Rep. 224; 20 Ins. L. J. 491. The particular contract of guaranty was construed in *Wise v. Morgan*, 13 Daly (N. Y.), 402; *s. c.* affirmed without opinion, 103 N. Y. 682.

reserve; and that they are accordingly entitled to treat the contract of insurance as broken, and to recover damages for the breach, whenever such damages have in fact accrued.¹

§ 7228. Administration of the Securities Deposited with the Superintendent of Insurance.—Under the statute laws of most of the States regulating the business of insurance companies, and especially that of foreign insurance companies, such companies are required to make a deposit with some officer of the State, as an additional guaranty in favor of their policy-holders. It has been held, under the statutes of New York, that a receiver, appointed on an application of the Attorney-General, to wind up an insurance company on the ground of its insolvency, is not entitled to the custody of the securities deposited with the Superintendent of Insurance;² though, when the Superintendent of Insurance converts the securities into money, under the governing statute, the receiver is entitled to the money for general administration.³

¹ *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105.

² *Ruggles v. Chapman*, 59 N. Y. 163; affirming *s. c.* 1 Hun (N. Y.), 324; *People v. Chapman*, 64 N. Y. 557; *Re Guardian Mut. Life Ins. Co.*, 74 N. Y. 617; affirming *s. c.* 13 Hun (N. Y.), 115. Compare *ante*, § 3376.

³ *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94; modifying *s. c.* 26 Hun (N. Y.), 294. In New York the statutes have provided for two classes of insurance: one, by policies unregistered, but still protected by a deposit of securities to the amount of \$100,000 in the insurance department; the other, by registered policies and annuity bonds, secured by an additional deposit of similar securities, to an amount not less than \$25,000. The former, when the company is found to be in such a condition as to be unsafe for the further transaction of its business, are

to be distributed under a decree of the Supreme Court, made for that purpose; while the latter are to be sold by the Superintendent of the Insurance department, the proceeds of their sale paid over to the receiver, on his receipt, and applied by him to the satisfaction of the registered policies and annuity bonds, and the surplus on the debts owing by the company. *People v. Chapman*, 5 Hun (N. Y.), 222. The rule of the cases first cited, that a receiver of an insurance company, appointed under the Revised Statutes, is not entitled to have transferred to him the securities deposited by the company with the Superintendent of the Insurance department,—applies also to a receiver appointed under Laws 1853, chapter 463. *Matter of Guardian &c. Life Ins. Co.*, 13 Hun (N. Y.), 115; *s. c.* affirmed, 74 N. Y. 617.

§ 7229. Proceedings where Receiver Disallows a Claim.

It was laid down by Chancellor Walworth, as the proper practice in chancery, where the receiver of such a company disallows a claim, and referees are appointed in the manner prescribed by the governing statute, to determine the validity of the claim,—for the receiver to permit those for whose benefit the defense against the claim is made,—that is to say, the *makers of the premium notes* which will be assessable to pay it,—to *manage the defense*, which defense must, however, be made under the direction of the receiver.¹

§ 7230. Compromising Claims.—The receiver of an insolvent insurance company may, upon application to the court, be authorized to *compromise disputed and doubtful claims* against the company, allowing so much of such claims as he may deem just and equitable. He may also be authorized, in any case where he deems it expedient and for the interest of the creditors and stockholders, to compromise with debtors of the company who are unable to pay in full, upon the receipt of such part of what is due from them as he shall deem reasonable and for the best interests of the creditors and stockholders, under all the circumstances of the case.²

§ 7231. Premium Notes in the Hands of Receiver.—In the case of a mutual insurance company, the premium notes given by the policy-holders, under the governing statute “for the better security of its dealers,” *stand in the place of a joint stock*, and when a receiver is appointed by reason of insolvency, such notes *are available as assets* in his hands, subject to the terms and conditions prescribed by the governing statute.³ The object of the statute authorizing the giving of premium notes for this purpose was to furnish a basis for the business of the company,—a substitute for capital stock, on which those dealing with it might rely for their security.⁴ A

¹ Attorney-General *v.* Life &c. Ins. Co., 4 Paige (N. Y.), 224.

² Re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642; *ante*, § 6973.

³ See Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158.

⁴ That such notes constitute the company's capital stock, see Van

company, whose members have given premium notes without taking insurances, under such a statute, stands on a different footing from a purely mutual company, since it does business other than insuring for its own members. It follows that such notes are valid and enforceable in the hands of a receiver of the company after its insolvency, so far as the security of the "dealers" requires it.¹ It has been held that if premium notes are given in advance, at the outset of the business of the company, for the better security of its dealers, and are *renewed* at their maturity, the makers will be liable to the receiver of the company, in the same manner as if the occasion for their use had arisen during the currency of the original note.² It is no defense to such a note that the company has failed, and that, on an application to it, subsequently made, for insurances for the purpose of applying them on the note, the company declined to underwrite for the makers.³ Where a premium note had been given for the security of dealers, to a mutual insurance company, payable in one year; and, while the company was running, the makers took out insurance in the company, on which the premiums were more than half the amount of the note, and paid the same at the end of the year; and, instead of deducting the amount from the premium note, they renewed the latter by a new note for the whole amount, payable one year after date, and the company failed during the second year;—it was held that they were liable for the whole of the second note, and could not claim a deduction for the premiums incurred during the first year.⁴ The maker of such a note is entitled to have deducted from it all the premiums earned against him by the company while the company is running or is paying the amount of such premiums. He is not liable for such premiums in addition to the amount

Buren v. Chenango &c. Ins. Co., 12 Barb. (N. Y.) 671; with which compare Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605, 609. That such notes are to be dealt with by the receiver just as by the company,—see Lamar Ins. Co. v. Moore, 84 Ill. 575.

¹ Howard v. Palmer, 64 Me. 86.

² Hone v. Folger, 1 Sandf. (N. Y.) 177; Howard v. Hinckley &c. Iron Co., 64 Me. 93; Maine Mut. Ins. Co. v. Blunt, 64 Me. 95. See Deraismes v. Merchants' Ins. Co., 1 N. Y. 371.

³ Hone v. Folger, *supra*.

⁴ Hone v. Ballin, 1 Sandf. (N. Y.) 181.

of his subscription note.¹ However, where premium notes were thus taken in advance, but subsequently to the organization of a mutual insurance company, it was held to be a question of fact, to be determined by the character of the notes, or by other evidence, whether they were given under that clause of the company's charter which provided for forming a security for dealers, or whether they were given for the premiums in advance on insurances procured by their makers in the usual course of business.²

§ 7232. **Further of Premium Notes.**—Such a note, being for the security of third persons dealing with the company, is, in the event of the insolvency of the company, valid in the hands of its receiver, for its whole face value, although the premiums on insurances actually received by the maker may have amounted to no more than a part of it;³ therefore, if premiums have been paid by members for risks at the time of taking insurance in the company, such premiums cannot be deducted from such a note.⁴ As the note is valid by force of the statute authorizing it to be taken, it seems that a partial failure of consideration cannot be set up to defeat recovery for its full amount.⁵ Somewhat analogous to the principle already considered with reference to the inability of subscribers to the capital stock of a corporation to plead fraud, or want or failure of consideration, after the rights of creditors of the corporation have supervened,⁶ it has been reasoned that, if a consideration is necessary, the concurrence of others, in giving similar notes for the purpose of giving credit to the company in pursuance of an agreement entered into by all the makers, the contemplated advantages of insurance in such company, and the compensation, authorized to be paid to the makers, on such an amount as the note should exceed the premiums of insur-

¹ *Merchants' Mut. Ins. Co. v. Leeds*, 1 Sandf. (N. Y.) 183.

² *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. (N. Y.) 184.

³ *Deraismes v. Merchants' Mut. Ins. Co.*, 1 N. Y. 371.

⁴ *Howard v. Hinckley & Co. Iron Co.*, 64 Me. 93.

⁵ *Deraismes v. Merchants' Mut. Ins. Co.*, 1 N. Y. 371.

⁶ *Ante*, § 1438, *et seq.*

ance actually taken,—constitute a sufficient consideration to uphold it.¹ Nor is it any defense to such a note that no insurance has been effected under the open policies for which the notes in question were given, nor that the company has 'become insolvent.'² As such a note is a valid security in the hands of the company, it may be *transferred* to a party who has insured in the company, in settling his claim for a loss.³ Nor is a resolution of the board of directors necessary to authorize the president of the company to make such a transfer, where he is authorized by the by-laws to make contracts and to prosecute the ordinary business of the company.⁴ If the note is made payable to the maker's own order, and is not indorsed by him, it is none the less available as a security in the hands of the company, and a court of equity will compel its indorsement by the maker; and if it is wrongfully withdrawn from the company, its amount may be recovered in trover by the company, or by a receiver of its assets.⁵ Such a note cannot be given up to the maker without consideration, by the board of trustees of the company, any more than a stockholder of the company can be released by its trustees;⁶ and if so given up, the receiver may sue and recover it from the maker.⁷

§ 7233. **Assessing the Premium Notes.**—Statutes exist in several of the States, authorizing the receivers of insolvent

¹ *Deraismes v. Merchants' Mut. Ins. Co.*, *supra*. Substantially to the same effect is *Howard v. Palmer*, 64 Me. 86.

² *Howard v. Palmer*, 64 Me. 87; distinguishing *Pendergast v. Commercial Mut. Ins. Co.*, 15 Gray (Mass.), 257, on the ground that the notes in question were something more than a note given by the assured against his own open policy. The practice of giving premium notes on *open policies* of insurance is explained in *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629, where it held that the maker of such a note is not liable to

the company beyond the *earned premiums*, and is under no obligation to insure to the amount named in the policy, or to any amount, but may rescind the contract at any time on paying the premiums.

³ *Howland v. Myer*, 3 N. Y. 290. See also *White v. Haight*, 16 N. Y. 310; *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53.

⁴ *Ibid.*

⁵ *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629.

⁶ As to release of stockholders, see *ante*, § 1511, *et seq.*

⁷ *Brouwer v. Hill*, *supra*.

mutual insurance companies to lay assessments upon the premium notes given by the members, so far as may be necessary to raise money to liquidate the obligations of the company. Where these statutes exist, the power to lay such an assessment is regarded as springing from the statute, and the receiver, in making them, acts *ministerially* in virtue of his statutory authority, and not in virtue of an order of the court;¹ though, in view of what has preceded in another title,² it can hardly be doubted that a court of equity possesses the inherent power to order such assessments, and to authorize the receiver to enforce them by suitable actions; and it has even been held that, in the absence of statutory authorization, the receiver of such a company can make such assessments for the purpose of raising money to meet its obligations.³ These statutes have been generally construed as putting the receiver *in the place of the directors*, and vesting him with their rights and powers; so that he may collect of the members upon their premium notes whatever amount the directors might have collected, and upon the same principle, and in the same manner.⁴ On the other hand, the proceedings of the receiver in making assessments are of no greater force

¹ Macklem v. Bacon, 57 Mich. 334; Russell v. Berry, 51 Mich. 287; Sands v. Sanders, 28 N. Y. 416; Jackson v. Roberts, 31 N. Y. 304; Lawrence v. McCready, 6 Bosw. (N. Y.) 329; Berry v. Brett, 6 Bosw. (N. Y.) 627; Bangs v. Gray, 12 N. Y. 477; reversing s. c. 15 Barb. (N. Y.) 264; Sands v. Sweet, 44 Barb. (N. Y.) 108; Thomas v. Whallon, 31 Barb. (N. Y.) 172; Williams v. Babcock, 25 Barb. (N. Y.) 109; Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605. It is reasoned, in one of these cases, that the provisions of the Revised Statutes of New York authorizing the property of an insolvent corporation to be sequestrated and a receiver thereof to be appointed, embody a special delegation of power over such

corporations, to be exercised in a prescribed manner and upon a particular state of facts; and that, like all cases of delegated authority under a statute affecting liberty or property, the prescribed form for obtaining *jurisdiction* of the person and the subject-matter must be strictly pursued. Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

² *Ante*, § 3537, *et seq.*; § 3567, *et seq.*

³ Embree v. Shideler, 36 Ind. 423; approved in Tippecanoe Township v. Manlove, 39 Ind. 249.

⁴ Shaughnessy v. Rensselaer Ins. Co., 21 Barb. (N. Y.) 605, 608; Williams v. Babcock, 25 Barb. (N. Y.) 109; and other cases first above cited; Embree v. Shideler, 36 Ind. 423, 429; Lamar Ins. Co. v. Moore, 84 Ill. 575.

than the same act would have possessed if done by the board of directors;¹ and where he makes an application to the court, under a statute requiring this to be done, and secures the approval of the court, this, it has been held, operates no further than to place his act in the same position which an assessment by the directors would have occupied.² This being the case, such an assessment is not conclusive upon the policyholders who have been assessed, of its necessity or validity.³

§ 7234. *Necessity of Assessment.* — While the receiver of a mutual insurance company is regarded as standing in the place of its directors in respect of the power to make and enforce such assessments, yet he can no more bring actions upon the premium notes deposited by the members, and recover the whole amount of those notes, without making assessments, than the directors could, if the company were a going concern.⁴ The reason is, that the receiver has no right to raise, by this means, any more money than is actually needed to liquidate the obligations of the company.⁵ This rule is analogous to that relating to actions *by the corporation* against its shareholders to recover the unpaid balances on their share subscriptions, under which, as already seen, a valid assessment by the directors must precede the bringing of an action.⁶ Here, as in the case of the assessment of stockholders, an *assessment* and *notice* are essential conditions, both in respect to the amount to be paid and the time of payment; and until these are shown, no breach on the part of the maker of the note is established. If there is no allegation or proof of such an assessment and notice, in an action by the receiver, on such a note, the plaintiff should be non-suited.⁷ Such an action cannot be sustained where the complaint shows on its face

¹ *Bangs v. Duckinfield*, 18 N. Y. 592.

² *Ibid.*

³ *Ibid.*

⁴ *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605, 609; *Williams v. Babcock*, 25 Barb. (N. Y.) 109; *Embree v. Shideler*, 36 Ind. 423; *Sav-*

age v. Medbury, 19 N. Y. 32; *Manlove v. Burger*, 38 Ind. 211.

⁵ *Ante*, §§ 3538, 3542. ⁶ *Ante*, § 1702.

⁷ *Williams v. Babcock*, 25 Barb. (N. Y.) 109. See also *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

that neither the receiver nor the court to which he reports his action, has examined and determined upon the validity of the claims against the company, for the payment of which the assessment is made.¹ On principles already stated, the appointment of the receiver, when made by a court or authority of competent jurisdiction, will be binding upon the makers of premium notes.² But such an appointment does not determine the necessity of an assessment, nor involve an adjudication of their liability on the notes.³ The insolvency of the company does not enable the receiver to prosecute actions on the premium notes, under circumstances in which the company could not have maintained such an action, nor to any greater amount.⁴ An order of court, directing the receiver to "prosecute and collect the whole amount unpaid on the deposit and premium notes, by any and all legal and proper ways and means," will not authorize him to sue without first making an assessment, inasmuch as "the amount unpaid" on a note can only be determined by an assessment.⁵

§ 7235. Circumstances under Which Such Assessments may be Made.—The circumstances under which a receiver may make such assessments are governed by the contract embodied in the premium notes themselves, of which contract the statute under which the notes are given is a necessary part. If the notes are, by their terms, assessable only to raise money to pay losses, then, in an action to enforce such an assessment, it is incumbent upon the plaintiff to give *some* evidence that a loss has taken place.⁶ Where the company itself sued to enforce such an assessment, it was held that the record of losses kept by the company was sufficient evidence, *prima facie*, that the loss therein described had occurred; and the same rule has been held applicable where such an action is brought by a receiver.⁷ Where the action is brought by a

¹ Embree v. Shideler, 36 Ind. 423, 591.

² Manlove v. Burger, 38 Ind. 211.

³ *Ante*, §§ 3386, 3537, 3538.

⁴ Savage v. Medbury, 19 N. Y. 32.

⁵ Devendorf v. Beardsley, 23 Barb. (N. Y.) 656.

⁶ Jackson v. Roberts, 31 N. Y. 304.

⁷ *Ibid.* 310; People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.), 297.

receiver, it has been held that such evidence of a loss, and a settlement and allowance of the same, as would conclude the company whilst engaged in its proper business, will be sufficient evidence to support the action of the receiver.¹ For instance, a *judgment* recovered against the company upon a loss is sufficient evidence of it.² It is held to be unnecessary to show the *particular loss* for the payment of which the assessment is made; but it is sufficient if it be shown that losses have occurred during the time the defendant's policy was in force, and that the defendant's note has been assessed to meet them.³ An assessment may be made by a receiver upon a premium note to raise money to pay losses happening to members who have been insured for a *cash premium*, payable in advance.⁴ Where it appears to the receiver that all the notes are properly chargeable, to the full extent of their face value, a general assessment upon all of them, without regard to classes, to their full amount, is unobjectionable.⁵ It is reasoned that all the notes of a mutual insurance company constitute its capital, whether in one department or another; so that if the necessity exists, resort may be had to the entire fund.⁶ If such a company divides its applications for insurance into three classes, one of which is the "hazardous department," and a premium note is in that department, the maker of the note is first liable to contribute for losses in that department; but if the losses do not exhaust his note, what is left unexhausted is applicable to the payment of losses in the other departments during the running of the policy.⁷ The assessment must be upon the notes of all those who were members of the company *at the time of the losses*, whether they had been members for a longer or a shorter time. If the directors omit any persons liable to be assessed, or include the amount of previous assessments, from the payment of which the parties assessed have been released, the assessment will be

¹ Jackson v. Roberts, 31 N. Y. (N. Y.) 177; Jackson v. Roberts, 31 N. Y. 304, 313.

² *Ibid.*

⁵ Sands v. Sanders, 28 N. Y. 416.

³ *Ibid.*

⁶ *Ibid.*

⁴ White v. Havens, 20 How. Pr.

⁷ *Ibid.*

invalid.¹ "A member of a mutual insurance company is not liable to assessments upon his premium note to meet deficiencies of means arising from a failure to collect of other solvent members. When a member has paid towards any loss or expenses, in proportion to the amount which his deposit note bears to the other deposit notes, legally assessable, his liability to assessment in respect to such loss or expenses is discharged. He cannot be assessed beyond such proportion, without a violation of the charter of the corporation; and no such assessment, either by the directors or by a receiver duly appointed by the court upon such corporation becoming insolvent, can be upheld. A receiver of an insolvent mutual insurance company cannot legally assess any person insured therein, beyond his proportion of the losses; and he is bound to allow toward the proportion of members what they have paid on former assessments for the same losses, etc., whether void or valid."² "The amount of claims which the receiver or the court will allow as just demands against the company, together with any indebtedness previously allowed by the directors of the company, as shown by their books, must be ascertained before an assessment can be made to pay such indebtedness."³

¹ Embree v. Shideler, 36 Ind. 423, 429. The receiver under the New York statutes, and, it may be assumed, under most other statutory systems, proceeds, in making such an assessment, exactly as the directors should have proceeded if the company had remained a going concern. Having ascertained that the company is liable for a loss, and that it has not sufficient funds to pay the same, the directors are to ascertain who were the members of the company, at the time when the loss occurred; and then their assessment is to be made upon each such member, in the proportion which the amount of his deposit note bears to the amount of all the deposit notes. They have no right to take into consideration the

length of time any person has been a member, in determining the amount of his assessment, or in determining whether he shall be assessed at all. If they omit to assess the deposit notes of any persons who were members at the time of the loss, and who are liable, consequently, for their proportion of it, or if they include in the assessment the amounts of previous assessments, from the payment of which the parties assessed have been released, the assessment is invalid. *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373.

² Embree v. Shideler, 36 Ind. 423, 429; opinion of the court by Downey, J.

³ *Downs v. Hammond*, 47 Ind. 131, 132.

§ 7236. **Effect of Assessments by a Former Receiver.**—As the action of the receiver, in making an assessment under the direction of a statute, is *ministerial* and *not judicial*, there is no ground for the contention that an assessment by a former receiver is in the nature of an *adjudication* and an *estoppel* against the present assessment. The fact that a former receiver has made an assessment upon the same notes, which assessment remains unenforced, will not prevent his successor from making a *new assessment* for the same purposes; since it is merely repeating the performance of a condition precedent to a right of action upon the notes by the receiver, and is, in no sense, a judicial determination of a controverted matter.¹ In making such an assessment, the receiver may properly include, as a portion of the amount to be raised, an *unpaid balance under former assessments*, which ought to have been paid by delinquent members, but which, owing to their inability or insolvency, has not been paid; and this, although the result will be to assess the solvent members to make up the deficiencies caused by the insolvent ones.²

§ 7237. **Extent and Proportion of the Assessment.**—In this, as in other cases, the general principle is, that the receiver has no right to make an assessment for more than enough to liquidate the debts of the company, and pay the costs of the proceeding. It has been held that, in an action to enforce an assessment, the declaration should *allege the amount of the debts* of the corporation, and that the capital stock paid in, where there is a capital stock, has been exhausted.³

¹ *Sands v. Sweet*, 44 Barb. (N. Y.) 108; *Jackson v. Van Slyke*, 44 Barb. (N. Y.) 116, note *a*; overruling *Campbell v. Adams*, 30 Barb. (N. Y.) 132.

² *Bangs v. Gray*, 12 N. Y. 477; reversing *s. c.* 15 Barb. (N. Y.) 264.

³ *Lamar Ins. Co. v. Moore*, 84 Ill. 575. Under a statute providing that whenever the directors shall deem it necessary to make an assessment for the payment of losses, etc., they shall settle and determine the sums

to be paid by the members of the company as their respective portions of a given loss, and that the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, — the members are liable only to pay upon their premium notes their proper shares respectively of the losses or damages sustained by the members. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

A member of a mutual insurance company in New York, the charter of which was similar to that of the Jefferson County Mutual Insurance Company,¹ which was the type of many special charters granted in that State, was liable, upon his deposit note, for losses, in the proportion which the amount of his note bore to the aggregate of the deposit notes, held by the company, which were collectible, and legally subject to assessments for such losses; and his liability was not limited to the proportion which the amount of his note bore to the whole amount of deposit notes legally assessable for the loss, whether the latter were collectible or not; but he was bound to pay an assessment made upon his note to meet a deficiency in funds to pay losses arising from the inability of other creditors to pay the proportion of such losses assessed upon their notes.²

§ 7238. **Valuation of Policies in Winding up.**—On this subject there has been considerable difference of opinion. The English Court of Chancery have held that the amount to be proved in respect of a policy in winding up, as its surrender-value, is the sum which would be required by a solvent insurance company to effect a new policy of the same amount, on the same conditions, and at the same premium, as the policy in respect of which the proof is made.³ But Lord Cairns, sitting as arbitrator in the winding up of the Albert Life Assurance Company, felt constrained, on account of the practical difficulty of applying this rule, to adopt a different one,—which was, that the sum to be proved was the difference between the present value of the sum insured and the present value of the premiums which the insured would have to pay in order to keep the policy on foot.⁴

¹ N. Y. Laws 1836, ch. 41.

² *Bangs v. Gray*, 12 N. Y. 477. Said Denio, J.: "The obligation to contribute among the members of these companies closely resembles that which prevails among several sureties, for a common principal. The rule in equity in such cases is to divide the whole loss among the sol-

vent sureties." *Ibid.* 486; citing 1 Story Eq. Jur., § 496.

³ *Holdich's Case*, L. R. 14 Eq. 72; *Bell's Case*, L. R. 9 Eq. 706.

⁴ *Lancaster's Case*, L. R. 14 Eq. 72, *n.*; with which compare Lord Romilly's observations upon it in *Holdich's Case*, *Ibid.*

§ 7239. Rule Adopted by Statute in England.—The rule thus laid down by Lord Cairns was substantially adopted by a subsequent act of Parliament, in the following language: “Where a life assurance company is being wound up by the court, or subject to the supervision of the court, or voluntarily, the value of every life annuity and life policy requiring to be valued in such winding up shall be estimated in manner provided by the first schedule to this act; but this section shall not apply to any company, the winding up of which has commenced before the passing of this act, unless the court having cognizance of the winding up so ordered, which order that court is hereby empowered to make if it think expedient so to do, on the application of any person interested in the winding up of such company.”

“First Schedule: Rule for Valuing an Annuity.—An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and where such tables cannot be ascertained or adopted to the satisfaction of the court, then according to the table known as the Government Annuities Experience Table, interest being reckoned at the rate of four per centum per annum.”

“Rule for Valuing a Policy.—The value of the policy is to be the difference between the present value of the reversion in the sum assured on the decease of the life, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums. In calculating such present values, the rate of interest is to be assumed as being four per centum per annum, and the rate of mortality as that of the tables known as the Seventeen Offices' Experience Tables. The premium to be calculated is to be such premium, as according to the said rate of interest and rate of mortality, is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.”

“Second Schedule.—Where an assurance company is being wound up by the court, or subject to the supervision of the court, the official liquidator, in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, for life assurance, endowment, annuity, or other payment, is to ascertain the value of such policies, and give notice of such value to such persons; and any person to whom notice is so given shall be bound by the value so ascertained, unless

he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the court.”¹

§ 7240. Manner of Making the Assessment. — In making such an assessment, it has been held that no discrimination is to be made between notes given when higher rates of insurance existed, and those made under reduced rates.² *Separate assessments* should be made for the payment of several losses for which the note is liable, upon all the premium notes in force at the time when each successive loss happened,³ — unless it appears to the receiver that it is necessary to collect all that is collectible on all the notes deposited.⁴ Where several losses have occurred at the same time, or so near together that the same notes are liable to be assessed for the payment of them all, only one assessment is necessary.⁵

§ 7241. Equalizing Those Who have Paid Premiums in Cash. — Where a portion of the business of an insurance company has been transacted on the *stock plan*, and a portion upon the *mutual plan*, and the premiums received from persons obtaining insurance on the stock plan, by paying the whole premium in cash, have been expended in the payment of losses and expenses, thus relieving former members from assessments upon their premium notes and leaving others to be assessed for the payment of subsequent losses, — there is said to be no remedy for any inequality which may result from this mode of transacting the business of the company, and the receiver cannot so apply the funds in his hands as to produce an equality, although the effect may be to allow a greater burden to rest upon those whose notes happen to be in force at the time when the insolvency of the company occurred.⁶

¹ Stat. 35 & 36 Vict., ch. 41, § 5, Lind. Comp. Law (5th ed.), 733, 734.

² *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605; citing *Herkimer & c. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373.

³ *Shaughnessy v. Rensselaer Ins.*

Co., 21 Barb. (N. Y.) 605; *Embree v. Shideler*, 36 Ind. 423, 430.

⁴ *Ante*, § 3386.

⁵ *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

⁶ *Ibid.*

§ 7242. **Particularity in Making the Assessment.**— Such an assessment need not be so formally particular as to specify the name of the party bound to contribute, nor the amount of the note. A general assessment by which the receiver declares that each premium note is assessed to the full amount thereof, has been held valid.¹ On the other hand, in a decision where the statutory steps seem to have been strained to an unreasonable strictness, it was held that an assessment made by such a receiver upon such premium notes is not complete and consummated until it is ascertained, fixed, and determined, by carrying out upon the extension book the amount which each member is to pay, and that a notice of such an assessment, if published before this is done, is premature and will not support an action by the receiver.²

§ 7243. **Requisites of Notice of the Assessment.**— It has been held that the notice, in order to support a right of action on the assessment, must state the amount which each member is to pay.³ It is no objection to such an assessment, or to the notice of it, that the persons called upon to contribute are apprised of the amount of their liability only by a statement of the rate per cent at which the premium notes in force at specified dates are respectively assessed.⁴ It is enough that the makers of the notes, who are bound to know their amounts, date, etc., are furnished with the *data* for making the proper computation. It is not necessary to inform each one how much he has to pay.⁵

§ 7244. **Notes Payable Absolutely where No Assessment is Necessary.**— Under many special charters in the State of New York, and subsequently under a general law enacted

¹ *Sands v. Sanders*, 28 N. Y. 416.

² *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

³ *Ibid.*

⁴ *Bangs v. Duckinfield*, 18 N. Y. 592.

⁵ *Ibid.* But where such notice specified different rates of assessment for "small notes" and "large notes,"

without showing in any manner how a given note was distinguishable as belonging to the one or the other class, and there was no evidence of any rule on the subject contained in the charter or by-laws, the notice was held void for uncertainty. *Ibid.*

after the prohibition against the granting of special charters contained in the constitution of 1849, a class of notes was authorized to be given to insurance companies by their policyholders, which were declared, by the statute, to stand in lieu of the capital of the company, which notes were the absolute property of the company, transferable for the purposes of its business or the settlement of its losses, the same as any other absolute evidences of indebtedness are transferable, and suable without any preliminary assessment made thereon, either by the directors while the company was a going concern, or by its receiver thereafter. A history of the special charters creating mutual insurance companies, under which assessable premium notes were given, and of those under which notes thus payable absolutely were given by the members in lieu of capital, "as a security for dealers," — is given by Denio, C. J., in a case decided by the Court of Appeals of that State in 1857.¹ The theory of the court in regard to this class of notes is that they stand in the place of capital subscribed and paid in by the members of the company, and not as a mere guaranty fund subject to assessment; that they are payable absolutely to the extent of their full face value, when demanded by the company or its representative; that the company may transfer them or deal with them as an owner may deal with his absolute property, subject, of course, to any limitation of its powers imposed upon it by its charter or its governing statute; that their quality is to be determined by the statute in pursuance of which they have been given; that they are thus given to the corporation in absolute ownership, in consideration of the benefits accruing to the members from their shares in the profits of the business of the company; and that they are payable absolutely, and not merely when an assessment is made upon valid conditions precedent, although they may, on their face, embody a promise to pay in such portions and at such times as the directors may require.²

¹ White v. Haight, 16 N. Y. 310.

² In White v. Haight, 16 N. Y. 310, 324, the following cases are referred to by Denio, C. J., as settling

the question that notes of this character "are payable absolutely, and may be collected without any allegation of loss, and without an assess-

§ 7245. Arrangements among the Members Limiting their Liability. — We have already seen, that when it becomes necessary to charge the stockholders of a corporation in favor of its creditors, no arrangements made among themselves or between the particular stockholder and the directors, officers, or other agents of the corporation, discharging or reducing the liability of the stockholder, will avail, as against the rights of the creditors.¹ Upon the same principle, it has been justly held that the liability of persons insured in a mutual insurance company to pay their proportion of such assessments as shall be necessary to meet all of the company's losses and liabilities, cannot be avoided by any arrangement entered into with the company, whereby the insured seeks to limit such liability, nor lessened by any provisions in the articles of association.² But where the company has not taken any insurance on the stock plan, and the question concerns only the liability of the members *inter sese*, — that is to say, the liabil-

ment":—*Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53; *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629, note; *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 153; *Hone v. Allen*, 1 Sandf. (N. Y.) 171, note; *Hone v. Folger*, 1 Sandf. (N. Y.) 177; *Caryl v. McElrath*, 3 Sandf. (N. Y.) 176; *Deraismes v. Merchants' Mut. Ins. Co.*, 1 N. Y. 371; *Howland v. Myer*, 3 N. Y. 290; *Brown v. Crooke*, 4 N. Y. 51; *Emmet v. Reed*, 8 N. Y. 312. These cases do not decide, in terms, that an assessment upon notes thus given "as security for dealers" with the company, is not necessary in order to enable the receiver to sue on them; but they were all actions by receivers upon such notes themselves, without a previous assessment, so far as the writer can see from an examination of them; and the doctrine embodied in them, that such notes are absolute assets of the company, and, as such, transferable in the course of its business at its pleas-

ure, is inconsistent with the conclusion that they must be assessed like ordinary premium notes, and that the action is an action to recover the assessment, and not an action on the note. It was therefore held that an action might be maintained by the receiver of an insolvent mutual insurance company upon a note of the following tenor, without any previous assessment:—" \$500. For value received, in policy No. 122, dated August 16th, 1850, issued by the Union Mutual Insurance Company, at Fort Plain, N. Y., I promise to pay the said company, or their treasurer for the time being, the sum of five hundred dollars, in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require." *White v. Haight*, 16 N. Y. 310; recognized in *Savage v. Medbury*, 19 N. Y. 32.

¹ *Ante*, §§ 1400, 1514.

² *Russell v. Berry*, 51 Mich. 287.

ity of *all* to be assessed to pay losses which have been sustained by *some*,—it does not appear why a general arrangement or understanding among the members, limiting their liability to assessment for losses to a less sum than the amount allowed under the governing statute, should not be upheld and applied by the courts, if clearly proved; and such was the holding of the same court in a subsequent case. A member of an insolvent mutual insurance company filed a bill in equity to restrain an assessment by a receiver, averring it to be the general understanding of the members, as well as of himself, that no one was to be assessed beyond the amount which he had agreed to pay by his premium note. A demurrer admitted this allegation. It was held that, as general agreements to that effect would not be illegal, and as individual members could waive provisions made by the statute for their protection, it would be inequitable for any member of the company to insist on its enforcement, after all had become insured with the understanding that their liability was limited to their premium notes.¹

§ 7246. **Actions to Enforce Assessments upon Premium Notes.**—In an action to enforce such an assessment, the statutory *conditions precedent* to the making of the assessment must be *averred and proved*, at least where the assessment is made by the receiver, and not by the court superintending the administration.² This qualification is added, because if the assessment is made by the court, after an account taken and stated of the resources and liabilities of the company, the order of assessment may be regarded as in the nature of an *adjudication* that the amount ordered to be assessed is required to meet the necessities of the liquidation.³ But where the assessment is made by the receiver, by virtue of his statutory authority, and not by the court superintending the administration, it is a mere *ministerial act*.

¹ Macklem v. Bacon, 57 Mich. 335.

² Bangs v. McIntosh, 23 Barb. (N. Y.) 591; Devendorf v. Beardsley,

23 Barb. (N. Y.) 656; Thomas v. Whallon, 31 Barb. (N. Y.) 172.

³ Ante, § 3537, *et seq.*; ante, §§ 3752, 3754.

possessing of itself no vigor; and in order to enforce it by an action in a court of justice, it is necessary for the receiver to allege and prove that the conditions, which warranted him in making it, existed.¹ When, therefore, in such an action there was no averment or proof of the existence of any liabilities on the part of the company, for the payment of which an assessment was necessary, it was held that the receiver could not recover.²

§ 7247. **What the Receiver must Aver and Prove.**—At the outset, a statutory receiver must aver and prove that he has been *duly appointed a receiver* in conformity with the governing statute, and if issue is taken upon that allegation, he is bound to make proof of it.³ It has been held not enough to aver that, on a *day* named, the plaintiff was *duly* appointed receiver by the Court of Chancery, but that *the place* must be stated, and it must be directly averred that an order of appointment was made by the court.⁴ This is in conformity with the rule of pleading that the *place*, as well as the *time*, of every traversable fact should be stated. An averment that the plaintiff was duly appointed receiver has been held not to present any issue capable of trial, because it consists partly of matter of law and partly of matter of fact. “The plaintiff should have stated what in particular was done, and then the court could determine whether he was duly appointed; or, if an issue of fact was tendered, the jury could answer as to the truth of the allegation.”⁵ Where the receiver is appointed

¹ Thomas v. Whallon, 31 Barb. (N. Y.) 172, 178. See also Bangs v. Gray, 12 N. Y. 477; Herkimer &c. Mut. Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; Re Bangs, 15 Barb. (N. Y.) 264.

² Thomas v. Whallon, 31 Barb. (N. Y.) 172.

³ Bangs v. McIntosh, 23 Barb. (N. Y.) 591.

⁴ Gillet v. Fairchild, 4 Denio (N. Y.), 80.

⁵ *Ibid.*; reaffirmed in White v. Joy,

13 N. Y. 83, 86. But where, in an action under the Code of Procedure of New York, upon a promissory note, the plaintiff was described as receiver of a banking corporation, but there was no allegation in the complaint of his appointment; and the *answer* alleged the appointment of a receiver of the corporation, without naming him, and that the note in suit was transferred to such receiver in payment of a debt owing to the corporation, and was held and owned by the receiver

under a statute and derives his authority to make the assessment from the statute, he must, in addition to making proper averment of his appointment as receiver, aver and prove the existence of the facts upon which the statute predicates his right to make the assessment.¹ Such premium notes embody a promise on the part of the maker to make payment of assessments upon the happening of certain conditions named therein; and, upon an elementary principle of pleading, it is incumbent upon the receiver, in order to support an action upon such a note, to aver and prove the happening of such conditions.² But, in Indiana, it is not necessary that the complaint should be accompanied with a *transcript of the decree* appointing the plaintiff receiver, and imposing the assessment sued for.³ He must aver and prove that the *losses*, which are to be paid with the money to be collected from the assessments which he sues to enforce, occurred *during the time* when the defendant was a policy-holder and member of the company.⁴ In other words, he must state the period of time for which the policy note was given, and that the losses, for which the assessment was made, occurred during that period of time.⁵ He must, in Indiana, allege that the court, from which he derives his authority, has determined on the validity of the claims for the payment of which the assessment is made.⁶ Where

in his official capacity, and not by the person named as plaintiff; and the *reply* averred that the plaintiff was the receiver mentioned in the answer, and as such owned, and sought to recover upon, the note,—it was held, on a demurrer to the reply, proceeding on the ground that it departed from the complaint, that the plaintiff was entitled to judgment. *White v. Joy*, 13 N. Y. 83.

¹ *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Manlove v. Burger*, 38 Ind. 211.

² *Thomas v. Whallon*, 31 Barb. (N. Y.) 172, 178; *Ferris v. Purdy*, 10 Johns. (N. Y.) 359. See *ante*, § 1827.

³ *Boland v. Whitman*, 33 Ind. 64.

⁴ *Manlove v. Naw*, 39 Ind. 289; *Whitman v. Mason*, 40 Ind. 189.

⁵ *Embree v. Shideler*, 36 Ind. 423. See also *Downs v. Hammond*, 47 Ind. 131.

⁶ *Downs v. Hammond*, 47 Ind. 131. Where, in that State, the receiver, to sustain such an action, read in evidence the order of the court appointing him and authorizing him to bring suits, and another order of court reciting that the receiver had submitted a report showing the condition of the company, but did not set out the report in the bill of exceptions, but left the words "here insert" with a blank; and the order confirmed an assessment of fifty per cent, made by the receiver;

the corporation is a mixed company, having a capital stock, and the note is given by the stockholder in settlement of his subscription, the receiver, in order to maintain an action upon the note, must aver and prove that the paid-in *capital stock* has been *absorbed by losses*, in order to show a necessity for maintaining the action;¹ and the same rule would, by parity of reasoning, be applicable in the case of an action brought upon a so-called premium note given in a mutual insurance company. He must allege that the *claims* for losses had been *adjusted*, or were *justly due* to parties setting up such claims.² Upon the question what evidence will support such an action, it has been held that the receiver must give *some evidence* of the existence of losses such as render the assessment proper.³ In respect of the quality of this evidence, it has been reasoned that such evidence of the loss, and the settlement and allowance of the same, as would conclude the company whilst engaged in its proper business, will be sufficient to support such an action by the receiver.⁴ It is sufficient to show that losses have accrued during the time the defendant's policy was in force, and that the defendant's note was assessed to meet them.⁵ He ought to exhibit the substantial facts upon which he or the company has allowed the losses for which the assessment was made; but he is not required to do more in this respect than to prove that sufficient claims for losses were presented to the company or to him, and allowed by the company or by him, to make up the sum for which the assessment was levied.⁶

§ 7248. Recovery of Interest on Such Premium Notes. — It has been held that upon recovery upon a premium note, for

and the receiver also read in evidence another order of court, which recited that he had submitted another report which was confirmed, but the report was not put in evidence; and the receiver also read the note sued upon, and proved the giving of notice of the assessment, and rested; — it was held that his evidence was wholly insuffi-

cient to show a right of recovery. *Ibid.*

¹ Lamar Ins. Co. v. Moore, 84 Ill. 575.

² Manlove v. Burger, 38 Ind. 211.

³ Jackson v. Roberts, 31 N. Y. 304.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Sands v. Hill, 42 Barb. (N. Y.) 651. See Jackson v. Roberts, 31 N. Y. 304.

the non-payment of an assessment laid thereon by the receiver of an insolvent insurance company, the plaintiff is not entitled to *interest* on the amount of the note, for the reason that the recovery for the whole amount is in the nature of a *penalty*.¹

§ 7249. **Receiver Takes Premium Notes Subject to Equities.** — The general rule is that the receiver takes no greater rights than the company had, though he may, under certain circumstances, impeach the transactions which the company, while a going concern, might be held estopped to impeach.² Those who stand liable to the company, under valid contracts, cannot, on any principle known to law or equity, be placed under a greater liability, from the mere circumstance that the company became insolvent and that its assets passed into the hands of a receiver. For instance, the liability of members of the company upon their *deposit notes* cannot be increased by such a circumstance.³ The receiver of a mutual insurance company takes its premium notes subject to all the equities which exist in favor of their makers. It has been said that he takes the notes and assets of the company subject to all the conditions and legal disabilities with which they were trammelled in the hands of the corporation itself, and that he cannot impeach or disaffirm its authorized acts, nor the authorized acts of its agents.⁴ We have already discovered a difference of judicial opinion upon the question, whether a receiver stands strictly, like a voluntary assignee, in the shoes of the corporation, or whether, in right of the creditors whom he represents, he may impeach acts which the corporation itself would be estopped to impeach?⁵ In the case of the receiver of a strictly mutual insurance company, there is less room for the discussion of this question, since, in general, all

¹ *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591. There is no sense whatever in this decision.

² *Ante*, §§ 3562, 3680, 3639, *et seq.*

³ *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. (N. Y.) 605.

⁴ *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656, 659; following *Hyde v. Lynde*, 4 N. Y. 387.

⁵ *Ante*, §§ 3562, 3680, 3639, *et seq.*

the creditors are members. Here, the prevailing view seems to be that the receiver takes only in right of the company and subject to every equity which would be good against the company, and to every estoppel which would estop the company.¹ It follows from this doctrine that, if a premium note given to the corporation, and which has passed into the hands of the receiver, is void in the hands of the corporation and incapable of enforcement, by reason of *fraud* or *illegality* in its procurement or inception, the judicial act of passing it into the hands of a receiver does not purge it of those defects, but it remains subject to those defenses when sued upon by the receiver, in like manner as though it had been sued upon by the corporation.²

§ 7250. **Illustrations of This Principle.**—By the charter of a mutual insurance company created in New York, a policy issued by the company became, by its terms, void, in consequence of a sale of the insured property, and the assured became thereby entitled to have his deposit note surrendered and canceled, but only on paying his proportion of any losses then incurred. Under this provision, a member surrendered a policy which he held from the company, and the secretary of the company canceled and surrendered his deposit note. At the time of the surrender there were contested claims for losses against the company, some of which were subsequently established, and a receiver, appointed in consequence of the insolvency of the company, made a demand upon a class of deposit notes, including that of the defendant, for the purpose of paying such claims. The note had been given up without the payment of anything toward the losses, but there was no proof of *fraud* or of any *mistake of fact* in regard to existing claims against the company. It was held that the surrender was a valid transaction, and that the receiver could not maintain an action on the premium note.³ The reasoning of the court, in substance, was that the amount to be paid by the insured, if anything, toward previous losses on a surrender of his deposit note, was a legitimate subject of adjustment between him and the company, and that, when an adjustment had been

¹ Devendorf v. Beardsley, 23 Barb. (N. Y.) 656; Hyde v. Lynde, 4 N. Y. 387.

² Devendorf v. Beardsley, *supra*.
³ Hyde v. Lynde, 4 N. Y. 387.

made and the policy and note surrendered, the settlement was binding upon the parties, unless impeached on the ground of fraud or mistake; and, being binding upon the parties, was binding upon the representative of one of them.¹ Where a mutual insurance company was authorized to receive notes in advance for premiums of insurance, and a note was received upon an agreement that the maker might pay it in premiums on policies which he might procure in his own name or for his friends, and the agreement was fully performed and the note returned to the maker, — it was held that neither the company nor its receiver could repudiate the agreement and collect a part of the note, which was paid by policies issued to other persons than the maker. Such an agreement, thus executed, was held good, on the theory of ratification, when made with the secretary and approved by the president of the company, notwithstanding it had not been ratified by a formal vote of the directors.²

§ 7251. Right to Set-off in Actions on Premium Notes. — In conformity with a principle already stated,³ the defendant in such an action may set off a demand in his favor against the company, which was liquidated before the receiver's appointment, and in respect of which a right of set-off then existed.⁴ On principle, it is incumbent on the defendant to show that the demand accrued in his favor so as to be the subject of a set-off, prior to the appointment of the receiver.⁵ But we have already had occasion to note a difference of view as to the *status* of receivers in general, in this particular.⁶

¹ Hyde v. Lynde, 4 N. Y. 387.

² Emmet v. Reed, 8 N. Y. 312.

³ Ante, § 6965.

⁴ Berry v. Brett, 6 Bosw. (N. Y.) 627. To the general principle that a receiver takes the assets of the corporation subject to any equitable offsets in favor of those who are indebted to it, — see Colt v. Brown, 12 Gray (Mass.), 233; Hade v. McVay, 31 Ohio St. 231; Van Wagoner v. Paterson Gaslight Co., 23 N. J. L. 283.

⁵ See Smith v. Mosby, 9 Heisk. (Tenn.) 501. The principle which allows this right of set-off is, that the

receiver, — and we have seen that it is peculiarly appropriate in the case of a strictly *mutual company*, — takes the assets in the same plight and subject to the same equities under which they were held by the corporation, and that he is not a *bona fide* purchaser for value, in the sense which gives him a higher right than the corporation. Van Wagoner v. Paterson Gaslight Co., 23 N. J. L. 283 (case of an insolvent bank).

⁶ Ante, § 6964, *et seq.* Compare ante, § 3785, *et seq.*

Whether an offset should be allowed by the receiver will often be a matter of doubt, in respect of which different advice might be given by competent lawyers. When, therefore, the receiver finds himself in substantial doubt, he should seek the instructions of the court.¹ The court superintending the administration has the power to order the receiver to allow a set-off in a proper case, upon a summary application. This was done where the policy-holder, who had sustained a loss, was indebted to the company, by bond and mortgage, for a loan.²

§ 7252. **Right of Set-off under Statutes of New York.** — It has been held in New York that a receiver of an insolvent corporation, whether appointed under the statute relating to insurance companies,³ or under the provisions of the Revised Statutes relating to proceedings against corporations in equity, is bound, in the administration of the estate, to allow a *liquidated debt*, due to the corporation, to be set off against an *unliquidated debt* due from the corporation to the same person, in the same manner as trustees of insolvent debtors are bound to offset cross-demands arising from mutual credits, as well as from mutual debts. In such cases, the right of set-off is not confined to *liquidated debts*, or to such as might have been offset in a suit at law between the original parties, but it extends to *all mutual credits*, arising *ex contractu*, between the original parties.⁴ In this case, Chancellor Walworth proceeded upon the ground that a party may have a greater *equitable right of set-off* than that which is accorded to him at law by the statute relating to this subject. But he said that "to entitle a party to such equitable relief, in a case not provided for by the statute, he must either have an equity arising out of the contracts or dealings between the parties, from their connection with each other, or his natural equity to have one unconnected claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those for whose benefit his claim to an equitable offset is resisted. The natural equity to have mutual but unconnected demands [set off], between two parties who have been dealing with each other, is, as a general rule, superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of the specific fund

¹ *Re Van Allen*, 37 Barb. (N. Y.) 225.

² New York Stat. Jan. 18, 1836.

³ *Holbrook v. Receivers*, 6 Paige (N. Y.), 220.

⁴ *Holbrook v. Receivers*, 6 Paige (N. Y.), 220.

against which the right of set-off is claimed.”¹ Still later, in the same State, a departure was taken from this decision, so far as to lay down the doctrine that a set-off will be allowed against the receiver of an insolvent insurance company, as its representative, where it would be allowed against the principal, but holding, nevertheless, that the *principal is the body of creditors*, and not the company; that the question of set-off is to be tested by the consideration whether there could be a set-off if the action stood in the name of the creditors as plaintiffs, against the particular defendant; so that where he has no claim against the creditors in respect of which he could demand a set-off, he cannot demand it against the receivers.² At the same time, it is conceded that the party demanding the right of set-off is entitled to its allowance in respect of any demand which he had against the corporation at the time of its dissolution.³

¹ *Holbrook v. Receivers*, 6 Paige (N. Y.), 231. The value of this decision as an authority is extremely doubtful. A policy-holder who had sustained a loss, had, prior to the loss, borrowed from the company \$4,000, for which he had given his bond secured by a mortgage; he had also borrowed another \$4,000, for which he had given the joint bond of himself and another person, also secured by a mortgage. After the loss, the receiver refused to allow him to have what the company owed him for the loss, applied in liquidation of these two debts owing by him to the company. Vice-Chancellor McCoun sustained the receiver, and refused to order the set-off, on the ground that the loss was an *unliquidated* demand, and not within the statute relating to set-offs, and that he could go no further in allowing a set-off than a court of law could go. But, in so far as he so held, his decision was reversed by Chancellor Walworth on appeal, who directed that the set-off be allowed in respect of the \$4,000 due by the single bond and mortgage

of the policy-holder, but that it should not be allowed in respect of the \$4,000 due by the joint bond of the policy-holder and another, on the ground that, in respect of the latter indebtedness, there was a want of mutuality. The infirmity of the decision consists in the fact that it does not appear that the debts secured by the bond and mortgage were *past due*, at the time when the loss occurred and prior to the appointment of the receiver. But, even if they had been so due, it would not have made a case within the governing principle already stated (*ante*, § 7251), unless the claim for the loss had also been adjusted prior to the appointment of the receiver; for that principle is, that the receiver cannot allow a set-off unless the circumstances were such that it was demandable, as between the parties to the contract, prior to the time when he took possession.

² *Osgood v. Ogden*, 4 Keyes (N. Y.), 70.

³ *Ibid.*; following *McLaren v. Pennington*, 1 Paige (N. Y.), 102.

§ 7253. **Defenses to Such Actions.** — It has been held that if, at the time of the making of the contract of insurance, the agent of the company, with the authority of the directors, represented that the company was entirely solvent and able to pay all losses, and that it was then worth a considerable amount, and the insured relied upon those representations, and was thereby induced to enter into a contract of insurance and to execute a premium note, and such representations were false, — these facts will constitute a good defense to an action by the receiver on the premium note.¹ He may defend by setting up the fraudulent representations of the agent appointed by the company to procure insurances and premium notes; but he must aver, in his answer, that he has done all in his power to restore to the insurance company what he has received from it under the contract: the principle being, that a party cannot rescind a contract which has been imposed upon him through the fraud of another, without restoring the benefits which he has received under it. It is not a good defense to such an action that the claims for losses for which the assessment was made stood upon such a footing that the receiver might have resisted a recovery thereon upon strictly legal or technical grounds. If those claims are meritorious, in an equitable, — that is to say, in a moral, — sense, the receiver is not bound to insist upon *technical defenses* against them; although we have had occasion to note a view that he cannot waive preliminary proofs of loss,³ but that such proofs are made a part of the essence of the contract by the terms of the contract itself. But the *receiver may waive defenses* against claims, which defenses are not meritorious but *technical* merely, just as the company might have done if in possession of its franchises; and his waiver will be binding upon the makers of the premium notes.⁴

§ 7254. **Priorities in Distribution.** — The *officers* of insolvent insurance companies are not entitled to have their *salaries*

¹ Boland v. Whitman, 33 Ind. 64;
Devendorf v. Beardsley, 23 Barb.
(N. Y.) 656.

² Devendorf v. Beardsley, *supra*.

³ *Ante*, § 7225.

⁴ Sands v. Hill, 42 Barb. (N. Y.) 651.

paid in full, in preference to other creditors. In respect of unpaid arrearages of their salaries which existed when the company went into the hands of the receiver, they stand merely on the footing of general creditors, and must take their *pro rata* dividends with the others.¹ This follows from the doctrine that the officers of an insolvent corporation, as, for instance, the *cashier* of an insolvent bank, — have *no lien* upon the funds of the corporation for the payment of any arrears of their salaries.² Where the receiver of an insurance company prosecutes an action to recover money which he claims to belong to the fund of which he is receiver, and fails to recover, the defendant is, of course, entitled to his *costs*. The defendant is not bound to await the administration of the fund and to share as a general creditor, *pro rata* with the other creditors, in respect of his demand for costs, but is entitled to an immediate order for their payment out of any funds in the hands of the receiver. This necessarily follows from the principle that the costs of the administration are a preferred demand.³ If the receiver makes and pays unreasonable or improper costs, that will be a matter of exception on the part of creditors when his accounts are passed upon.⁴

§ 7255. Receiver may Exercise an Option Possessed by the Company. — If the company, under a contract, possessed an option, which it may exercise within a time stated, upon giving notice in writing, and, before the time has expired, it passes into the hands of a receiver, it is competent for the receiver to exercise the option and give the notice. It was so held where certain securities were deposited as collateral by a corporation, taking the following receipt: "Received of Alexander Frear, secretary and treasurer, the following claims,

¹ Re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642.

² Bruyn v. Receiver, 1 Paige (N. Y.), 584. For a case adjusting the conflicting rights of policy-holders in a life insurance company where the company was insolvent at the time of the notice of the death of one of the

policy-holders, and where a receiver was appointed a few days thereafter and before the loss was paid, — see Re Security Life Ins. Co., 11 Hun (N. Y.), 96.

³ Columbian Ins. Co. v. Stevens, 37 N. Y. 536.

⁴ *Ibid.*

notes, and bonds, as collaterals on the indebtedness of the New York Iron Company to us, viz.: [Specifying them.] The above securities are given upon the following conditions: We agreeing to release the New York Company from all liabilities to us, either as indorsers or principals, provided the secretary of the said company wishes us to do so, and giving us notice to that effect in writing." It was held that this did not constitute the secretary, in any way, an *arbitrator*, but the option was the option of the company, which could be legally made either by itself or by anyone acting as its representative, and consequently that it could be made by the receiver of its assets after its insolvency.¹

§ 7256. Distribution not Made to Creditors of Creditors.

For reasons already stated,² after a receiver of an insolvent insurance company has been appointed under a statute, and the company has been enjoined from the further prosecution of its business, its funds in the hands of the receiver are not subject to *garnishment* by creditors of its creditors, called "*trustee process*" in Massachusetts.³ Such process will not run against the corporation, because it has been enjoined from paying its debts; nor against the receiver, because the property which he holds has been intrusted to and deposited with him; not by the acts of the public, but by authority of law; and the law allows no person, so holding funds, to be charged by such process, except executors, administrators, and assignees under the insolvent acts.⁴ It was suggested that, if the creditor of the creditor could, by any form of remedy, have the property of the corporation applied to the payment of the debt due him from one of its creditors, it could only be by *petition in equity* in the case in which the receivers were appointed.⁵ On this suggestion, such a petition was subse-

¹ *Phoenix Iron Co. v. New York Wrought Iron Railroad Chair Co.*, 27 N. J. L. 484.

² *Ante*, § 6933.

³ *Columbian Book Co. v. De Golyer*, 115 Mass. 67.

⁴ Gray, C. J., in *Columbian Book Co. v. De Golyer*, *supra*; citing *Colby v. Coates*, 6 Cush. (Mass.) 558; *Thayer v. Tyler*, 5 Allen (Mass.), 94.

⁵ *Columbian Book Co. v. De Golyer*, *supra*.

quently presented and denied. The court reasoned that the property of the corporation is intrusted to the receiver, by the authority of the law, for the purpose of distribution among the creditors of the corporation, and not among the creditors of those creditors; and that, for the court to undertake to determine, as incidental to the administration of the estate of the corporation, the validity and equity of the claims of every creditor of a creditor of the corporation, would unreasonably embarrass and delay the distribution of the estate, and the settlement of the accounts of the receivers.¹ It is believed that these objections are not sufficient to warrant the establishment of a *rule* of exclusion which practically cuts off all remedy of the creditor of the creditor; and there are certainly many cases in which they would have no application at all.

¹ *Com. v. Hide & Leather Ins. Co.*, 119 Mass. 155. In a case involving the question of priorities in the distribution of the assets of an insolvent life insurance company in the hands of a receiver, a number of claims were set up for preferences which were severally disallowed, and the court held that the holders of claims for death losses, and the assignees of such claims who stood on the same footing as the original holders, were entitled to be paid first, and that the balance remaining in the hands of the receiver was to be divided *pro rata* among all the other creditors. One who had subscribed for stock on the formation of the company and had paid his subscription, who never had received any stock, but had allowed his money to remain for several years in the hands of the company, became thereby a general creditor of the com-

pany, and was not entitled to any preference. Those who advanced money to pay for losses incurred on particular policies, and who appeared on the books of the company as credited with so much money to be applied toward the payment of losses incurred on the particular policies, did not, for that reason, stand on a footing different from that of general creditors, and were hence not to be preferred. Judgment creditors were not to be preferred over general creditors, for the reason that they had acquired no lien upon the assets of the company in the hands of the receiver by the recovery of their judgments. But it was not held that, if the lien of a judgment had attached to such assets before it went into the hands of a receiver, the judgment would not be preferred. *Kitchen v. Conklin*, 51 How. Pr. (N. Y.) 308.

CHAPTER CLXXV.

RECEIVERS OF NATIONAL BANKS.

SECTION

- 7262. Power of courts to appoint receivers of national banks.
- 7263. Cases in which courts will appoint receivers.
- 7264. Appointment of receiver by Comptroller of the Currency under Revised Statutes of the United States.
- 7265. Circumstances under which Comptroller may appoint receiver under Act of 1876.
- 7266. Action of Comptroller in appointing receiver conclusive upon debtors.
- 7267. Evidence of his appointment.
- 7268. Effect of appointment on rights of action by and against bank.
- 7269. Effect of judgments against national banks in the hands of receivers.
- 7270. Right of action of receiver in Federal courts.
- 7271. Statute forbidding transfers after insolvency.
- 7272. Fraudulent preferences under this statute.
- 7273. Further of this statute.
- 7274. Statute prohibits attachments after insolvency.
- 7275. Further of attachments against national banks.
- 7276. Continued: Attempted distinction in cases where bank not insolvent.
- 7277. This distinction repudiated.
- 7278. Further of such attachments.
- 7279. Actions by receiver to collect debts.
- 7280. In whose name action brought by receiver.

SECTION

- 7281. Power of receiver to compromise debts.
- 7282. Whether receiver succeeds to larger rights of action than the corporation possesses.
- 7283. His right of action against the directors.
- 7284. His right of action against shareholders.
- 7285. Necessity of assessment.
- 7286. Determination of Comptroller in assessing the shareholders conclusive.
- 7287. Parties in equity.
- 7288. When the action should be at law and when in equity.
- 7289. Pleading in such actions.
- 7290. Accruing of interest against stockholders.
- 7291. Mode of enforcing contribution and securing equality among the stockholders.
- 7292. Creditor's bill to enforce individual liability of stockholders.
- 7293. Receiver takes assets *cum onere*.
- 7294. Must respect valid liens and pledges.
- 7295. Must restore trust funds.
- 7296. Must restore money subscribed on scheme to increase capital which has failed.
- 7297. Must restore money deposited to be loaned to the president of the bank.
- 7298. What rights of set-off exist against receiver.
- 7299. The question how viewed on principle.

RECEIVERS OF NATIONAL BANKS. [6 Thomp. Corp. § 7262.

SECTION	SECTION
7300. The question how viewed by other courts.	7316. Enjoining proceedings by Comptroller and receiver.
7301. The same subject continued.	7317. Actions against national banks after commencement of liquidation.
7302. Continued.	7318. Defenses available to the receiver against actions.
7303. Waiver of right of set-off.	7319. State courts no control over receiver.
7304. Voluntary liquidation of national banks.	7320. Jurisdiction of State courts of actions by and against such receivers.
7305. When stockholders may elect agent to wind up.	7321. No relief against the United States in actions against the Comptroller or receiver.
7306. Receiver authorized to purchase property in which bank has equities.	7322. What actions lie against the comptroller.
7307. Notice to present claims to receiver.	7323. Effect of receiver being substituted as defendant.
7308. Proof of claims by creditors.	7324. Payment of State taxes.
7309. Dividends by Comptroller in liquidation.	7325. Actions against receiver for taxes.
7310. What claims entitled to distribution.	7326. Sales by such receivers.
7311. Priorities among creditors in such distribution.	7327. Replevin of property in custody of receiver.
7312. When United States not a preferred creditor.	7328. Effect of appointment upon the statute of limitations.
7313. Fees and expenses of the winding up and receivership.	
7314. Creditors entitled to interest.	
7315. Redemption of circulating notes.	

§ 7262. Power of Courts to Appoint Receivers of National Banks.—The act of Congress known as the National Banking Act provides for the winding up of national banks under the direction of the Comptroller of the Currency, who appoints a receiver for that purpose.¹ The view has been frequently taken by the courts that these provisions are *not exclusive*, and were not intended to put it out of the power of the courts to appoint receivers upon a judgment creditor's bill,² or even upon a bill filed by a stockholder;³ and this jurisdiction has been exercised by State courts.⁴ A creditor's

¹ Rev. Stat. U. S., § 5226, *et seq.*

² *Wright v. Merchants' Bank*, 1 Flipp. (U. S.) 568; *s. c.* 1 Nat. Bank Cas. 321; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301; *s. c.* 1 Nat. Bank Cas. 303.

³ *Elwood v. First Nat. Bank*, 41 Kan. 475; *s. c.* 21 Pac. Rep. 673; *Merchants' &c. Bank v. Trustees*, 63 Ga. 549.

⁴ *Elwood v. First Nat. Bank*, *supra*.

bill will lie, in the Circuit Court of the United States, for the appointment of a receiver for such a bank.¹ It has been held that, until a Federal court acts, neither law nor comity requires a State court to suspend its equitable jurisdiction to reach the assets of such a bank and to enforce its own final process against the same. The pendency of a bill brought by a stockholder in a Federal court to which the judgment creditor has not been made a party, will not therefore oust the State court of its power to appoint a receiver, nor make the exercise of such power a violation of comity.²

§ 7263. Cases in Which Courts will Appoint Receivers.

Coming now to cases in which the courts will appoint a receiver of a national bank, we find that it was held proper to appoint a receiver, under a bill in equity by a judgment creditor, which alleged that his judgment was for moneys deposited with the bank; that the bank had gone into voluntary liquidation; that it had withdrawn its bonds which had been deposited with the Treasurer of the United States; that its officers had fraudulently applied the funds of the bank to the payment of persons other than the complainant; and that there was no property of the bank subject to seizure on execution.³ In another such case the bill set forth, in substance, that the complainant had recently obtained a judgment for \$10,000 against the defendant, a national bank, in a State court; that the complainant was unable to obtain payment of the same; that the bank had closed its doors, discontinued its business, and was insolvent; that, in contemplation of insolvency, it had transferred all its assets to one creditor, a correspondent bank in the city of New York, which was also a large stockholder in the defendant national bank; that

¹ *Wright v. Merchants' Nat. Bank*, 1 Flipp. (U. S.) 568; 3 Cent. L. J. 351; 1 Nat. Bank Cas. 321.

² *Merchants' &c. Nat. Bank v. Trustees*, 63 Ga. 549; s. c. 2 Nat. Bank Cas. 220. The United States District Court, as a court of bankruptcy, under the late *bankruptcy act*,

had no jurisdiction to wind up an insolvent national bank. Re *Manufacturers' Nat. Bank*, 5 Biss. (U. S.) 499; s. c. 1 Nat. Bank Cas. 192.

³ *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301; s. c. 1 Nat. Bank Cas. 203.

this preferred creditor was appropriating all the assets to the satisfaction of its own debt; and that nothing would be left for the plaintiff, and that nothing could then be collected by legal process. It was held that this bill exhibited a proper case for the appointment of a receiver, subject possibly to the appointment being superseded by the action of the Comptroller of the Currency.¹ Where a judgment had been rendered in a State court against a national bank, and an execution had been returned *nulla bona* within the county where the bank was located, and the bank had ceased to discharge its functions as a fiscal agent of the United States, and was disposing of its assets among its stockholders, it was held that a State court would, on a bill filed by the judgment creditor, grant the usual injunction and appoint a receiver.²

§ 7264. Appointment of Receiver by Comptroller of the Currency under Revised Statutes of the United States.— Until the act of 1876, quoted in the next section, this subject was governed by the following sections of the Revised Statutes of the United States: “Whenever any national banking association fails to redeem, in the lawful money of the United States, any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable, offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand, an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the

¹ Wright v. Nat. Bank, 1 Flap. (U. S.) 583; s. c. 3 Cent. L. J. 351; 1 Nat. Bank Cas. 321.

² Merchants' &c. Bank v. Trustees, 63 Ga. 549; s. c. 2 Nat. Bank Cas. 220.

Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.”¹ “On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes, and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.”² “After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice [*of forfeiture of the bonds*] [thereof] has been given by him to the association, it shall not be lawful for the association suffering the same, to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.”³ “On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to

¹ Act Cong. June 3, 1864, ch. 106, § 46; 13 U. S. Stat. at Large, 113; Rev. Stat. U. S., § 5226.

² Act. Cong. June 3, 1864, ch. 106, § 47; 13 U. S. Stat. at Large, p. 114; Rev. Stat. U. S., § 5227.

³ Act Cong. June 3, 1864, § 46; 13 U. S. Stat. at Large, p. 113; Act

Cong. Feb. 18, 1875, ch. 80; 18 U. S. Stat. at Large, p. 320; Rev. Stat. U. S., § 5228. The phrase in this section, “*deliver special deposits*,” implies the power to receive such deposits. *National Bank v. Graham*, 100 U. S. 699; s. c. 2 Nat. Bank Cas. 64; affirming s. c. Thomp. Nat. Bank Cas. 775.

pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets, of every description, of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.”¹

§ 7265. Circumstances under Which Comptroller may Appoint Receiver under Act of 1876.—This is now determined by the first section of the act of Congress of June 30, 1876, which is as follows: “That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 5239 of the Revised Statutes of the United States; or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court, stating that such judgment has been rendered and has remained unpaid for the space of thirty days; or whenever the Comptroller shall become satisfied of the insolvency of a national banking association;—he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 5234 of said statutes.”²

¹ Act Cong. June 3, 1864, ch. 106, § 50; Act Cong. June 30, 1876, ch. 156, §§ 1, 3; 19 U. S. Stat. at Large, p. 63; Rev. Stat. U. S., § 5234.

² Act Cong. June 30, 1876, § 1; 19 U. S. Stat. at Large, 63; 1 Supp. to Rev. Stat. U. S. (2d ed.), p. 107.

§ 7266. Action of Comptroller in Appointing Receiver Conclusive upon Debtors.—The debtors of a national bank, when sued by its receiver, appointed by the Comptroller of the Currency, cannot require the receiver to allege and prove the propriety of his appointment. "It is sufficient, for the purposes of such a suit, that he has been appointed and is receiver in fact. As to debtors, the action of the Comptroller in making the appointment is conclusive, until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot. Section 50¹ makes express provision for a contest by the bank."² Another statute authorizes the *Deputy Comptroller* of the Currency to act in the place of the Comptroller in certain contingencies stated; and therefore, it seems that where a deputy has acted in making an appointment, or in ordering an assessment against shareholders, his action is equally conclusive with that of the Comptroller.³

§ 7267. Evidence of his Appointment.—In any action by the receiver, where the validity of his appointment is challenged, the *certificate of his appointment* made by the Comptroller of the Currency is legal evidence of the fact that he was duly appointed. The receiver is not required to prove the facts upon which the Comptroller based his action; because the statute,⁴ in requiring the Comptroller to make the appointment on "*becoming satisfied*," etc., of the facts upon which the preceding sections authorize him to make the appointment, was drawn with the evident purpose of excluding the idea that he was required to be satisfied by legal evidence.⁵

¹ Rev. Stat. U. S., § 5237.

² *Cadle v. Baker*, 20 Wall. (U. S.) 650; *s. c.* 1 Nat. Bank Cas. 108; *Platt v. Beebe*, 57 N. Y. 339; *s. c.* 1 Nat. Bank Cas. 725; affirming *Platt v. Crawford*, 8 Abb. Pr. (N. Y.) 297; *Young v. Wempe*, 46 Fed. Rep. 354.

³ *Young v. Wempe*, 46 Fed. Rep. 354.

⁴ Rev. Stat. U. S., § 5234; *ante*, § 7264.

⁵ *Platt v. Beebe*, 57 N. Y. 339; *s. c.* 1 Nat. Bank Cas. 725; *Platt v. Crawford*, 8 Abb. Pr. (N. Y.) 297. That the Comptroller's certificate is evidence of the due *organization* of a national bank,—see *Thatcher v. West River Nat. Bank*, 19 Mich. 196; *s. c.* 1 Nat. Bank Cas. 622; *Tapley v. Martin*, 116 Mass. 275; *s. c.* 1 Nat. Bank Cas. 611. Compare *ante*, § 219, *et seq.*

§ 7268. **Effect of Appointment on Rights of Action by and against Bank.**—There is nothing in the National Banking Act¹ which goes to show that, upon the appointment of a receiver for any of the reasons named therein, the corporation is thereby dissolved.² On the contrary, it may be concluded that its *corporate existence remains unimpaired*, although unable to continue the exercise of its banking powers. For example, it may receive and keep all money belonging to it, and also re-deliver special deposits. Moreover, the fiftieth section of the act contains an express recognition of the right of creditors to have their claims adjudicated by a court of competent jurisdiction. Accordingly, the law is stated by the Supreme Court of the United States as follows: "The association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation. Suits and proceedings under the act, in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the District Attorney under the direction of the Solicitor of the Treasury; and no doubt is entertained that the directors, from the time a receiver is appointed, cease to have any power in respect to such matters, and that the control and supervision of the same are vested in the proper officers of the United States."³ So, a national bank which goes into voluntary liquidation under the provisions of the statute,⁴ is not thereby dissolved as a corporation, but

¹ 13 U. S. Stat. at Large, 99.

² *National &c. Bank v. First Nat. Bank*, 36 Conn. 325; *s. c.* 4 Am. Rep. 80; 14 Wall. (U. S.) 383; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *Green v. Walkill Nat. Bank*, 7 Hun (N. Y.), 63; *Turner v. First Nat. Bank*, 26 Iowa, 562; *National Bank v. Insurance Co.*, 104 U. S. 54.

³ *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383, 386, 400, *per* Clifford, J. That an action may be maintained against a national bank after the appointment of a receiver of its assets by the Comptroller of the Currency,—see *Green v. Walkill Nat. Bank*, 7 Hun (N. Y.), 63; *s. c.* 1 Nat. Bank Cas. 786.

⁴ Rev. Stat. U. S., § 5220.

may sue and be sued by its corporate name, for the purpose of winding up its business.¹

§ 7269. **Effect of Judgments against National Banks in the Hands of Receivers.** — If judgment is rendered against a national bank in the hands of a receiver, execution cannot issue upon the judgment; but, under the operation of the statute,² it is to be paid by the Comptroller from the assets in his hands, ratably with other claims.³ For this purpose the judgment should be certified by the receiver to the Comptroller.⁴ Where a judgment is rendered against a receiver of a national bank in a Circuit Court of the United States, upon a demand against the bank, "it requires neither argument nor authorities to show" that it is competent for the court to make an order upon the Comptroller of the Currency to provide for its payment.⁵

§ 7270. **Right of Action of Receiver in Federal Courts.** — The appointment of a receiver of a national bank, made by the Comptroller of the Currency as provided by the National Bank Act, is presumed to be made with the concurrence or approval of the Secretary of the Treasury, and is, therefore, in theory, made by the head of a department, within the meaning of section 2 of article II. of the constitution of the United States. Such a receiver is therefore *an agent or officer of the United States*, and an action brought by him in his representative capacity is an action at common law, brought by an officer of the United States, under the authority of an

¹ National Bank v. Insurance Co., 104 U. S. 54.

² Rev. Stat. U. S., § 5236.

³ Eastern Township Bank v. Vermont Nat. Bank, 22 Fed. Rep. 186, 189.

⁴ *Ibid.*

⁵ Case v. Bank, 100 U. S. 446, 456. The judgment ran as follows: "That the Citizens' Bank of Louisiana do have and recover of the Crescent City National Bank, Frank F. Case, receiver, \$4,000 and interest, etc.; . . .

and that Frank F. Case, receiver, do recognize the said Citizens' Bank of Louisiana as creditor; . . . and that he do pay the same, or certify the same to the Comptroller, to be paid in due course of administration . . . and that the Citizens' Bank of Louisiana do receive, before further payment to creditors, its due proportion of dividends, *pro rata* with those already paid to the creditors of the Crescent City National Bank."

act of Congress, of which action the Circuit Court of the United States has concurrent jurisdiction with the District Court, without regard to the amount sued for.¹ A receiver of a national bank might, accordingly, sue either in the Circuit or District Court of the United States within the district in which the national bank was situated.² The law stood in this way until it was restrained by an act of Congress passed July 12, 1882, by which it was provided "that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking association may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this *proviso* be, and the same are hereby, repealed."³ The purpose of this statute was to put national banks in the same situation as State banks, for the purposes of suing and being sued. Under its operation, a court of the United States will ordinarily have no jurisdiction of an action between a national bank and a citizen of a State within which the national bank is situated.⁴ A receiver of a national bank, for the general purposes of his rights of action, stands on the footing of the bank itself; and where jurisdiction would attach in case the bank were suing or being

¹ Price *v.* Abbott, 17 Fed. Rep. 506; Armstrong *v.* Ettlesohn, 36 Fed. Rep. 209; Frelinghuysen *v.* Baldwin, 12 Fed. Rep. 395. See also Platt *v.* Beach, 2 Ben. (U. S.) 303; *s. c.* 1 Nat. Bank Cas. 182; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357; Kennedy *v.* Gibson, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17; Bank *v.* Kennedy, 17 Wall. (U. S.) 19; *s. c.* 1 Nat. Bank Cas. 87; United States *v.* Hartwell, 6 Wall. (U. S.) 385; Armstrong *v.* Trautman, 36 Fed. Rep. 275.

² Frelinghuysen *v.* Baldwin, 12 Fed. Rep. 395.

³ Act Cong. July 12, 1882, *proviso* to § 4; 22 U. S. Stat. at Large, ch. 290, § 4; Supp. to Rev. Stats. U. S. (2d ed.), p. 354, § 4, *proviso*. See the modified statute, *infra*, in this section.

⁴ Hendee *v.* Connecticut & C. R. Co., 26 Fed. Rep. 677; *s. c.* 23 Blatchf. (U. S.) 451.

sued, the same jurisdiction will attach in case the receiver is suing or being sued.¹ But where Federal jurisdiction depends upon citizenship, the general rule is that it is governed by the *personal domicile* of the receiver, and not by that of the corporation of whose assets he is receiver.² The act of July 12, 1882, was subsequently re-enacted, in a modified form, as follows: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located. And in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."³

§ 7271. Statute Forbidding Transfers after Insolvency. — The National Bank Act provides that "all transfers of the

¹ Argument in *Hendee v. Connecticut &c. R. Co.*, *supra*. That a receiver of a national bank represents the rights of the bank for the purposes of bringing and defending actions,—see *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *s. c.* 1 Nat. Bank Cas. 87; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383; *s. c.* 1 Nat. Bank Cas. 77.

² *Ante*, § 6985. It was held by Mr. District Judge Wheeler, in 1886, that the effect of the Act of 1882, in connection with the other applicatory statutes, as they then stood, was to leave the State courts with jurisdiction arising out of the ability of such a receiver to sue and be sued, where the other party to the action was a citizen of the same State with the national bank, but without power over

purely administrative proceedings, taken or to be taken by the receiver, who is an officer of the United States, and who proceeds under the laws of the United States. By more or less specious reasoning, it was therefore held that the receiver of a national bank, in Vermont, might maintain an action in the Circuit Court of the United States against a railroad company, which was, for the purposes of Federal jurisdiction, a citizen of the State of Vermont, to restrain such company from prosecuting an action in Canada to determine the title to certain bonds which had been pledged to the national bank. *Hendee v. Connecticut &c. R. Co.*, 26 Fed. Rep. 677; *s. c.* 23 Blatchf. (U. S.) 451.

³ Act of Cong. Aug. 13, 1888, § 4; 25 U. S. Stat. at Large, 433.

notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credits; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, — shall be utterly null and void.”¹ The “*act of insolvency*,” mentioned in this section, is an act which would be an act of insolvency on the part of an individual banker, — that is, the closing of the doors, refusing to pay depositors on demand, refusal to go on in the due course of business, to transact its business as a bank and discharge its liabilities to its creditors.² The return of an *execution nulla bona* is sufficient evidence of such insolvency.³ The word “*insolvency*,” as here used, is synonymous with the same word in the late bankrupt act. It means present inability to pay in the ordinary course of business.⁴ For the purposes of this statute, it is only necessary that *insolvency* should be *in the contemplation* of the bank making the transfer: the party receiving the transfer need not know of such insolvency, or contemplate that the transfer is made with the view of its happening.⁵

¹ Act Cong. June 3, 1864, ch. 106, § 52; 13 U. S. Stat. at Large, p. 115; Rev. Stat. U. S., § 5242.

² *Irons v. Manufacturers' Nat. Bank*, 6 Biss. (U. S.) 301; *s. c.* 1 Nat. Bank Cas. 203, 207, *per* Blodgett, J. For a case exhibiting acts of insolvency by a national bank which required the vacation of an attachment under another clause of this section, — see *Market Nat. Bank v. Pacific Nat. Bank*, 30 Hun (N. Y.), 50; *s. c.* 3 Nat. Bank Cas. 672.

³ *Wheelock v. Kost*, 77 Ill. 296; *s. c.* 1 Nat. Bank Cas. 406.

⁴ *Case v. Citizens' Bank*, 2 Woods (U. S.), 23; *s. c.* 1 Nat. Bank Cas. 276; *Roberts v. Hill*, 24 Fed. Rep. 571; citing and following *Wager v. Hall*, 16 Wall. (U. S.) 584, 599; *Vennard v. McConnell*, 11 Allen (Mass.), 555; *Thompson v. Thompson*, 4 Cush. (Mass.) 127.

⁵ *Case v. Citizens' Bank*, 2 Woods (U. S.), 23; *s. c.* 1 Nat. Bank Cas. 276.

§ 7272. **Fraudulent Preferences under This Statute.** — To render a transfer void under this section, it must have been made either with a view to prevent the application of the assets in the manner prescribed by the National Bank Act, or with the view to the preference of one creditor over another.¹ The “*preference*” mentioned in the statute is a preference given to an existing creditor for a *pre-existing debt*, and does not refer to a case where one makes a loan to a bank and receives a concurrent transfer of property as security therefor. When, therefore, a national bank, being embarrassed, receives a loan of money, or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, — this is not giving him a preference over other creditors, within the meaning of this section.² But where such a bank, being embarrassed, received a loan of money upon depositing with a certain commercial firm a portion of its assets as security, — it was held that the fact that one of the members of the firm was president of the bank did not render the transaction illegal; and that the bank could not escape liability for the loan upon the ground that the president had no authority to effect it, where it appeared that it was effected with the knowledge of the directors, and that the money was used by the bank.³ It has been reasoned that if the officers of such a bank pledge a note to secure a depositor who has been allowing the bank to use his money,

¹ *Casey v. Credit Mobilier*, 2 Woods (U. S.), 77; s. c. 1 Nat. Bank Cas. 285. Substantially to the same effect, see *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234. Analogous cases under the late bankrupt law are: *Tiffany v. Lucas*, 15 Wall. (U. S.) 410; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Clark v. Iselin*, 21 Wall. (U. S.) 360.

² *Casey v. Credit Mobilier*, 2 Woods (U. S.), 77; s. c. 1 Nat. Bank Cas. 285.

³ *Ibid.* The court held that a national bank, which enters into a contract not authorized by its charter, cannot repudiate the contract, and at the same time retain the fruits of it. *Ibid.* See *ante*, § 6016. For special instances of unlawful transfers under this section, see *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12; s. c. 3 Nat. Bank Cas. 576; *National Security Bank v. Butler*, 129 U. S. 223; s. c. 3 Nat. Bank Cas. 320; affirming s. c. 22 Fed. Rep. 697.

but who is apprehensive of losing it, and they, at the time of making the pledge to the depositor, realize that the bank is approaching failure, and make the pledge to keep the note out of the assets to be distributed, the pledge will be void; but that if they make it to avert the threatened failure, and with the expectation that it will enable them to do so, by retaining the use of the deposit to pay other depositors, the transaction will be valid under the statute.¹ The plain distinction is between transferring assets in the expectation of a failure and to defeat the ratable distribution intended by the statute, and the using of the assets to avert a threatened failure.² While this reasoning seems sound, yet on a rehearing of the case, the conclusion of the court was different, and the transfer was held fraudulent and was set aside. On the rehearing, the view was taken that a transfer is presumptively fraudulent when the affairs of the bank reach such a crisis that it becomes reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations.³ And it was held that the *intent to give a preference is presumed* when a payment is made to a creditor at the time when the officers of the bank know of its insolvency, and that it cannot pay all its creditors in full; and, moreover, that the *motive* of giving the preference is immaterial, and that it will be void under the statute, even where it is made for the mere purpose of postponing failure,⁴ — a conclusion which is believed to be unsound.

¹ Roberts v. Hill, 23 Fed. Rep. 311, per Wheeler, J.

² *Ibid.*

³ Roberts v. Hill, 24 Fed. Rep. 571.

⁴ *Ibid.* Notwithstanding this statute, it has been held in the Superior Court of Buffalo, New York, that where one deposits a draft with a national bank for collection, and the bank at the time is insolvent, and the bank sends it to an agent for collection, who collects it, and the bank sus-

pends before receiving the avails of it, the depositor may rescind the transaction for fraud, and recover the avails of it from the collecting agent. Craigie v. Smith, 14 Abb. N. Cas. (N. Y.) 409. But this draws the inquiry away from the statute, and into the question of the right to follow *trust funds* deposited with a person or corporation who afterwards becomes insolvent, — a question already considered: *ante*, § 7084, *et seq.*

§ 7273. **Further of This Statute.**—In determining the question of priorities among creditors, the receiver should proceed upon the principle that, after a vote of the directors to close the bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby he secures a preference, is *presumed* to be *fraudulent*.¹ The receiver must also proceed upon the principle that preferences given by national banks to particular creditors are presumed to be fraudulent, when, at the time of giving the preference, the officers of the bank knew that it was insolvent; and that, where property is transferred by such a bank to a creditor, to avoid paying the amount due him, and thus postpone the failure of the bank, it is none the less fraudulent and void.² The statute above quoted does not extend so far as to exclude the right of a bank, which is a customer of a national bank, to assert its *banker's lien* upon funds collected for the national bank. When, therefore, a bank, holding paper deposited by a national bank for collection, accepted a draft drawn on the national bank, and the national bank thereafter failed and went into the hands of a receiver,—it was held that the accepting bank might retain, for its own reimbursement, the proceeds of such paper of the national bank, although the moneys may have been collected subsequently to the failure of the national bank. By accepting the draft drawn on the national bank, the collecting bank made itself the principal debtor in respect of that draft, and this gave it a lien upon the funds and securities in its hands belonging to the payee of the draft, which lien ran from the date of the acceptance.³

¹ National Security Bank v. Price, 22 Fed. Rep. 697; Case v. Citizens' Bank, 2 Woods (U. S.), 23; s. c. affirmed, 100 U. S. 446; 2 Nat. Bank Cas. 47; Re Silverman, 4 Nat. Bank. Reg. 523; s. c. 1 Sawy. (U. S.) 410; Sawyer v. Turpin, 2 Lowell (U. S.), 29, 33. For a transfer which was held not to be made after a commis-

sion of an act of bankruptcy, or in contemplation of insolvency, or with a view to a preference, or to prevent the application of the assets as prescribed by the statute,—see Price v. Coleman, 24 Fed. Rep. 694.

² Roberts v. Hill, 24 Fed. Rep. 571.

³ Re Armstrong, 41 Fed. Rep. 381.

§ 7274. Statute Prohibits Attachments after Insolvency.

Under this section it has been adjudged that a creditor cannot acquire a lien upon the property of a national bank, after it has become insolvent, by an attachment of its property, although no receiver of the bank has been appointed; and that such an attachment should be vacated upon the application of a receiver subsequently appointed, because it would be subversive of the policy of the statute to permit the attaching creditor thus to obtain a preference over other creditors.¹

§ 7275. Further of Attachments against National Banks.

The National Banking Act, after providing for suits against national banking associations in the courts of the State and of the United States, contained a further provision that "no attachment, injunction, or execution shall be issued against any such association or its property, before final judgment in any such suit, action, or proceeding, in any State, county, or municipal court."² This *proviso* was held to relate only to actions against such banks commenced in the venue where the national bank is situated, and not to attachments against such banks or their funds in other States. In other words, it did not apply to *foreign attachments* against such banks.³ This construction, which was at obvious variance with the policy of the statute, seems to have preceded an amendment of it; so that, as it now stands in the Revised Statutes, the word "such" before "attachment" is omitted, and it reads as follows: "No attachment, injunction, or execution shall be issued against such association or its property, before final

¹ National Bank v. Colby, 21 Wall. (U. S.) 609; s. c. 1 Nat. Bank Cas. 109; Harvey v. Allen, 16 Blatchf. (U. S.) 29; s. c. 2 Nat. Bank Cas. 439. Funds held by national bank as depositary of *bankruptcy court* not subject to *garnishment*, because *in custodia legis*: Havens v. National City Bank, 6 Thomp. & C. (N. Y.) 346; s. c. 1 Nat. Bank Cas. 783.

² Act. Cong. June 3, 1864, ch. 106, § 57; as amended by Act of 1873, 3d sess., ch. 269, § 2.

³ Southwick v. First Nat. Bank, 9 Hun (N. Y.), 96; s. c. 1 Nat. Bank Cas. 789; Robinson v. National Bank, 81 N. Y. 385; s. c. 58 How. Pr. (N. Y.) 306; 37 Am. Rep. 508; 2 Nat. Bank Cas. 309; Bowen v. First Nat. Bank, 2 Nat. Bank Cas. 316, n.

judgment in any suit, action, or proceeding in any State, county, or municipal court.”¹ Subsequently to the introduction of this change in the phraseology of the statute, it was held that an attachment will not lie before final judgment against the property of a national bank situated in a different State from that in which the bank is located;² and that is now the settled meaning of the statute, irrespective of the question whether or not the bank is insolvent.³

§ 7276. Continued: Attempted Distinction in Cases where Bank not Insolvent.—The New York Court of Appeals attempted the distinction, that the language of the statute above quoted, even after this amendment, was intended to apply only in cases *where the national bank was insolvent*, and consequently that it did not prohibit an attachment for the purpose of seizing its funds and effectuating the remedies of a creditor in another State, where it was not insolvent, and where such seizure would not operate to the prejudice of the right of its general creditors to have its assets ratably distributed among them.⁴ But where the national bank was insolvent, the court held that an attachment could not be issued by a

¹ Rev. Stat. U. S., § 5242.

² *Rhoner v. First Nat. Bank*, 14 Hun (N. Y.), 126; s. c. 2 Nat. Bank Cas. 331. To the same effect is *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. (N. Y.) 136; s. c. 1 Nat. Bank Cas. 801.

³ *Pacific Nat. Bank v. Mixter*, 124 U. S. 721; s. c. *sub nom. Butler v. Coleman*, 3 Nat. Bank Cas. 291, *dicta* of the court *per* Waite, C. J.; *Safford v. First Nat. Bank*, 61 Vt. 373; s. c. 17 Atl. Rep. 748; *First Nat. Bank v. La Due*, 39 Minn. 415; s. c. 40 N. W. Rep. 367. See also *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp. 852. On the ground that such an attachment was merely *void*, the Supreme Court of Minnesota refused to *enjoin*, at the suit of a national bank, a party within its jurisdiction, from attaching its funds in the State of New York. *First Nat. Bank v. La*

Due, 39 Minn. 415; s. c. 40 N. W. Rep. 367.

⁴ *Robinson v. National Bank*, 81 N. Y. 385; s. c. 58 How. Pr. (N. Y.) 306; 37 Am. Rep. 508; 2 Nat. Bank Cas. 309; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; s. c. 3 Nat. Bank Cas. 624. See also *People's Bank v. Mechanics' Nat. Bank*, 62 How. Pr. (N. Y.) 422; s. c. 3 Nat. Bank Cas. 670; *Market Nat. Bank v. Pacific Bank*, 2 Civ. Proc. Rep. (N. Y.) 330; s. c. 30 Hun (N. Y.), 50; 3 Nat. Bank Cas. 672. Under this rule, it was held that the receiver of a national bank, situated in another State, might move to vacate such an attachment, although he was not a party to the suit, and that the attachment must be vacated on proof of the insolvency of the bank. *People's Bank v. Mechanics' Nat. Bank*, 62 How. Pr. (N. Y.) 422; s. c. 3 Nat. Bank Cas. 670.

State court.¹ Pursuing this line of thought, the same court held that where a national bank had committed an act of insolvency, so that the attachment was prohibited at the time when it was levied, it was not restored to validity by the subsequent acquisition by the bank of further capital, especially where the resuscitation was of short duration; and, although the bank, after the issuing of the attachment, had paid a large amount of its debts in full, this did not estop it from questioning the validity of the attachment.²

§ 7277. **This Distinction Repudiated.** — Subsequently the Supreme Court of the United States, in considering the question whether the statute operated to prohibit suits by attachment against national banks in the courts of the United States, expressed its opinion that the statute “stands now, as it did originally, as the paramount law of the land, that attachment shall not issue from State courts against national banks, and writes into all State attachment laws an exception in favor of national banks.”³ And the court repudiated the doctrine of the Court of Appeals of New York, in the following language: “Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation

¹ *National Shoe &c. Bank v. Mechanics' &c. Bank*, 89 N. Y. 467; *s. c.* 3 Nat. Bank Cas. 601.

² *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; *s. c.* 3 Nat. Bank Cas. 624. The court, however, conceded — what was too obvious for doubt — that the above provision of the National Bank Act was not repealed by the act of Congress of July 12, 1882 (*ante*, § 7270), providing that the jurisdiction of suits thereafter brought against national banks shall be the same as for suits against State banks, and repealing laws inconsistent therewith. *Ibid.* Where a national bank closed its doors on November 18, 1881; was put in charge of the government bank examiner and thus continued until March 14, 1882, when the Comptroller of the Currency allowed it to resume; and it thereafter transacted

business until May 22, 1882, when it was placed in the hands of a receiver; and an attachment was issued against it in another State on November 19, 1881, the day after it first closed its doors; and it appeared that, at that time, its assets would have paid its debts and liabilities, exclusive of its capital, but that it had refused to pay various legal obligations then due; — it was held that it had committed “acts of insolvency,” within the previous portion of this section of the Revised Statutes (*post*, § 7281), and that the attachment should be vacated. *Market Nat. Bank v. Pacific Nat. Bank*, 2 Civ. Proc. Rep. (N. Y.) 330; *s. c.* 30 Hun (N. Y.), 50; 3 Nat. Bank Cas. 672.

³ *Butler v. Coleman*, 124 U. S. 721, 726; *s. c.* 3 Nat. Bank Cas. 291, 296.

is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether, and cannot be used under any circumstances.”¹

§ 7278. **Further of Such Attachments.**—In like manner, *no court of the United States* can issue an attachment against an insolvent national bank; and therefore a bond given to release property from such an attachment is void.² It followed that, where the assets of a national bank had been illegally seized under a writ of attachment issuing out of a court of the United States, and a bond had been given, with sureties, for the purpose of dissolving the attachment, and the sureties had received into their possession assets of the bank to indemnify them against loss, and the bank had passed into the hands of a receiver appointed by the Comptroller of the Currency, a bill in equity might be maintained by the receiver to discharge the sureties, and to compel them to transfer their collateral to him.³ It did not need the aid of the statute to induce the conclusion that *after a receiver has been appointed*, a levy of an attachment upon the assets of the bank is merely void, so that a sale thereunder will pass no title to the purchaser.⁴ The *constitutionality* of this clause of the National Bank Act was unsuccessfully assailed in the Court of Appeals of Maryland.⁵

§ 7279. **Actions by Receiver to Collect Debts.**—The receiver may bring an ordinary action to collect a debt due the bank, without special instructions from the Comptroller of the Currency: “The language of the statute authorizing the appointment of a receiver to act *under the direction of the Comptroller*, means no more than that the receiver shall be *subject* to the direction of the Comptroller. It does not mean that he shall

¹ Butler v. Coleman, 124 U. S. 727;

3 Nat. Bank Cas. 297.

² Pacific Nat. Bank v. Mixter, 124 U. S. 721; *s. c. sub nom.* Butler v. Coleman, 124 U. S. 721; *s. c.* 3 Nat. Bank Cas. 201; reversing Price v. Coleman, 22 Fed. Rep. 694.

³ *Ibid.*

⁴ National Bank v. Colby, 21 Wall. (U. S.) 609; *ante*, § 6931.

⁵ Chesapeake Bank v. First Nat. Bank, 40 Md. 269; *s. c.* 17 Am. Rep. 601; 1 Nat. Bank Cas. 531.

do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts, no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do.”¹ But *stockholders* are not ordinary debtors of the bank, and the receiver cannot enforce their *liability* without the direction of the Comptroller.²

§ 7280. In whose Name Action Brought by Receiver.—The receiver may sue either in his own name or in the name of the bank to his own use.³ Such actions are generally and more appropriately prosecuted by the receiver in his own name.⁴

§ 7281. Power of Receiver to Compromise Debts.—Section 5234 of the Revised Statutes of the United States, which provides for the appointment of a receiver by the Comptroller of the Currency and defines his powers and duties,⁵ among other things, provides that he may, “upon the order of a court of record of competent jurisdiction, sell or compound all bad or doubtful debts,” etc. The act does not state what shall be a court “of competent jurisdiction,” and such receivers are in the constant habit of applying to the complacent judges of the State courts for such orders, which, it is believed, have been often procured corruptly. It is perceived that the only debts

¹ *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *s. c.* 1 Nat. Bank Cas. 89, 89.

² *Ibid.*; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17. In such an action, an *allegation* that, on a day named, the Comptroller of the Currency appointed the plaintiff receiver of the bank, in accordance with the provisions of the act of Congress, and the plaintiff has taken possession of the assets, including the demand in suit, is a *sufficient allegation of appointment*. *Platt v. Crawford*, 8 Abb. Pr. (N. S.) (N. Y.) 297.

³ *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17. Compare *ante*, §§ 3570, 6970.

⁴ *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357; *s. c.* 2 Nat. Bank Cas. 162.

⁵ *Ante*, § 7261. It will be perceived that this section is a jumble on the part of the draughtsman. In the first part it states, by reference to preceding sections, the circumstances under which the Comptroller may appoint a receiver, and then it takes up a totally different subject, the powers which the receiver shall exercise, who is so appointed.

which the statute authorizes the receiver thus to compound are "bad or doubtful debts." It was held by Mr. Circuit Judge McKennan, that the personal *liability of a shareholder* to be assessed to the extent of the par value of his shares, under the statute, for the benefit of creditors, is not a "bad or doubtful debt," within the meaning of this provision; and hence that a compromise with such a shareholder under the sanction of a State court is ineffectual, for want of power in the court to direct or sanction it.¹ The Comptroller of the Currency has no power to compound or settle claims of a national bank against its debtors, since that requires the authority of a court of competent jurisdiction, under the above statute.² It has been held that a compromise of a suit made by such a receiver, with the assent of his counsel, who was also attorney for the United States, will not be opened after a delay of seven years, no fraud being shown.³ A District Court of the United States is "a court of record of competent jurisdiction," within the meaning of this statute, and may, consequently, authorize such a receiver to compromise bad or doubtful debts.⁴ After such a banking association has been dissolved by the judgment of a court of competent jurisdiction, no action can be prosecuted against it.⁵

§ 7282. Whether Receiver Succeeds to Larger Rights of Action than the Corporation Possesses. — We have already considered this question in another relation, where it is seen that there is a conflict of authority upon the question whether a receiver stands as the representative of creditors in such a sense that he may assert rights of action which the corporation itself would have been estopped by its contract or conduct from asserting.⁶ The receiver of an insolvent national bank is a *statutory trustee*, and it is nowhere disputed that he

¹ Price v. Yates, 19 Alb. L. J. 295; s. c. 2 Nat. Bank Cas. 204.

² Case v. Small, 10 Fed. Rep. 722; s. c. 4 Woods (U. S.), 78.

³ Henderson v. Meyers, 11 Phila. (Pa.) 616; s. c. 2 Nat. Bank Cas. 759.

⁴ Petition of Platt, 1 Ben. (U. S.) 534; s. c. 1 Nat. Bank Cas. 181.

⁵ National Bank v. Colby, 21 Wall. (U. S.) 609; s. c. 1 Nat. Bank Cas. 109.

⁶ Ante, §§ 3562 to 3566; 6945, et seq.

may assert all the rights of action which the corporation itself might have asserted; but whether he can go further and undo contracts into which the corporation has been drawn through the fraud of its directors or managing officers, is the question now to be considered. It was held by Mr. Circuit Judge Jackson (afterwards Mr. Justice Jackson) that the receiver of an insolvent national bank can assert no rights against the subscribers to its shares which the bank itself could not have asserted.¹ The reason given for this conclusion is that the corporate management, while in charge of its business, represents all the interests of creditors as well as stockholders, as much as the receiver represents them after his appointment.² And if the doctrine that the assets of a corporation are a trust fund for its creditors has any substantial value, this must be the correct conception. At the same time, the following concession is made: "In a certain class of cases, a receiver may assert rights which the corporation could not. Thus, he may disaffirm illegal and fraudulent transfers of corporate property, and may recover its funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock from his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These, and like transactions involving the misapplication or fraudulent disposition of corporate property, a receiver may disaffirm,

¹ *Winters v. Armstrong*, 37 Fed. Rep. 508; citing *Cutting v. Damerel*, 88 N. Y. 410. So doubtful is the decision in *Cutting v. Damerel*, that no less than five previous decisions, regarded as authority in that State, were "distinguished." These were *Adderly v. Storm*, 6 Hill (N. Y.), 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Mann v. Cur-*

rie, 2 Barb. (N. Y.) 294; *Webster v. Upton*, 91 U. S. 65; and *Pullman v. Upton*, 96 U. S. 329. It should also be noted that in *Cutting v. Damerel*, 88 N. Y. 410, the Court of Appeals of New York reversed the same case as reported in 23 Hun (N. Y.), 339.

² Jackson, J., in *Winters v. Armstrong*, *supra*.

and recover such assets for the benefit of creditors, when the corporation might not be in a position to do so.”¹

§ 7283. **His Right of Action against the Directors.**—The effect of the National Currency Act is to vest in the receiver all rights of action which the corporation itself possessed against any and all persons, however the rights may have arisen, for the benefit of whomsoever may be entitled to the avails of such actions; which rights of action may be enforced by him, by action brought either in his own name or in the name of the national bank whose receiver he is, and whose corporate existence is, in technical theory, continued for that purpose. Perhaps it is a better way of stating the same principle to say that all rights of action possessed by the bank vest in the receiver for the benefit of its creditors and stockholders, and that the *franchise*, possessed by the bank as a corporation, of suing as a person to enforce its rights, passes to the receiver, and may be exercised by him, either in his own name or in the name of the corporation, according to the course of the court in which the action is brought.² Such a receiver may therefore bring an action in a court of the United States, where the other circumstances exist to give jurisdiction, either in his own name or in the name of the bank, to enforce against its directors, for the benefit of its creditors and stockholders, any right or claim resting on the non-performance or negligent performance of their duties, which the bank itself could have enforced;³ or he may bring such an action in a *State court*.⁴ Whether such an action

¹ *Winters v. Armstrong*, 37 Fed. Rep. 508, 521; citing *Wood v. Dummer*, 3 Mas. (U. S.) 308; *Curran v. State*, 15 How. (U. S.) 304; *Burke v. Smith*, 16 Wall. (U. S.) 390; *New Albany v. Burke*, 11 Wall. (U. S.) 96; *Sawyer v. Hoag*, 17 Wall. (U. S.) 619, — as illustrations of cases in which receivers may assert rights which the corporation or corporate management could not enforce.

² *Kennedy v. Gibson*, 8 Wall.

(U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17; *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *s. c.* 1 Nat. Bank Cas. 87; *Case v. Terrell*, 11 Wall. (U. S.) 199; *s. c.* 1 Nat. Bank Cas. 67; *Movius v. Lee*, 30 Fed. Rep. 298; *s. c.* 24 Blatchf. (U. S.) 291.

³ *Movius v. Lee*, 30 Fed. Rep. 298; *s. c.* 24 Blatchf. (U. S.) 291.

⁴ *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

abates by the *death* of the director must, it has been held, be determined by the law of the State within which the national bank is situated and where the director died.¹ Where the national bank was situated in Vermont and the director died in that State, it was held, under the decisions in Vermont, that the action abated by the death of the director, and could not be revived against his administrator.²

§ 7284. His Right of Action against Shareholders.—The receiver may bring an action against shareholders of the bank of which he is receiver, to charge them, not only in respect of what may remain unpaid upon their share subscriptions, but also in respect of their superadded individual liability imposed by the statute;³ and formerly he alone could bring such actions.⁴ But the act of Congress of 1876⁵ provides that the individual liability of shareholders of an insolvent national bank “may be enforced by any creditor of such association by bill in equity, in the nature of a creditors’ bill, brought by such creditor on behalf of himself and all the other creditors.” Under the operation of this and other statutes, a mortgage made by the cashier of such a bank, who is also a stockholder therein, of all his individual property, after

¹ *Witters v. Foster*, 26 Fed. Rep. 737; citing *Henshaw v. Miller*, 17 How. (U. S.) 212.

² *Witters v. Foster*, *supra*. Analogous decisions in Vermont were: *Barrett v. Copeland*, 20 Vt. 244; *Winhall v. Sawyer*, 45 Vt. 466.

³ Rev. Stat. U. S., § 5234. For examples of such actions, see *Witters v. Sowles*, 32 Fed. Rep. 130; *s. c.* 32 Fed. Rep. 767; 25 Fed. Rep. 168; 35 Fed. Rep. 640; *Hobart v. Johnson*, 8 Fed. Rep. 493; *s. c.* 19 Blatchf. (U. S.) 359; *Irons v. Manufacturers’ Nat. Bank*, 17 Fed. Rep. 308; *s. c.* 36 Fed. Rep. 843; *Price v. Whitney*, 28 Fed. Rep. 297; *Price v. Abbott*, 17 Fed. Rep. 506; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17;

Casey v. Galli, 94 U. S. 673; *s. c.* 1 Nat. Bank Cas. 142; *Butler v. Aspinwall*, 33 Fed. Rep. 217; *Delano v. Butler*, 118 U. S. 634; *Richmond v. Irons*, 121 U. S. 27; *Welles v. Larrabee*, 36 Fed. Rep. 866; *Welles v. Stout*, 38 Fed. Rep. 807; *Case v. Small*, 4 Woods (U. S.), 78. Case where the action was brought to restrain the prosecution, by the receiver, of such an action, and where the bill was dismissed,—see *Morrison v. Price*, 23 Fed. Rep. 217. Compare *ante*, § 3549, *et seq.*

⁴ *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17.

⁵ Act Cong. June 30, 1876; 19 U. S. Stat. at Large, 63.

its suspension, to secure a depositor, is void as against a judgment recovered against the cashier by the receiver, either in the hands of a receiver or of a purchaser from him for value.¹

§ 7285. **Necessity of Assessment.** — An assessment by the Comptroller of the Currency is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver; and the fact must be distinctly averred in all such cases, and, if it be put in issue, must be proved.²

§ 7286. **Determination of Comptroller in Assessing the Shareholders Conclusive.** — The discretion of the Comptroller of the Currency, not only in respect of the propriety of appointing a receiver, but in respect of the necessity of assessing the shareholders, is conclusive upon the shareholders, and cannot be controverted by them in an action by the receiver to enforce the assessment. Upon this subject it has been said in a leading case: "The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such *data* as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue, must be

¹ Gatch v. Fitch, 34 Fed. Rep. 566. As to the right of *set-off* in such actions, see *ante*, §§ 3785, *et seq.*, 6965, *et seq.*; Welles v. Stout, 38 Fed. Rep. 807.

² Kennedy v. Gibson, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17, 20. Compare *ante*, §§ 3537, 3752, *et seq.*

proved.”¹ In a subsequent case the court reaffirmed the principles thus stated, by stating that the amounts to be paid rest in the discretion and judgment of the Comptroller; that his determination cannot be controverted by the stockholders in suits against them; and that, when the order is to collect the full amount of the par of the stock, the suit must be at law.² It was no defense to such an action to set up that the defendant was bound to contribute ratably to pay a large sum, and that this sum was not stated in the declaration, and hence that what would be ratable and proper did not appear; nor that the obligation of the defendant was to pay into the hands of the Comptroller of the Currency a ratable portion of the debts of the association, proved before him, and that the declaration did not show that any debts had been so proved.³ Therefore, in an action to enforce such an assessment, it is sufficient to allege that the Comptroller determined that the assessment was necessary, and levied it.⁴ The collection of such an assessment, by an action at law, does not deprive the stockholders of their property “without due process of law.”⁵ If the assessment is made by a *Deputy* Comptroller, his action is equally conclusive.⁶

§ 7287. **Parties in Equity.**—Where a contribution only is sought, *all the stockholders* who can be reached by the process of the court may be joined in the suit, and it will be no objection that there are others beyond the jurisdiction of the court, who cannot, for that reason, be made co-defendants.⁷

¹ Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c. 1 Nat. Bank Cas. 17, 20; opinion of the court by Mr. Justice Swayne.

² Casey v. Galli, 94 U. S. 673; s. c. 1 Nat. Bank Cas. 142, 144; overruling Bowden v. Morris, 1 Hughes (U. S.), 378; s. c. 1 Nat. Bank Cas. 930. Cases following this doctrine are Bailey v. Sawyer, 4 Dill. (U. S.) 463; s. c. 2 Nat. Bank Cas. 154; Strong v. Southworth, 8 Ben. (U. S.) 331; s. c. 2 Nat.

Bank Cas. 172; National Bank v. Case, 99 U. S. 628; Welles v. Stout, 38 Fed. Rep. 67; Richmond v. Irons, 121 U. S. 27; Young v. Wempe, 46 Fed. Rep. 354.

³ *Ibid.*

⁴ Young v. Wempe, 46 Fed. Rep. 354.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c. 1 Nat. Bank Cas. 17.

§ 7288. **When the Action should be at Law and when in Equity.**—When the order of the Comptroller is to collect the full amount of the par of the stock, the suit *must be at law*; and it is of course no defense to such a suit that the defendant is bound to contribute ratably, and that the proper amount to be contributed by him can be ascertained only in equity.¹ But where less than the entire liability of the stockholder is sought to be enforced, the suit *may be in equity*, and an interlocutory decree may be taken for a contribution.²

§ 7289. **Pleading in Such Actions.**—In an action by the receiver of a national bank against a shareholder to recover an assessment ordered by the Comptroller, an allegation in the petition that, on a day named, “the Comptroller of the Currency, in order to pay the liabilities of” the bank, “made an assessment upon the said shares of the capital stock of said bank,” of one hundred per cent upon its par value, “and ordered the stockholders to pay the same on or before” a day named, is sufficient to show that the requisite action was had by the Comptroller, not only as to determining upon the necessity of an assessment, but also as to the enforcement thereof by suit against the delinquent stockholders. The allegation following, “that, by virtue of the premises, and of the statutes in such case made and provided, the defendant became and is indebted to your petitioner in the sum of,” etc., sufficiently shows that defendant had become indebted in the sum named, and also that such indebtedness still continued when the petition was filed, and is equivalent to an allegation of non-payment.³

§ 7290. **Accruing of Interest against Stockholders.**—The sum to be paid being liquidated, and due and payable when

¹ Casey v. Galli, 94 U. S. 673; s. c. 1 Nat. Bank Cas. 142, 144; Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c. 1 Nat. Bank Cas. 17. See Young v. Wempe, 46 Fed. Rep. 354.

² Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c. 1 Nat. Bank Cas. 17.

³ Welles v. Stout, 38 Fed. Rep. 67. *Pleading in an action by such a receiver to recover assets fraudulently transferred; when two counts state but one cause of action:* Brown v. Carbonate Bank, 34 Fed. Rep. 776.

the Comptroller's order is made, it follows that the amount bears interest from the date of the order; otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation.¹

§ 7291. Mode of Enforcing Contribution and Securing Equality among the Stockholders. — In the leading case on this subject the following suggestions are made by the court, with an evident intention that they shall be regarded as authoritative: "The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be *at law*. Where less is required, the proceeding may be *in equity*; and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court — if such action should subsequently prove to be necessary — until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses, by insolvency and otherwise, in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain, after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed

¹ *Casey v. Galli*, 94 U. S. 673; *s. c.* 1 Nat. Bank Cas. 142, 144.

than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants.”¹

§ 7292. Creditor's Bill to Enforce Individual Liability of Stockholders.—Prior to the Act of June 30, 1876, the receiver alone possessed the right of action to enforce the individual liability of stockholders in national banks; but by the second section of the act of Congress of that date it was enacted: “That when any national banking association shall have gone into liquidation under the provisions of section 5220 of said statutes, the individual liability of the shareholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.”² Prior to this statute, the Circuit Court of the United States, in equity, had jurisdiction of a suit brought by a judgment creditor to prevent or redress maladministration or fraud against creditors in the voluntary liquidation of a bank, whether such fraud was contemplated or executed; and such a suit, though begun by a single creditor, was necessarily prosecuted for the benefit of all.³ And where a bill of that nature had been filed by a creditor prior to the enacting of this statute, the court held that, whether the statute be considered declaratory of the existing law, or as giving a new remedy, it warranted the court in retaining the bill and allowing it to be amended.⁴

¹ Kennedy v. Gibson, 8 Wall. (U. S.) 498; s. c. 1 Nat. Bank Cas. 17, 20.

² Act Cong. June 30, 1876, § 2; 19 U. S. Stat. at Large, 63; 1 Supp. to Rev. Stats. U. S. (2d ed.), p. 107.

³ Richmond v. Irons, 121 U. S. 27, 49.

⁴ *Ibid.* See the same case for an example of an amendment of such a bill held not materially to change the substance of the case nor make the

The *expenses* of a receivership of a national bank appointed in a creditors' suit, such as is authorized by this statute, contesting a voluntary liquidation of the bank, cannot be charged upon the stockholders as a part of their statutory liability, but must be borne by the creditors, at whose instance the receiver was appointed.¹ No person is entitled to share as a creditor in the distribution which takes place under such a creditors' bill, who does not come forward and present his claim.² The bill need not, on its face, purport to be filed on behalf of other creditors, since the law will give it that effect and the court will so treat it; but if this is deemed necessary, it is within the discretionary power of the court to allow it to be *amended* by adding that recital.³ The diligence of the creditor who files the bill will give him no greater rights than any other creditor, to share in the distribution of the assets; and hence a prayer in the bill that such creditor be given priorities over other creditors will not be granted.⁴ Creditors who have received, as *collateral security*, paper *guaranteed* by the bank, and who have obtained judgments against the bank on its contracts of guaranty, stand on the basis of *general creditors* in such distribution, and are to receive only the amount shown to be due them by the bank when it suspended, less payments on the indebtedness by the principal, and amounts collected from the collaterals, with legal interest upon the unpaid balance.⁵ The rights under the *statutes of limitations*, of a creditor who becomes a party to such creditors' bill, depend on the date of the filing of the bill, and *relate back* to that date, and are not to be determined as of the date of his becoming a party to the suit; in other words, the filing of the

bill *multifarious*, so as to make the allowance of the amendment an improper exercise of the *discretion* of the court, within the rule laid down in *Hardin v. Boyd*, 113 U. S. 756, 761.

¹ *Richmond v. Irons*, 121 U. S. 27.

² *Ibid.*

³ *Irons v. Manufacturers' Nat. Bank*, 17 Fed. Rep. 308.

⁴ *Ibid.* All the creditors who come

in and prove their claims under the bill, stand on an equal footing in the distribution. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; *s. c.* 3 Nat. Bank Cas. 211.

⁵ *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; *s. c.* 3 Nat. Bank Cas. 211. This case was reversed on some of its points, *sub nom.* *Richmond v. Irons*, 121 U. S. 27.

bill stops the running of the statute upon all claims against the bank which are brought in by creditors under the bill, without reference to the date when the claims are brought in.¹ Where a creditor's bill has been filed under this statute and a receiver has been appointed under the bill, the Comptroller of the Currency has no power to institute a separate winding-up proceeding by the appointment of a receiver; and if a receiver, so appointed, brings a suit to enforce the liability of a stockholder, the latter may *plead* the pendency of a creditor's bill under the statute, *in abatement*, because he is not to be vexed with two actions at the same time for the same cause.²

§ 7293. Receiver Takes Assets Cum Onere.—The rule already considered as applicable to receivers generally, applies to receivers of national banks appointed by the Comptroller of the Currency,—that such a receiver takes the assets of the bank *cum onere*,—that is to say, subject to any rights existing against them in the nature of *liens* or *rights of reclamation* which *might have been asserted* at the time when he was appointed, or which subsequently matured under pre-existing contracts.³ And the Supreme Court of the United States have held that he takes debts due to the bank subject to any right of *set-off* which may exist against them by the debtors, though such rights of set-off do not mature until after his appointment.⁴ On principles already considered,⁵ he takes *trust funds* subject to the obligation of restoring them entire to the *cestui que trust*, and is not at liberty to remit the *cestui que trust* to a *pro rata dividend*, on the footing of the general creditors. Thus, if a draft has been delivered to a national bank for collection, and the bank remits it to a collecting agent and then fails, and the collecting agent collects the money and turns it over to the receiver of the bank,

¹ *Richmond v. Irons*, 121 U. S. 27; reversing on some points *s. c. sub nom. Irons v. Manufacturers' Nat. Bank*, 17 Fed. Rep. 308; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; *s. c.* 3 Nat. Bank Cas. 211.

² *Harvey v. Lord*, 10 Fed. Rep. 236; *s. c.* 11 Biss. (U. S.) 144.

³ *Ante*, §§ 6903, 6917.

⁴ *Post*, § 7298. Compare *ante*, § 3785, *et seq.*, and § 6965, *et seq.*

⁵ *Ante*, § 7084, *et seq.*

the receiver must account in full to the person depositing the draft for collection. The reason is, that the depositor of the draft had the *right of reclamation* at any time down to the time when the bank with which he deposited it had actually collected it and mingled the amount with its general funds, or had credited the account of the depositor of the draft with the amount of the collection; and the receiver took the proceeds of the draft subject to this right of reclamation.¹

§ 7294. **Must Respect Valid Liens and Pledges.**—Liens upon the property of a national bank, acquired without fraud while the bank was a going concern, will, however, be respected by the receiver. Thus, if the officers of such a bank *pledge* a note to secure a creditor who has been allowing the bank to use his money to prevent a failure of the bank, and with the expectation that a failure will be prevented by retaining and using the deposit to pay other depositors, — it is a valid pledge, and should be respected by the receiver.²

§ 7295. **Must Restore Trust Funds.**—Trust funds which come into the hands of receivers of national banks must be restored to the *cestui que trust*, upon principles considered in a former chapter.³ This subject will not be pursued in this

¹ National Exch. Bank v. Beal, 50 Fed. Rep. 355; *ante*, § 7090. The conclusion of the court so holding will equally rest upon the ground that until the avails of the draft had been collected, by the bank with which it was first deposited, prior to its suspension, and mingled with its own funds, or passed to the credit of the depositor of the draft, the draft, and consequently its proceeds, continued to be a *trust fund*, and that when the proceeds passed into the hands of the receiver after the insolvency of the bank, they passed into his hands as a trust fund, and he was not at liberty to deal with them as a *general deposit*, and remit the depositor of the draft to the position of a general

creditor in respect of them. *Ante*, § 7091. The court, in the case under consideration, also held that where, in such a case, there are *mutual accounts* between the two banks, the right of the collecting agent to *set off* the amount of the collection against the indebtedness of the insolvent national bank to it, cannot be adjudicated in a suit in equity between the owner of the draft and the insolvent national bank, without making the collecting bank a *party*. National Exch. Bank v. Beal, *supra*.

² Roberts v. Hill, 23 Fed. Rep. 311. And see, as to *restoring trust funds*, *ante*, § 6903.

³ *Ante*, § 7084, *et seq.*

chapter, further than to suggest that the receiver of a national bank cannot impound, for the benefit of its creditors, property which the bank itself does not own. Under the operation of this principle, the proceeds of paper deposited with the bank for collection, which were collected or credited to the bank prior to the appointment of the receiver, become general assets to be turned over to the Comptroller for distribution among creditors.¹ But proceeds of such collections as are made *by the receiver*, that is, such as are paid to the receiver by the payor of the paper, — are a trust fund, and must be restored in full to the persons depositing the paper.²

§ 7296. Must Restore Money Subscribed on Scheme to Increase Capital Which has Failed. — It has been held that where a scheme has been set on foot to increase the capital stock of a national bank, and the public have been invited to subscribe for shares under such scheme, and they have subscribed and paid the amount of their subscriptions in full, but the scheme is invalid under the statute for the want of the consent of two-thirds of the stockholders, and the national bank subsequently fails, before any estoppel in favor of the bank has arisen against such subscribers, — they are entitled to recover back the full amount of their subscriptions on the footing of its being a *trust fund*.³ But the true view seems to be that they are *general creditors* merely.⁴

§ 7297. Must Restore Money Deposited to be Loaned to the President of the Bank. — In a case depending rather upon facts than law, it appeared that the president of a national bank wanted to borrow, for his own purposes, \$50,000 from a Canadian bank, but the latter could not lend the money without exceeding the limit of

¹ First Nat. Bank *v.* Armstrong, 42 Fed. Rep. 193.

² *Ibid.* Circumstances under which the receiver is not required to account for a sum of money contributed by the directors to restore its capital, as a special trust fund, but under which such an amount is

to be treated merely as a debt, — see Booth *v.* Welles, 42 Fed. Rep. 11; and compare Welles *v.* Stout, 38 Fed. Rep. 807.

³ Winters *v.* Armstrong, 37 Fed. Rep. 508. See also Schierenberg *v.* Stephens, 32 Mo. App. 314.

⁴ *Ante*, § 4466.

loans allowed to it, but agreed instead to deposit the required amount at interest with the bank of which the applicant for the loan was president. The officers and the majority of the directors of the bank receiving the deposit, approved the transaction, and part of it was actually reloaned to its president. Subsequently the bank receiving the deposit failed. It was held error for its receiver to reject the claim of the Canadian bank for the amount thus deposited, on the theory that it was not really a transaction with the bank of which he was receiver, but, in substance and intent, a personal loan to the president of the bank. The court laid stress upon the fact that there had been a complete *ratification* and adoption of the transaction by the officers of the bank receiving the deposit, such as made it the act of the bank, and such as made the bank responsible for it.¹

§ 7298. What Rights of Set-off Exist against Receiver.—

We have already considered the question of the right of set-off in cases where insolvent estates are being wound up in the hands of receivers, with the conclusion that, under the principles of equity, no such right exists, except in those cases where it existed at the time when the corporation ceased to be a going concern.² We have already noticed that the reason which excludes the right of set-off in other cases is that the effect of it is to give a preference to the creditor seeking the right of set-off, over the other creditors, and substantially to pay a part of his debt out of their money. Dealing now with the question with particular reference to the administration of the assets of insolvent national banks in the hands of receivers, we discover a difference of opinion upon it. But it has been lately settled, so far as the present phase of it is concerned, by a decision of the Supreme Court of the United States. The question came before that court in 1892 in two cases: one a writ of error to the Circuit Court of the United States for the Southern District of Ohio, and the other a certificate from the United States Court of Appeals for the Sixth Circuit. In answer to a question certified by the United

¹ *Eastern Township Bank v. Vermont Nat. Bank*, 22 Fed. Rep. 186; *s. c.* 22 Blatchf. (U. S.) 498.

² *Ante*, § 3786. Compare *ante*, § 6964, *et seq.*

States Court of Appeals, the Supreme Court hold that where a national bank becomes insolvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, a debtor of the bank can set off against his indebtedness the amount of a claim which he holds against the bank, although the debt due to him from the bank was payable at the time of its suspension, while the debt due by him to the bank was payable at a subsequent time.¹ But the court also hold that this right of set-off is an *equitable*, and *not a legal, right*, and therefore that the Circuit Court of the United States cannot, in an action by the receiver of the insolvent national bank against its debtor, accord to the defendant such right of set-off; but that it must be sought by the defendant by an affirmative proceeding in equity.² Some previous decisions of the court, when dealing with the question of the right of set-off in other relations, had prepared the way for the conclusion that *insolvency*, on the one hand, justifies the set-off of a debt *owing to the insolvent*, on the other, although such debt is *not due* at the time of the suspension.³

§ 7299. **The Question how Viewed on Principle.**—Professional opinion will not concur in the propriety of the conclusion of the court that “natural justice would seem to require that where the transaction is such as to raise the *presumption of an agreement* for a set-off, it should be held that the equity that this should be done is superior to any subsequent equity, not arising out of a purchase for value without notice.”⁴ Nor will the profession concur, without dissent, in the following observations of the court: “In the case at bar, the credits between the banks were reciprocal, and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable

¹ Scott v. Armstrong, 146 U. S. 499, 502, 513.

² *Ibid.*

³ Blount v. Windley, 95 U. S. 173, 177; Carr v. Hamilton, 129 U. S. 252, 262; Scammon v. Kimball, 92 U. S.

362; Blount v. Windley, *supra*, simply administered a *statute* of North Carolina.

⁴ Scott v. Armstrong, 146 U. S. 499, 508.

to mutual credits applied." Stripped of unnecessary detail, the case was nakedly the case where the customer of a national bank tenders to the bank his note for discount, and the note is discounted, and the proceeds are passed to his credit, the same as an ordinary deposit, and subject to his check for whatever purposes he may desire. By the transaction, under well-settled rules relating to the subject of bank deposits, the national bank becomes indebted to the customer to the amount of the proceeds of the discounted note placed to his credit, which debt is payable upon his demand. On the other hand, he becomes indebted to the national bank to the full amount of his note which the bank has discounted, but his debt to the bank is payable at a future day. Before his debt to the bank matures and becomes payable, the bank fails, and the Comptroller of the Currency puts it in the hands of a receiver for the purpose of winding it up and distributing its assets, first among its creditors, and next among its stockholders. While the fact of putting its assets in the hands of a receiver does not work a technical *dissolution* of the bank, such as suspends the prosecution of actions against it,¹ it does work what has often been called a *de facto dissolution*. It puts an end to the bank for every future purpose of conducting its business as a going concern, unless it shall, by proceeding under another section of the National Bank Act,² *enjoin* the Comptroller and receiver from so holding its assets, or unless it shall restore the deficiency of its assets, or otherwise satisfy the Comptroller of its ability to resume its business. It is thus, in substance and essence, *dissolved*, and ought to pass out of view as a factor in determining the question. But if the mental processes of the judges who have taken this view were analyzed, it would be found that the infirmity of their view has been brought about by their inability to look upon the question except as a question standing between the two contracting parties, and their failure to note that one of the contracting parties has substantially ceased to exist, and that those who claim in his right are *other creditors* who ought to

¹ *Ante*, §§ 6894, 7268.

² *Post*, § 7316.

stand on an equal footing with the customer claiming the set-off. If his right of set-off is conceded, it operates to that extent as a payment by the bank of his debt in full, and this, too, out of money which the bank has loaned to him, which money was, in part at least, the money of other depositors; and thus he is paid out of the pockets of other creditors of the bank. Now, in what respect does he stand in a better position than the other creditors, out of whose deposits he is thus paid? He does not stand on as good a footing. They have put their money into the bank — the very money out of which he is paid in preference to them; whereas he has *borrowed* their money from the bank. That is the very substance of the transaction in every case where the *capital* of the bank is entirely exhausted at the time of the transaction, and it is measurably the substance of the case where the capital of the bank is in part exhausted at that time. To make the question more bald and palpable, let us suppose that *to-day* a customer of a national bank procures it to discount his note for \$10,000, and to place the proceeds to his general credit, and that, *to-morrow*, and before he has checked at all against the proceeds, and before his note has matured, the bank fails by reason of its insolvency, and that the result of its liquidation shows that, at the time of the discount, its capital was exhausted and that its assets are sufficient to pay no more than ten cents on the dollar to its depositors. The particular effect of this rule is to *rescind* the transaction by which the borrower procures the bank to discount his note; whereas no rescission is accorded to the depositors who have handed over to the bank their own money, but they are put off with a dividend of ten cents on the dollar. It is idle to characterize a rule which permits this to be done “as natural justice.” The legal profession will never concur in such a conclusion. The whole tenor of the National Bank Act is opposed to such a conclusion. By one of its provisions, “the Comptroller shall make a *ratable dividend*,”¹ and by another, *all preferences avoided*, and attachments (which would lead to preferences) are pro-

¹ Rev. Stats. U. S., § 5236.

hibited.¹ The reasoning of the Supreme Court of the United States, by which they endeavor to establish the right of set-off in the face of these statutory provisions, possesses some degree of plausibility, but overlooks the substantial reason and justice of the question.²

¹ Rev. Stats. U. S., § 5234.

² That reasoning, in its opinion, written by Mr. Chief Justice Fuller, is as follows: "The argument is that these sections, by implication, forbid this set-off, because they require that after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered, in contemplation of, or after committing the act of insolvency, shall stand. And it is insisted that the assets of the bank, existing at the time of the act of insolvency, include all its property without regard to any existing liens thereon or set-offs thereto. We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges, or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its

allowance can be considered a preference; and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement, as to ratable dividends, is to make them from what belongs to the bank, and that which, at the time of the insolvency, belongs of right to the debtor, does not belong to the bank." *Scott v. Armstrong*, 146 U. S. 499, 510. Analogous decisions in the English Court of Chancery, under an early bankruptcy law of that country, to which the court appealed for support of its conclusion, are antiquated. *Anonymous*, 1 Mod. 215; *Curson v. African Co.*, 1 Vern. 121; *Chapman v. Deroy*, 2 Vern. 117. They are two hundred years old; they are relics of a period when the system of equity was in a very crude condition, and when the conceptions of justice upon which the English Court of Chancery proceeded were far less enlightened than those upon which courts proceed at the present day. Decisions of inferior Federal courts, tending to the same conclusion, were also cited by the Supreme Court: *Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18; *Yardley v. Clothier*, 49 Fed. Rep. 337; *Armstrong v. Warner*, 21 Week. Law Bull. (Ohio) 136; *s. c.* 27 Weekly Law Bull. (Ohio) 100. The case of *Louis Snyders' Sons Co.*, *supra*, is not in point, because in that case the receiver had allowed the set-off, and the question for decision was whether the court would subsequently set it aside

§ 7300. **The Question how Viewed by Other Courts.**—It has been held by the Supreme Court of Ohio that the receiver of a national bank holds, in respect of the bank and its creditors, the substantial relation of a statutory assignee, and that “a right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank’s insolvency,”—the reason being that he succeeds only to the rights of the bank existing at the time when it goes into liquidation.¹ A Federal district judge, sitting in the Circuit Court of the United States in the same State, has, however, held that, under the provision of the national banking law² (and other provisions of the same act) prescribing the duties of the receiver in winding up such insolvent banks,—all unsecured creditors are placed on the same footing of equality.³ The court accordingly held that funds received by a creditor of a national bank, upon the discounting of his note by the bank, which were deposited with the bank subject to his check, and which had been drawn upon by him, but which were intended to meet the note when due, could not be pleaded as a set-off in an action on the note brought by the receiver into whose hands the note had come before maturity; and that this conclusion was not affected by the provision of the Code of Civil Procedure of Ohio, to the effect that a cross-demand, which may be pleaded as a counter-claim or set-off, shall not be extinguished as such by the assignment or death of either party.⁴ The conclusion is perfectly plain, and is consistent with the doctrine of the Supreme Court of Ohio, above referred to; for the reason that no right of set-off existed at the time when the receiver was appointed, because the note of the customer in the hands of the bank had not then matured. It is respectfully submitted that there is nothing in the language of the Revised Statutes of the United States which indicates a purpose on the part of Congress to establish any rule different from that which obtains under the principles of equity, and from that prescribed by the Ohio statute, in regard to this right of set-off; and that the statute ought not to be so con-

on the theory of money paid under “a mutual mistake.” But Yardley *v. Clothier*, *supra*, is directly in point, and contains a learned opinion by Butler, J. There are State decisions belonging to the same category; but that they are not in accordance with

the weight of modern judicial opinion may be easily made to appear.

¹ *Hade v. McVay*, 31 Ohio St. 231; *s. c.* 2 Nat. Bank Cas. 353.

² Rev. Stats. U. S., § 5242.

³ *Armstrong v. Scott*, 36 Fed. Rep. 63.

⁴ *Ibid.*

strued as to destroy a right of set-off existing at the time when the receiver was appointed, since that would give it a construction which would make it operate to destroy *vested rights*. Under any theory of the subject which the courts have adopted, the principle obtains which has been elsewhere noted,¹ that a debtor to the bank cannot, by *purchasing claims against it* subsequently to the appointment of a receiver, acquire a right of set-off as against the receiver.² One test by which to determine whether there is a right of set-off is to consider whether the claim sought to be used as an offset is of such a nature that the creditor demanding the right of set-off would be entitled to stand as a preferred creditor in respect of such claim.³

§ 7301. **The Same Subject Continued.**—Cases are found which concede this right of set-off where the debt of the depositor to the national bank did not mature until after the appointment of the receiver; but they are not in accordance with sound principle, because they operate to give the depositor a preference over other creditors of the bank, and to convert his simple deposit into something in the nature of a trust fund.⁴ Of course, a depositor who has no right of set-

¹ *Ante*, §§ 3797, 6967.

² To illustrate this, take a Pennsylvania case where A. owed a national bank \$35,000, and where B. had in the bank a deposit of \$44,000 at the time when the bank stopped payment by reason of insolvency, and where on the next day B. assigned his deposit to A. Here it was held that A. could not set off the deposit as against his indebtedness to the bank, as it would operate to give a preference to one creditor over the others in contravention of the act of Congress (*Venango Nat. Bank v. Taylor*, 56 Pa. St. 14)—a conclusion which is perfectly plain.

³ *Welles v. Stout*, 38 Fed. Rep. 807.

⁴ Among these cases is *Platt v. Bentley*, determined in one of the departments of the Supreme Court of New York (11 Am. Law Reg. (N. S.) 171; *s. c.* 1 Nat. Bank Cas. 758),

where the plaintiff, as receiver, took possession of the bank on September 5, 1867, and the defendant had on deposit to his credit at that date, \$571.21, but the bank at that date held his note for \$800, to become due on the 5th of November, 1867,—two months after the receiver, in fact, took possession. The depositor paid the amount of his deposit, and the receiver sued for the balance, and it was held that he could not recover, as the depositor had a right to have his deposit set off against the note. The court proceeded upon the view that such was the statute law of New York, and that there was nothing in the National Bank Act making a different rule. See, to the same effect, *New Amsterdam Sav. Bank v. Garter*, 54 How. Pr. (N. Y.) 385. But the Supreme Court of Errors of Connecticut, proceeding upon the sound

off at the time when the bank passes into the hands of the receiver, cannot create such a right by assigning his deposit to a debtor of the bank; and this, on the principle that one cannot, by buying up claims of an insolvent person or corporation, after it has ceased to be a going concern, acquire a right of set-off, such as will give him a preference over its other creditors.¹ A demand which the debtor of such a bank may have against it for the repayment of usurious interest which he may have paid to it, cannot be availed of by him in an action against him by its receiver, to secure a set-off.² Indeed, such a set-off is not available against the bank while it continues to be a going concern.³ The reason is that, the statute having prescribed as a *penalty* for the taking of usurious interest by a national bank that the person paying unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, — the remedy to recover the penalty is *exclusive*, and he can resort to no other mode or form of procedure to right himself.⁴ The case refers itself to the well-known principle that where a statute creates a new right or offense and prescribes a specific remedy or punishment, such remedy or punishment is alone applicable, and to that extent the statute is *exclusive*.⁵

§ 7302. Continued. — Where the action of the receiver is *against a stockholder* to collect an assessment, or to enforce his individual liability under the National Banking Act, and the stockholder is also a creditor of the bank, he cannot use his

view, held that, upon the insolvency of a savings bank, a depositor cannot set off his deposit against the debt due from him to the bank, unless possibly, in the case where the deposit was made for the purpose of being applied on the indebtedness, and the bank officer knew the fact. And this would seem clear; for, in such a case, the set-off would be executed by the agreement of the parties. Osborn

v. Byrne, 43 Conn. 155; *s. c.* 21 Am. Rep. 641.

¹ *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14; *s. c.* 1 Nat. Bank Cas. 842; *ante*, §§ 3797, 6901, 6967.

² *Hade v. McVay*, 31 Ohio St. 231; *s. c.* 2 Nat. Bank Cas. 353.

³ *Barnet v. National Bank*, 98 U. S. 555.

⁴ *Ibid.*

⁵ *Farmers' &c. Nat. Bank v. Dear- ing*, 91 U. S. 29.

credit by way of set-off,¹ under principles already fully discussed.² In like manner, where the action is brought by the receiver against an *indorser* of a note maturing after his appointment, the indorser cannot set off his deposit in the bank;³ and this in accordance with the best opinion on the subject of the right of set-off as against a receiver, assignee, or other representative of insolvents, under statutes providing for a ratable distribution of their property among their creditors. Thus, in New York, one cannot set off a demand due him from an insolvent bank against a liability that has become fixed since the appointment of the receiver;⁴ for, while the receiver succeeds to the rights of the insolvent, he succeeds only to such rights as existed and were fixed at the time when he took possession.⁵ But no new or higher rights can arise *against the creditors* of the insolvent after his assets are impounded for ratable distribution among them.⁶ No subsequent lien can be created, or right of preference obtained, in respect of any such assets, or property, after the appointment of the receiver;⁷ but the rights of the parties must be adjusted with reference to the condition of things which existed when the receiver took charge of the assets. If a note held by the bank was not then due, a deposit held by it cannot be availed of by the depositor as a set-off against the receiver, under principles which have been often acted upon by the courts.⁸ In an action by a receiver against a stockholder, the latter cannot establish a set-off upon evidence that the property was delivered by him to the bank upon an understanding that it should be applied upon his assessment

¹ *Hobart v. Gould*, 8 Fed. Rep. 57; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610.

² *Ante*, § 3786, *et seq.*

³ *Stephens v. Schuchmann*, 32 Mo. App. 333; *s. c.* 3 Nat. Bank Cas. 540.

⁴ *Jordan v. National Shoe & C. Bank*, 74 N. Y. 467; *s. c.* 30 Am. Rep. 319.

⁵ *American Bank v. Wall*, 56 Me. 167; *Miller v. Franklin Bank*, 1 Paige (N. Y.), 444; *Colt v. Brown*, 12 Gray (Mass.), 233.

⁶ See *Fry v. Evans*, 8 Wend. (N. Y.) 530; *Merritt v. Seaman*, 6 N. Y. 163.

⁷ *Balch v. Wilson*, 25 Minn. 299; *s. c.* 33 Am. Rep. 467; *ante*, §§ 3797, 6967.

⁸ *United States Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75, 76; *Clark v. Brockway*, 3 Keyes (N. Y.), 13; *Re Middle District Bank*, 1 Paige (N. Y.), 585; *s. c.* 19 Am. Dec. 452; *Clarke v. Hawkins*, 5 R. I. 219.

if the bank should fail.¹ The obvious reason is, that the individual liability of the stockholders of such a bank is in the nature of a statutory guaranty in favor of the creditors of the bank, which guaranty cannot be frittered away by arrangements between the bank and the stockholder.

●
 § 7303. **Waiver of Right of Set-off.** — The *voluntary payment* by the maker of a promissory note, with full knowledge of all the facts, operates as an abandonment or waiver of all right to set off cross-demands or independent debts; and a bill in equity disclosing such facts presents no case for equitable relief by way of an equitable set-off.²

§ 7304. **Voluntary Liquidation of National Banks.** — The National Bank Act provides that “any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.”³ A national bank in voluntary liquidation does not lose the faculty of suing and being sued in its corporate name for the purpose of closing its business; and a creditor may maintain a suit against it while so in liquidation, upon a disputed claim, although he has filed a bill, under an amendatory act already set out,⁴ to enforce the individual liability of the stockholders.⁵ If the bank is *reorganized* by a majority of the stockholders under a new name, and the assets of the bank in liquidation are sold to the new

¹ Witters v. Sowles, 32 Fed. Rep. 130.

² United States Bung Man. Co. v. Armstrong, 34 Fed. Rep. 94, *per* Jackson, J.

³ Rev. Stats. U. S., § 5220. The succeeding five sections (§§ 5221 to 5225) prescribe the details of the liquidation. Section 5221 provides that notice of the intent to dissolve must be given under the seal of the bank by the president or cashier, to the Comptroller, and published for two months in a newspaper, etc., notifying all creditors to present their claims. By section 5222, within six

months of the resolve to close, the bank must deposit with the United States Treasurer lawful money of the United States sufficient to redeem its outstanding circulation, which goes to the credit of the bank on redemption account. By section 5223, this deposit is not required from a bank consolidating with another. As to *voluntary liquidations by other corporations*, see *ante*, § 6692, *et seq.*; with which compare *ante*, §§ 4443 and 4538, *et seq.*

⁴ Act Cong. June 30, 1876, § 2; *ante*, § 7268.

⁵ National Bank v. Insurance Co., 104 U. S. 54; s. c. 3 Nat. Bank Cas. 23.

corporation, a stockholder, who receives dividends in liquidation, will be estopped to claim a right to share in the earnings of the new bank.¹ The rights of stockholders cannot be affected by contracts made by the president of the bank after it has gone into voluntary liquidation under this statute;² and where the acting president had made, while the bank was in liquidation, a contract with one of its creditors, by which the bank had been released as a guarantor on certain notes, and at the same time the president had attempted so to frame the contract as to retain the liability of the stockholders of the bank, it was held that the release of the bank released the liability of the stockholders.³ The fact that a national bank has gone into voluntary liquidation does not prevent the prosecution of actions against it.⁴

§ 7305. When Stockholders may Elect Agent to Wind up.—The third section of the act of Congress, June 30, 1876, enacts: "That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section 5234 and other sections of said statutes; and when, as provided in section 5236 thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States,—the Comptroller of the Currency shall call a meeting of the shareholders of such association, by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried

¹ First Nat. Bank v. Marshall, 26 Ill. App. 440; s. c. 3 Nat. Bank Cas. 401.

² Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67.

³ Ibid.

⁴ Ordway v. Central Nat. Bank, 47 Md. 217; s. c. 28 Am. Rep. 455; 1 Nat. Bank Cas. 559.

on, or if no newspaper is there published, in the newspaper published nearest thereto; at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote. And when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust,—the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them. And for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such association, and to each and all of the creditors and shareholders thereof. And such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record, or of the United States Circuit Court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided, for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and

things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards.”¹ It has been held that the courts of the United States have the same *jurisdiction* of suits by and against the “agent” of national banks, appointed under this statute, which they have of suits by and against receivers of such banks,—each being in the same sense *officers of the United States*, and each representing in the same relation the bank in its corporate capacity; and that this jurisdiction attaches without regard to diversity of citizenship or amount involved.² If an action has been commenced by the receiver of such a bank, and, pending the action, the receiver is displaced by an “agent” under the provisions of the statute, the agent may be substituted upon motion as plaintiff of record in place of the receiver.³

§ 7306. Receiver Authorized to Purchase Property in Which Bank has Equities.—By the act of Congress of March 29, 1886,⁴ the receiver of national banks is authorized, subject to the approval of the Comptroller of the Currency, to purchase property in which the bank has equities. The statute confers upon the receiver the power, under the superintendency of the Comptroller, to *redeem* property which has been mortgaged, pledged, or otherwise assigned by the bank, whenever the redemption of such property would be to the advantage of the trust. It is not thought necessary to set out the statute in terms.

§ 7307. Notice to Present Claims to Receiver.—The National Bank Act provides: “The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement

¹ Act Cong. June 30, 1876, § 3; 19 U. S. Stats. at Large, 63; Supp. to Rev. Stats. U. S. (2d ed.), p. 107.

² *McConville v. Gilmour*, 36 Fed. Rep. 277.

³ *Ibid.*

⁴ 24 U. S. Stats. at Large, 8; 1 Supp. to Rev. Stats. U. S. (2d ed.), p. 488.

in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.”¹

§ 7308. **Proof of Claims by Creditors.**—“The claims of creditors may be proved before the Comptroller, or established by suit against the association. Creditors must seek their remedy through the Comptroller in the mode prescribed by the statute; they could not, prior to the act of 1876, proceed directly in their own names against the stockholders or debtors of the bank.”²

§ 7309. **Dividends by Comptroller in Liquidation.**—The National Bank Act also provides that: “From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money, so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.”³

§ 7310. **What Claims Entitled to Distribution.**—This distribution by the Comptroller is to include all legal liabilities of the bank, whether such liabilities are *debts*, technically so called, or result from the *non-feasance* or *malfeasance* of its officers acting in its behalf,—*e. g.*, from their *embezzlement* of

¹ Act Cong. June 3, 1864, ch. 106, § 50; 13 U. S. Stats. at Large, p. 114; Rev. Stats. U. S., § 5235.

² Kennedy v. Gibson, 8 Wall. (U. S.) 498; *s. c.* 1 Nat. Bank Cas. 17, 21.

³ Act. Cong. June 3, 1864, ch. 106, § 50; 13 U. S. Stats. at Large, 114; June 30, 1876, ch. 156, § 3; 19 U. S. Stats. at Large, p. 63; Rev. Stats. U. S., § 5236.

bonds committed to the bank for safe-keeping.¹ As hereafter stated,² the claims of depositors and other creditors *draw interest*, because they are in equity entitled to interest before any surplus of the proceeds in the hands of the Comptroller for distribution are handed over to the stockholders.³ Where the claimant had brought an action to establish his claim, and, several years after the appointment of the receiver, had recovered a judgment, and, in the mean time, the receiver had paid several dividends in liquidation,—it was held that this claimant was not entitled to receive the *face of his judgment*, but that the receiver was right in calculating the amount due him according to the judgment, as of the date of the failure, and in paying him but sixty-five per cent upon the amount of the judgment. The reason was that the dividends to the other creditors had been calculated in that way, and that all the judgment creditor was entitled to was a share in the proceeds of the assets equal to what had been distributed to others during the pendency of his litigation. In other words, it was the duty of the Comptroller, in paying dividends upon this judgment, to take its value at the date of the appointment of the receiver as the basis of the distribution, because he had taken the value of the claims of the other creditors as of that date as the basis of the dividends which he had previously made; and if interest was to be added upon one claim after that date, before the percentage of dividends was calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratable, as the law requires. Stated in another way, the dividends are to be paid on the adjudicated claim, and not upon the amount due upon the claim when adjudicated. “The judgment established the claim, as a claim against the bank at the time of the insolvency, and the amount due when the judgment was rendered. Thus, the claim was adjudicated, and the amount due at the date of the judgment ascertained; but

¹ Turner v. First Nat. Bank, 26 Iowa, 562; s. c. 1 Nat. Bank Cas. 454.

³ Compare *ante*, § 3132, *et seq.*, and § 7270.

² *Post*, § 7314.

for the Comptroller to pay the relator on the amount due him at that time, and the other creditors on the amount due them eight years before, when the insolvency occurred, would certainly not be making ratable dividends from the assets on all claims against the bank.”¹

§ 7311. Priorities among Creditors in Such Distribution. The *claims* of depositors, when *proved* to the satisfaction of the Comptroller under the statute quoted in the preceding section, stand on the same footing as though they had been reduced to *judgment*.² Under this statute, claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity, and of determining the amount owed by the bank; but the *judgment*, when recovered, will not give the creditor any *lien* on the property of the bank, nor secure to the judgment creditor any *preference* over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the Comptroller according to the statute.³ After a national bank has been dissolved by the judgment of a court of competent jurisdiction, a creditor cannot, by *attaching* its assets, secure priority over other creditors, but his attachment must yield to the demand of a receiver subsequently appointed.⁴

§ 7312. When United States not a Preferred Creditor.— It has been held that, in the winding up of a national bank

¹ United States *v.* Knox, 111 U. S. 784, 787; *s. c.* 3 Nat. Bank Cas. 128. The act of June 30, 1876, § 3, which we have already set out (*ante*, § 7305), provides in detail for the return by the Comptroller of any surplus after the payment of all claims, to *an agent* to be elected by the shareholders, who shall have power to close up the affairs of the bank and distribute such surplus.

² National Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437; *s. c.* 1 Nat. Bank Cas. 133.

³ Bank of Bethel *v.* Pahquioque Bank, 14 Wall. (U. S.) 383; *s. c.* 1 Nat. Bank Cas. 77.

⁴ National Bank *v.* Colby, 21 Wall. (U. S.) 609; *s. c.* 1 Nat. Bank Cas. 109; *ante*, § 7274, *et seq.*

and in the distribution of its assets, *the United States is not a preferred creditor*, under the general act of Congress which gives the United States a first preference in the distribution of insolvent estates,¹ for the reason that the question is governed by a special statute, namely, the National Bank Act, and the special statute creates no such preference.² Nor can the United States take to itself a preference by claiming payment of its demand out of the surplus moneys remaining in its treasury accruing from proceeds of the bonds deposited as security for the circulating notes of the bank.³

§ 7313. Fees and Expenses of the Winding up and Receivership.—The National Bank Act also provides as follows: “All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.”⁴

§ 7314. Creditors Entitled to Interest.—The Comptroller, in making the distribution, should allow *interest* on the claims of creditors during the period of the administration before appropriating the surplus to the stockholders.⁵ Where a national bank held *deposits*, refusing to pay the same on demand, and thereafter a receiver was appointed, it was held that a depositor was entitled to interest from the date of his demand.⁶

¹ Rev. Stats. U. S., § 3466.

² Cook County Nat. Bank *v.* United States, 107 U. S. 445; reversing *s. c.* 25 Int. Rev. Rec. 266; 2 Nat. Bank Cas. 128; 9 Biss. (U. S.) 55.

³ *Ibid.*

⁴ Act of Cong. June 3, 1864, ch.

106, § 51; 13 U. S. Stats. at Large, p. 115; Rev. Stats. U. S., § 5238.

⁵ Chemical Nat. Bank *v.* Bailey, 12 Blatchf. (U. S.) 480.

⁶ National Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437; *s. c.* 1 Nat. Bank Cas. 133.

§ 7315. Redemption of Circulating Notes.—The National Bank Act provides: "Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid."¹

§ 7316. Enjoining Proceedings by Comptroller and Receiver.—The National Bank Act provides: "Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section 5227, apply to the nearest Circuit, or District, or Territorial court of the United States, to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show

¹ Act Cong. June 3, 1864, ch. 106, § 47; 13 U. S. Stats. at Large, p. 114; Rev. Stats. U. S., § 5229. By section 5230 it is provided that when the Comptroller becomes satisfied, under section 5226, or section 5227, of the bank's failure as there stated, he may, instead of canceling its bonds, sell the necessary amount of them at auction in New York City upon thirty days' notice to the bank; and that, for any deficiency in reimbursing the United States for redeeming its circulation, the United States has a paramount lien upon all its assets. As to this paramount lien, see *Schmidt v. First Nat. Bank*, 22 La. An. 314; s. c. 1 Nat. Bank Cas. 505.

By section 5231 it is provided that the Comptroller may sell the bonds instead at private sale, receiving in exchange therefor, either money or the circulating notes of the bank, but not for less than par nor the market value, and that no sale, either public or private, shall be complete until the bonds are transferred according to the provisions of sections 5162, 5163, and 5164. By section 5232, the Secretary of the Treasury may regulate the disposition, after presentation, of the circulating notes presented at the Treasury for payment; and by section 5233 all such notes must be canceled upon being paid.

cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal."¹

§ 7317. **Actions against National Banks after Commencement of Liquidation.** — An action may be maintained against a national bank after the appointment of a receiver by the Comptroller of the Currency.² So, an action may be prosecuted against a national bank, although it has resolved to go into liquidation, and has provided for its circulating notes under a statute already set out.³ And where, after the suspension of a national bank and the appointment of a receiver, an action is brought against it in a State court, the *receiver* may be *joined* as a party *defendant*.⁴

§ 7318. **Defenses Available to the Receiver against Actions.** — Where a creditor of a national bank brings an action against the bank and its receiver, upon a note upon which the bank is liable, it is not competent for the defendants to set up, by way of defense, that the note was void under the section of the National Bank Act,⁵ which provides that "no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock, at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following,"—the demand which gave rise to the indebtedness on the note not being within any of the exceptions.⁶

¹ Act Cong. June 3, 1864, ch. 106, § 50; 13 U. S. Stats. at Large, 114; Rev. Stats. U. S., § 5237.

² Bank of Bethel *v.* Pahquioque Bank, 14 Wall. (U. S.) 383, 386, 400; Green *v.* Walkill Nat. Bank, 7 Hun (N. Y.), 63; s. c. 1 Nat. Bank Cas. 786.

³ Ordway *v.* Central Nat. Bank, 47 Md. 217; s. c. 28 Am. Rep. 455; 2 Nat. Bank Cas. 559; *ante*, § 7268.

⁴ Turner *v.* First Nat. Bank, 26 Iowa, 562; s. c. 1 Nat. Bank Cas. 454.

⁵ Rev. Stats. U. S., § 5202.

⁶ Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208; reversing s. c. 50 Fed.

§ 7319. **State Courts No Control over Receiver.**—Since, by the terms of the governing statute, the receiver is to pay over all money which had come into his hands, to the Treasurer of the United States, subject to the order of the Comptroller, and also to make report to the Comptroller of all his acts and proceedings,¹ and as the dividends to creditors are to be made by the Comptroller of the Currency, and not by the receiver,²—it is plain that a State court has no power to order a receiver appointed by the Comptroller of the Currency, to pay a judgment recovered against the bank before his appointment.³

§ 7320. **Jurisdiction of State Courts of Actions by and against Such Receivers.**—Under the general principles of American constitutional law touching the duality of our general and State governments and the concurrency of the juris-

Rep. 735. The indebtedness was incurred for *furniture* to be used in the bank, and was evidenced by three promissory notes made by one Hussey, and indorsed by the bank before delivery, and the sale was in fact made to Hussey, and the furniture did not pass into the hands of the receiver as assets of the bank. The court below proceeded upon the doctrine that "contracts of corporations creating debts in excess of limitations fixed by their charters, are void, and such debts 'are not collectible by law'"; citing *Crampton v. Zabriskie*, 101 U. S. 601; *Daviess Co. v. Dickinson*, 117 U. S. 657; *Litchfield v. Ballou*, 114 U. S. 190; 7 Am. & Eng. Corp. Cas. 378. Hanford, J., added: "Business men are presumed to know the financial condition of corporations to whom they give credit, and if one voluntarily becomes a creditor for an additional amount, after a statutory limit has been reached, his position in a court of law is no better than that of one who knowingly becomes a party

to an illegal contract." It may be added, by way of comment upon this, that most business men would be very glad if they could know the financial condition of corporations, and especially *banking* corporations, to which they give credit; and many business men would be obliged to judges who propound such doctrines, if they would inform them in what manner they can make themselves acquainted with the financial condition of such corporations; and it is very little consolation to them, when they reflect upon the fact that their *ignorance* is, in most cases, absolutely *unavoidable*, that the law makes it, in a sense, *criminal*. The opinion of the Circuit Court of Appeals, by Gilbert, J., very clearly shows the inapplicability of the above decisions, which related to *municipal* corporations.

¹ Rev. Stats. U. S., § 5234.

² *Ibid.*, § 5236.

³ *Ocean Nat. Bank v. Carll*, 5 Hun (N. Y.), 237; *s. c.* 1 Nat. Bank Cas. 792.

diction of the courts of both governments, to administer the statute law enacted by the legislature of either government, the courts of the States have jurisdiction of actions by and against national banks and their receivers, in all cases where such jurisdiction is not excluded by the governing act of Congress, in express terms or by necessary implication. This conclusion results from the principles touching such jurisdiction which were laid down in the Supreme Court of the United States in the following language, in its opinion by Mr. Justice Bradley: "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction."¹ The juris-

¹ *Claffin v. Houseman*, 93 U. S. 130, 136; citing observations of Mr. Justice Field in *The Moses Taylor*, 4 Wall. (U. S.) 411, 429; those of Mr. Justice Story in *Martin v. Hunter*, 1 Wheat. (U. S.) 304, 334; and those of Mr. Justice Swayne in *Ex parte McNiel*, 13 Wall. (U. S.) 236. Mr. Justice Bradley added the following judicious

observations: "This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a

diction of the State courts in the cases under consideration, is impliedly conferred by the statute of 1882, already considered,¹ limiting and restraining the jurisdiction of courts of the United States in these cases. For instance, a State court has jurisdiction of an action founded on a contract brought by a resident of the State of the forum against a national bank located in another State, provided, of course, that service of process can be procured.² There is a Federal holding to the effect that a creditor of a national bank has *no right of action* against the receiver. Said the court: "The receiver has no control over the assets, except to pay their proceeds to the Treasurer of the United States, and would therefore not be liable to the plaintiff in any form of action."³ The creditor's right of action was against the bank only.⁴

§ 7321. No Relief against the United States in Actions against the Comptroller or Receiver.—When it is consid-

proper action in a State court. The fact that a State court derives its existence and functions from the State laws, is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occa-

sion of disastrous evils to the country." *Clafin v. Houseman*, 93 U. S. 130, 137. In the particular case the court held that, under the late bankruptcy law, an *assignee in bankruptcy might sue in a State court* to recover assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States.

¹ *Ante*, § 7270.

² *Robinson v. National Bank*, 58 How. Pr. (N. Y.) 306. This was an action in the Supreme Court of New York against a national bank, located in North Carolina. The action was commenced by *attachment*; and a valid attachment was, of course, necessary to support the jurisdiction. But it has been seen that such an attachment is prohibited by the language of the National Banking Act: *ante*, § 7274.

³ *Chemical Nat. Bank v. Bailey*, 12 Blatchf. (U. S.) 480; *s. c.* 1 Nat. Bank Cas. 260, 262, *per* Wallace, J.

⁴ *Ibid.*

ered that the United States, in their political character, are sovereign, and hence cannot be sued without their consent, and then only in the forum, and for the cause, and under the conditions expressed in that consent,¹—it must follow that, in the winding up of an insolvent national bank, *the United States cannot be drawn into the litigation* in any form of proceeding without its consent, — the Court of Claims being the only tribunal which is authorized to adjudicate and establish demands against the United States. It would scarcely be thought necessary to make these suggestions, if it were not for the fact that the Supreme Court of the United States found itself obliged so to hold, in a case appealed to it from the Circuit Court of the United States for the District of Louisiana. Certain creditors filed a bill against the receiver of a national bank, the Comptroller of the Currency of the United States, and two citizens of Louisiana, praying, among other things, that certain debts due to the United States from the bank be ascertained; that the United States be charged with certain sums, and required to account for them; and that a writ of injunction issue, restraining the Comptroller from making a dividend of the funds of the bank until the account be adjusted. The receiver and Comptroller appeared and answered the bill, and the receiver stated in his answer that “he submits, on behalf of the United States, to the decision of the court, the claims of the United States to priority of payment over the allowed claims of the creditors of said bank that are not disputed.” The only substantial relief was a decree against the United States, in favor of the creditors of the bank, for the sum of over \$200,000, which decree directed that no claim of the United States should have any priority in the distribution of the funds of the bank, except as to the bonds pledged to secure its circulation. On the appeal of the Comptroller and receiver, this decree was reversed. The

¹ That actions do not lie against the United States, see *De Groot v. United States*, 5 Wall. (U. S.) 419; *United States v. Eckford*, 6 Wall. (U. S.) 484; *The Siren*, 7 Wall. (U. S.) 152; *The Davis*, 10 Wall. (U. S.) 15; *Case v. Terrell*, 11 Wall. (U. S.) 199; *s. c.* 1 Nat. Bank Cas. 67.

court held that neither the Comptroller nor the receiver, by appearing and answering such a bill, could draw the United States into the controversy, since neither of them represented the United States for the purpose of subjecting it to the jurisdiction of the court. The receiver represented the bank, its creditors and stockholders, and did not in any sense represent the government; nor could such authority be conceded to the Comptroller of the Currency. If the government was liable and its liability was denied by its proper accounting officer, or payment refused, the Court of Claims had jurisdiction, and no other court had.¹

§ 7322. **What Actions Lie against the Comptroller.**—An ordinary action at law, by a creditor of the bank, will not lie against the Comptroller of the Currency. It was said that if an action could be maintained against him, it would be one to enforce a proper *distribution* of the fund; and it was accordingly held that an action of *assumpsit* would not lie against him, for it was not an appropriate remedy for that purpose.²

§ 7323. **Effect of Receiver being Substituted as Defendant.**—Where an action is brought in a State court against a national bank, and a receiver of the bank is appointed by the Comptroller of the Currency, and the receiver, on his own application, is substituted as defendant, — this does not *estop* him from questioning the *jurisdiction* of the State court.³

§ 7324. **Payment of State Taxes.**—The *status* of taxes assessed by the State against national banks upon the property of such banks in the hands of a receiver, will depend upon considerations adverted to in another connection.⁴ If, under the taxing laws of the State, not in conflict with the constitution or any of the statute laws of the United States, the tax had become a *lien* upon the specific property of the

¹ Case *v.* Terrell, 11 Wall. (U. S.) 199; *s. c.* 1 Nat. Bank Cas. 67.

* Chemical Nat. Bank *v.* Bailey, ³ Cadle *v.* Tracy, 11 Blatchf. (U. S.)
12 Blatchf. (U. S.) 480; *s. c.* 1 Nat. 101; *s. c.* 1 Nat. Bank Cas. 230.
Bank Cas. 260. ⁴ *Ante*, § 2854, *et seq.*

bank, prior to its passing into the hands of the receiver, such lien will, it may be assumed, attend the property in the hands of the receiver, and the Comptroller of the Currency will be obliged to respect it in making distribution. But where, under the taxing laws of the State, a tax, not having been levied upon specific property of the bank at the time when it passed into the hands of the receiver, was merely a *debt* due to the State, it stood on the footing of any other debt, and was not entitled to priority of distribution; nor could the taxing officer of the State lawfully seize property belonging to the bank to satisfy such a tax; and where such seizure was made, it was held that the receiver was entitled to an injunction to restrain the same.¹ The personal assets of an insolvent national bank should, in the hands of such a receiver, be exempt from taxation, to the same extent to which they were exempt in the hands of the bank before his appointment.²

§ 7325. **Actions against Receiver for Taxes.**—We have already had occasion to notice a scheme of taxation adopted by many of the States, under an enabling act of Congress, by which they lay taxes upon the *shares* of the capital stock of national banks, as distinguished from the *capital* itself.³ The only theory which justifies this mode of collection is, that the corporation is *in privity with its shareholders*, and is, in fact, their *trustee* for the protection of their rights as shareholders,⁴ and hence, that the corporation may easily *reimburse* itself from its shareholders, by withholding *dividends* from them, or by asserting a lien against their shares. But this scheme of taxation can only be justified on the assumption that the shares have *some value*, out of which the corporation can recoup itself in respect of what it has disbursed in payment of the tax. Construing such a statute,⁵ it was held that

¹ Woodward v. Ellsworth, 4 Colo. 580; s. c. 2 Nat. Bank Cas. 216.

² Rosenblatt v. Johnston, 104 U. S. 462; s. c. 3 Nat. Bank Cas. 32.

³ Ante, §§ 2813, 2854, et seq., and 2913.

⁴ That this is the relation of a corporation to its shareholders, see ante, § 2486, et seq.

⁵ The statute was Pub. Stat. Mass., ch. 13, §§ 8, 9, and 10, which provided that shares of stock in all banks, State

no suit for such a tax could be maintained against the receiver of an insolvent national bank, where the property represented by the shares had disappeared; and this, for the reason that nothing was left out of which the funds in the hands of the receiver could be reimbursed,—for which reason, the tax, if paid, would fall upon the assets of the bank, which belonged to its *creditors*, so that the payment of it would violate the rule that a State cannot tax the capital stock of a national bank.¹

§ 7326. *Sales by Such Receivers.*—It will be recalled that the section of the National Bank Act which defines the powers and duties of such receivers, recites that “such receiver, . . . upon the order of a court of record of competent jurisdiction, may *sell* or compound all bad or doubtful debts, and, on a like order, may *sell* all the real and personal property of such association, on such terms as the court shall direct,” etc.² Where the receiver presented a petition to the United States District Court, and obtained from the court an order permitting him “to sell each and every item of personal property and real estate mentioned and described in said schedule B, attached to his petition, on such terms and in such manner as, in his judgment, may be for the best interests of the creditors, and all interested in said bank and its assets,”—it was held that this gave him no power to *exchange, barter, or trade* the assets.³ Therefore, the failure of the receiver to comply with the terms of such a contract of barter or exchange, will not support an action to charge the assets of the bank in his hands.⁴ A sale by such a receiver is a *judicial sale*, and remains, it seems, under the superin-

and national, should be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for its reimbursement, should have a *lien* on the shares, and all the rights of the shareholders in the bank property.

¹ *Boston v. Beal*, 51 Fed. Rep. 306. For the rule that a State cannot tax

the *capital stock* of a national bank, see *ante*, § 2857.

² Rev. Stats. U. S., § 5234; *ante*, § 7264.

³ *Ellis v. Little*, 27 Kan. 707; *s. c.* 41 Am. Rep. 434; 3 Nat. Bank Cas. 440.

⁴ *Ibid.*

tendence of the court from which the receiver procured the order of sale; and, although the rights of the purchaser at such a sale are subject to the action of the court, yet it has been justly said that such action must depend upon the general principles and usages of law. But where the receiver, having made a sale, petitioned the court for an order to set it aside after it had been confirmed, and showed to the court that he had received a subsequent offer of an advance over the bid of the owner to whom it had been struck off, and a previous sale had been set aside for inadequacy of price,—it was held that the court ought not to set the sale aside.¹

§ 7327. Replevin of Property in Custody of Receiver.—

The party claiming title to property in possession of a receiver of an insolvent national bank, which has come into the possession of such receiver, with other property of the bank, may, on the refusal of the receiver to deliver the same, maintain an action of *replevin* to determine his title and right of possession thereto. Such an action is not prohibited by section 5242 of the Revised Statutes of the United States,² because the word “attachment,” as everywhere used, implies that the title is in the person against whom the suit by attachment proceeds. But the action of replevin is exactly the reverse. It proceeds

¹ Re Third Nat. Bank, 4 Fed. Rep. 775. In giving his *advice* to the District Judge against setting the sale aside, Mr. Circuit Judge Drummond said: “Let us see in what position this places the court. After the court has ordered a sale, and it is made, and the purchaser asks that it shall be confirmed, and the court has decided that a certain advance is not sufficient, they then bid upon the action of the court. In other words, it becomes a sort of auction in the court as to the price at which the property should sell. I do not think this is a proper way to make judicial sales; nor will it tend to make par-

ties come forward with an assurance that, if they bid in good faith for property offered at a judicial sale, they will be protected in their rights; nor will it cause property to bring what it is actually worth. The very fact that people believe that a sale amounts to nothing, or that the court will, of course, set it aside, prevents property from bringing its true value; and nothing, it seems to me, can more effectually destroy the sanctity, so to speak, of a judicial sale—nothing more injuriously affects such a sale—than to allow a practice of this kind.”

² *Ante*, § 7271.

upon an assertion of the fact that the title is in the plaintiff in the action, and not in the defendant who holds possession of the property. Such an action is not a disturbance of the rightful custody of the receiver, because he has no rightful custody of property except such as belonged to the bank, and "no law makes him the inevitable stake-holder, pending the litigation."¹

§ 7328. Effect of Appointment upon the Statute of Limitations.—The appointment of a receiver does not start the running of the *statute of limitations* against the claim of one who holds a *certificate of deposit* of the bank.² The reason is that a certificate of deposit, from its very nature, being payable to the order of the depositor, on its return to the bank, is not due or suable until *demand* made on the bank and *refusal* to comply with the same.³ Besides, there was a statute of Pennsylvania excluding insolvent corporations from the operation of the statute of limitations.⁴

¹ Corn Exch. Bank *v.* Blye, 101 N. Y. 303; *s. c.* 3 Nat. Bank Cas. 634; affirming *s. c.* 37 Hun (N. Y.), 473.

² Riddle *v.* First Nat. Bank, 27 Fed. Rep. 503.

³ See McGough *v.* Jamison, 107 Pa. St. 336. That the statute of limitations does not run against the holder

of a *certificate of deposit* until a *demand* has been made,—see Smiley *v.* Fry, 100 N. Y. 262; *s. c.* 3 N. E. Rep. 186; Branch *v.* Dawson, 33 Minn. 399; *s. c.* 23 N. W. Rep. 552. Compare Tripp *v.* Curtenius, 36 Mich. 494; *s. c.* 24 Am. Rep. 610.

⁴ 2 Purd. Pa. Stat. 1067, pl. 24.

CHAPTER CLXXVI.

FOREIGN RECEIVERS.

SECTION	SECTION
7334. Receivers have no extra-territorial power.	7344. Cases refusing to extend this comity.
7335. Cannot sue in a foreign jurisdiction except by comity.	7345. Foreign receivers preferred in contest with the debtor and his privies.
7336. This comity generally recognized except as against domestic citizens.	7346. Foreign receiver preferred in contest with foreign creditor.
7337. This comity does not extend to the prejudice of the State's own citizens.	7347. Distinction between voluntary assignments and assignments <i>in invitum</i> by operation of law.
7338. Foreign judicial assignments invalid as against domestic creditors.	7348. Where the receiver adopts and carries out the contract of the corporation.
7339. Actions permitted when not in derogation of domestic rights.	7349. Not chargeable as garnishee or with trustee process.
7340. For what purposes non-resident receivers permitted to sue.	7350. Attachment in foreign jurisdiction a contempt of court.
7341. May sue to repossess himself of property removed into the domestic jurisdiction.	7351. Appointing a receiver of property situated in a foreign jurisdiction.
7342. Illustrations of this principle.	7352. Auxiliary receivers appointed as a matter of comity.
7343. Real property situate in the foreign jurisdiction does not vest in receiver.	7353. Receiver cannot transfer jurisdiction to foreign court.

§ 7334. **Receivers have No Extra-territorial Power.**—A receiver “has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.”¹ Another

¹ Booth v. Clark, 17 How. (U. S.) 322, 338.

court has said that "a receiver is but an officer of the court which appoints him, and it would follow upon principle, and which is abundantly sustained by authority, that he cannot act in his official capacity outside the jurisdiction of the court by which he was appointed."¹

§ 7335. **Cannot Sue in a Foreign Jurisdiction except by Comity.**—It follows that "outside of the jurisdiction which appoints him, a receiver is not ordinarily entitled to maintain suits except by comity."²

§ 7336. **This Comity Generally Recognized except as against Domestic Citizens.**—Most of the American courts extend this comity so far as to give validity to foreign assignments and to foreign transfers of property, *in invitum*, in judicial proceedings, especially where the assignment or transfer takes place in another State of the American Union, when to do so will not operate to the prejudice of any rights secured by the local law to their own citizens.³

§ 7337. **This Comity does not Extend to the Prejudice of the State's Own Citizens.**—This comity does not extend

¹ Moseby v. Burrow, 52 Tex. 396, 403. Other cases affirming this doctrine are:—Farmers' &c. Ins. Co. v. Needles, 52 Mo. 17; Tully v. Herrin, 44 Miss. 626; Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477; s. c. 18 Am. St. Rep. 338; Sercomb v. Catlin, 128 Ill. 556; s. c. 15 Am. St. Rep. 147; Hunt v. Columbian Ins. Co., 55 Me. 290; s. c. 92 Am. Dec. 592; Chicago &c. R. Co. v. Keokuk &c. Packet Co., 108 Ill. 317; s. c. 48 Am. Rep. 557; Wilkinson v. Culver, 23 Blatchf. (U. S.) 416; Reynolds v. Stockton, 43 N. J. Eq. 211; s. c. 3 Am. St. Rep. 305; State v. Jacksonville &c. R. Co., 15 Fla. 201; Holmes v. Sherwood, 3 McCrary (U. S.), 405; Kain v. Smith, 80 N. Y. 458; s. c. 8 Abb. N. Cas. (N. Y.) 426; Kilmer v. Hobart, 58 How. Pr. (N. Y.) 452; Moseby v. Burrow, 52 Tex. 396;

Olney v. Tanner, 21 Blatchf. (U. S.) 540; Brigham v. Luddington, 12 Blatchf. (U. S.) 237; Warren v. Union National Bank, 7 Phila. (Pa.) 156; Hope &c. Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278; Willitts v. Waite, 25 N. Y. 577; Kronberg v. Elder, 18 Kan. 150, 152; Bartlett v. Wilbur, 53 Md. 485; Day v. Postal Telegraph Co., 66 Md. 354.

² Olney v. Tanner, 10 Fed. Rep. 101, 104; Humphreys v. Hopkins, 81 Cal. 551; s. c. 15 Am. St. Rep. 76; Sercomb v. Catlin, 128 Ill. 556; s. c. 15 Am. St. Rep. 147; Hunt v. Columbian Ins. Co., 55 Me. 290; s. c. 92 Am. Dec. 592; Hoyt v. Thompson, 5 N. Y. 320; s. c. 19 N. Y. 207.

³ Mowry v. Crocker, 6 Wis. 326; Cook v. Van Horn, 81 Wis. 291; Iglehart v. Bierce, 36 Ill. 133.

so far as to require one State to give effect to the laws and judicial proceedings of another State, when to do so will contravene its own public policy or its own laws, or be in derogation of the rights of its own citizens vested thereunder.¹ This principle is constantly applied in determining whether a foreign receiver will be permitted to bring actions, or otherwise to possess himself of, or deal with, the property of the debtor situated within the domestic jurisdiction. At an early period of our American jurisprudence, when the tribal theory — the theory of a mere league of independent sovereign States, — was uppermost in the minds of judges as the theory of the relation of the American States *inter sese*, — it was seldom, if ever, that a receiver appointed in one State was permitted to maintain an action in the courts of another State. In a leading case upon this subject, the court say: "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal."² But, it having been settled amid the thunder of cannon, — so far as force can settle any legal proposition or question of interpretation, — that the American States, in their relations among themselves, do not constitute a mere league of independent sovereignties, but rather present the case of a collection of quasi-sovereign communities in a close political union, — the

¹ McLean v. Hardin, 3 Jones Eq. (N. C.) 294; s. c. 69 Am. Dec. 740; Mahorner v. Hove, 9 Smedes & M. (Miss.), 247; s. c. 48 Am. Dec. 706; Humphreys v. Hopkins, 81 Cal. 551; s. c. 15 Am. St. Rep. 76; Wells v. Wells, 35 Miss. 638; Smith v. Godfrey, 28 N. H. 379; s. c. 61 Am. Dec. 617; Kanaga v. Taylor, 7 Ohio St. 134; s. c. 70 Am. Dec. 62; Bank v. McLeod, 38 Ohio St. 174, 180; Walters v. Whitlock, 9 Fla. 86; s. c. 76 Am. Dec. 607; Roche v. Washington, 19 Ind. 53; s. c. 81 Am. Dec. 376; Hurd v. Elizabeth, 41 N. J. L. 1; Johnson v. Parker, 4

Bush (Ky.), 149; Saunders v. Williams, 5 N. H. 213; Bagby v. Atlantic & C. R. Co., 86 Pa. St. 291; Pierce v. O'Brien, 129 Mass. 314, 315; Taylor v. Columbian Ins. Co., 14 Allen (Mass.), 353; Boulware v. Davis, 90 Ala. 207; Chandler v. Siddle, 3 Dill. (U. S.) 477; Pugh v. Hurtt, 52 How. Pr. (N. Y.) 22; Thurston v. Rosenfield, 42 Mo. 474; Runk v. St. John, 29 Barb. (N. Y.) 585, 587; Palmer v. Mason, 42 Mich. 146, 152; Booth v. Clark, 17 How. (U. S.) 322.

² Booth v. Clark, 17 How. (U. S.) 322, 334.

tendency is more and more to respect each other's laws and judicial proceedings, and to enlarge the principle of comity, which gives effect to them. A most conspicuous modern illustration, or class of illustrations, of the extension of this principle of comity, is found in the so-called *Glenn cases*, where a trustee, — in substance a receiver, — of an insolvent corporation, appointed by a court in Virginia, successfully maintained actions to recover assessments from its stockholders, both in the Federal and State courts, in many other States of the Union, and where the propriety of so doing was upheld by the Supreme Court of the United States.¹

§ 7338. Foreign Judicial Assignments Invalid as against Domestic Creditors. — In conformity with this principle, the rule now universally admitted and acted upon is, that assignments of the property of an insolvent, made, *in invitum*, by a court in a foreign jurisdiction, for the purposes of judicial administration, to a receiver, assignee, trustee, or other functionary, by whatever name called, are not permitted so to operate as to deprive domestic creditors of any remedy given them by the domestic law.² The principle has been stated with great clearness by Mr. Justice Gray in the following language: "This question is conclusively settled by authority. The effect of foreign laws beyond their own jurisdiction depends wholly upon the comity of the State in which their application is invoked. The general rule is everywhere admitted that the transfer of personal property, wherever situated, is to be governed by the law of the domicile of the owner. But the exception is equally well established in this country that when, upon the insolvency of a debtor, the law of the State in which he resides assumes to take his

¹ *Ante*, § 3570, last note.

² *Booth v. Clark*, 17 How. (U. S.) 322, 336; *Blake v. Williams*, 6 Pick. (Mass.) 286; *s. c.* 17 Am. Dec. 372; *May v. Breed*, 7 Cush. (Mass.) 15, 41, 42; *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.), 353; *Willits v. Waite*,

25 N. Y. 577; *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 477; *s. c.* 18 Am. St. Rep. 338; 24 N. E. Rep. 250; *Pugh v. Hurtt*, 52 How. Pr. (N. Y.) 22; *Humphreys v. Hopkins*, 81 Cal. 551; *s. c.* 15 Am. St. Rep. 76.

property out of his control, and to assign it, by judicial proceedings, without his assent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction. It can make no difference whether the persons to whom the involuntary assignment is made are called assignees, trustees, or receivers, or whether the debtor is an individual or a corporation, provided either remains in existence and liable to be sued. An assignment under the laws of another State of the Union stands upon the same ground as one made under the laws of a foreign country; for the States are in this respect independent of one another, and subject to no common control, so long as there is no national bankrupt law."¹

§ 7339. Actions Permitted when not in Derogation of Domestic Rights. — As between sister States of the American Union, the principle now generally acted upon is, that a receiver, appointed in another State, will be permitted, on the principle of comity, to bring an action in the domestic forum, for the purpose of collecting the assets of the insolvent, for distribution in accordance with the law of the foreign jurisdiction, when so to do will not contravene the rights of citizens of the domestic State.² This principle applies, not only

¹ Taylor v. Columbian Ins. Co., 14 Allen (Mass.), 353, 354, 355.

² Metzner v. Bauer, 98 Ind. 425; Runk v. St. John, 29 Barb. (N. Y.) 585; Hoyt v. Thompson, 5 N. Y. 320; Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291; Hurd v. Elizabeth, 41 N. J. L. 1; Bidlack v. Mason, 26 N. J. Eq. 230; Bank v. McLeod, 38 Ohio St. 174; Toronto General Trust Co. v. Chicago &c. R. Co., 123 N. Y. 37 (trustee appointed in Canada); Re Waite, 99 N. Y. 433; McAlpin v. Jones, 10 La. An. 552; Comstock v. Frederickson, 51 Minn. 350; s. c. 53 N. W. Rep. 713;

Lycoming Fire Ins. Co. v. Langley, 62 Md. 196; Boulware v. Davis, 90 Ala. 207; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Chicago &c. R. Co. v. Keokuk &c. Co., 108 Ill. 317; s. c. 48 Am. Rep. 557; Graydon v. Church, 7 Mich. 36; Pugh v. Hurtt, 52 How. Pr. (N. Y.) 22; Iglehart v. Bierce, 36 Ill. 133; Ex parte Norwood, 3 Biss. (U. S.) 504; National Trust Co. v. Miller, 33 N. J. Eq. 155; Paradise v. Farmers' &c. Bank, 5 La. An. 710; Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580, 583; s. c. 35 Am. Rep. 716.

in the case of receivers, but in the case of every other kind of statutory assignee or trustee, acquiring, by operation of the law of the State or country wherein he is appointed, dominion over the property of an insolvent, for the purpose of administration for the benefit of his creditors, — as distinguished from a *voluntary* assignee who holds the legal title, which carries with it a right of action *ex proprio vigore*.¹

¹ As to the distinction, in this respect, between *voluntary* and *involuntary* assignments, see *post*, § 7347. With reference to the question, so far as it relates to the right of action of the *assignees of bankrupts* appointed by a foreign tribunal, it may be worth while to note that the liberal genius of Chancellor Kent conceded to such trustees an unqualified right of action in the courts of New York. In *Bird v. Caritat*, 2 Johns. (N. Y.) 342, *s. c.* 3 Am. Dec. 433, it was held that a suit could be brought in that State, in the name of a foreign bankrupt, by his assignees, for their benefit as such, using the name of the bankrupt according to the principles of common-law pleading, since abrogated in the code States. "This," said he, "is more a question concerning form than substance; for there can be no doubt of the right of the assignees to collect the debts due to the bankrupt, either by a suit directly in their own names, or as trustees, using the name of the bankrupt. It is a principle of general practice among nations to admit and give effect to the title of foreign assignees. This is done on the ground that the conveyance, under the bankrupt laws of the country where the owner is domiciled, is *equivalent to a voluntary conveyance* by the bankrupt." In *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, *s. c.* 8 Am. Dec. 581, Chancellor Kent wrote an elaborate opinion, holding that foreign assign-

ees in bankruptcy took title to all the property of the bankrupt wherever situated, with the same force and effect as if the bankrupt had made a voluntary assignment of his property, and that such a title was good, even against subsequent attaching creditors, in a country other than that where the bankruptcy adjudication had taken place, and where the statutory transfer had been made. He said: "It is admitted in every case, that foreign assignees, duly appointed under foreign ordinances, are entitled, as such, to sue for debts due to the bankrupt's estate." *Ibid.* 485. In *Raymond v. Johnson*, 11 Johns. (N. Y.) 488, it was held that, although the court would recognize and protect the rights of an assignee, under the insolvent laws of another State, yet an action brought in New York must be in the name of the insolvent. But that rule of pleading is now abolished by the code, which requires every action to be brought in the name of the real party in interest. Another controversy came before the courts of New York between *Holmes and Remsen* (*Holmes v. Remsen*, 20 Johns. (N. Y.) 229; *s. c.* 11 Am. Dec. 269), where Platt, J., expressed views upon the question somewhat different from those of Chancellor Kent. In an opinion of exceptional learning and strength, he, in substance, annexed to those views the following qualification, which is quoted from the conclud-

§ 7340. For What Purposes Non-resident Receiver Permitted to Sue.—Giving effect to this principle of comity, it has been held that a non-resident receiver will be permitted to sue in a domestic tribunal, or to move therein to set aside a judgment on the ground of its being fraudulent as against the creditors represented by him, when there are no domestic

ing argument of Mr. Caines for the attaching creditors, and which is now generally accepted by all American tribunals: "We admit that the bankrupt assignment passes all the property of the bankrupt, here and everywhere, *provided* always that there are no creditors here having claims on that property. We admit the right of the assignees of the bankrupt to collect his property here and take it to *England*, if there are no creditors of the bankrupt here, but not otherwise. If there are creditors attaching here, there is a *conflictus legum*, and the foreign law must yield." *Ibid.* 254. Subsequently it was held by Chancellor Walworth that an assignment in bankruptcy, made in England, was good to pass personal property situated in New York, *as against the bankrupt himself and his creditors residing in England* (*Plestoro v. Abraham*, 1 Paige (N. Y.), 236); and such, we shall see, is the generally conceded law: *Post*, § 7345. In 1885 the Court of Appeals of New York, in a learned and laborious opinion by Earl, J., went over the decisions of that State relating to this question, and analyzed them with care, and the court announced the following doctrine: "1. The statutes of foreign States can, in no case, have any force or effect in this State, *ex proprio vigore*; and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. 2. But the comity of nations, which Judge Denio, in *Peter-*

sen v. Chemical Bank, 32 N. Y. 21, *s. c.* 88 Am. Dec. 298, said is a part of the common law,—allows a certain effect here to titles derived under, and power created by the laws of other countries; and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here, under our statutes; provided also, that such titles are not in conflict with the laws or the public policy of our State. 3. Such foreign assignees can appear, and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withhold the property of the bankrupt." *Re Waite*, 99 N. Y. 433, 448. The court regard these propositions as a legitimate deduction from the following decisions: *Petersen v. Chemical Bank*, 32 N. Y. 21; *s. c.* 88 Am. Dec. 298; *Kelly v. Crapo*, 45 N. Y. 86; *s. c.* 6 Am. Rep. 35; *Osgood v. Maguire*, 61 N. Y. 524; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *s. c.* 38 Am. Rep. 518; *Re Bristol*, 16 Abb. Pr. (N. Y.) 184; *Runk v. St. John*, 29 Barb. (N. Y.) 585; *Barclay v. Quicksilver Min. Co.*, 6 Lans. (N. Y.) 25; *Hooper v. Tuckerman*, 3 Sandf. (N. Y.) 311; *Olyphant v. Atwood*, 4 Bosw. (N. Y.) 459; *Hunt v. Jackson*, 5 Blatchf. (U. S.) 349.

creditors whose *rights*,—that is to say, whose *preferences*,—are to be protected.¹ So, where, on the dissolution of an insurance company domiciled in Pennsylvania, a receiver was appointed in that State, under a statute thereof, which clothed him “with power to prosecute and defend suits in the name of the corporation,”—it was held that an action might be maintained by him in Maryland in the name of the corporation, for his use, against a policy-holder, to recover assessments due by him.² So, it has been held that the courts of Alabama may properly take jurisdiction of an action by the receiver of an insolvent foreign corporation, brought for the purpose of gathering in its assets for an equal distribution amongst its creditors, where only the parties litigant appear to be interested, and where no domestic creditor appears to assert rights adverse to those of the receiver,—and this, although *eight years* have elapsed since the appointment of a receiver.³ So, it has been held in Vermont that a foreign receiver of an insolvent insurance company may sustain an action to recover assessments on premium notes, no creditor having intervened to prevent the prosecution of the suit.⁴ Where a receiver had been appointed under a creditors’ bill by a court in New York, and the debtor, in pursuance of the order of the court, *made a general deed of assignment* of all his property to the receiver, reciting therein the proceedings had in the cause, which assignment was in due form to transfer his interest in *land* under the statutes of Michigan,—it was held that the receiver might file a bill in chancery in Michigan to foreclose the mortgage interest, or to enforce the right of redemption held by the debtor at the time of the assignment, in lands in Michigan. The court proceeded upon a view elsewhere explained,⁵ that the receiver in such a case

¹ Comstock v. Frederickson, 51 Minn. 350; s. c. 53 N. W. Rep. 713. To the same effect, Bidlack v. Mason, 26 N. J. Eq. 230.

² Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

³ Boulware v. Davis, 90 Ala. 207;

s. c. 9 L. R. A. 601; 8 Rail. & Corp. L. J. 412; 20 Ins. L. J. 83; 8 South. Rep. 84; 32 Am. & Eng. Corp. Cas. 526. Compare ante, § 3774.

⁴ Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526.

⁵ Ante, § 7339; post, § 7347.

does not sue strictly in his official character, by virtue of his appointment by the foreign tribunal, but as a *voluntary assignee*, holding legal title by virtue of the assignment of the debtor.¹ It is not necessary, in such a case, for the receiver to go behind the recitals in the deed of assignment, and prove the prior proceedings of the court. The recitals of those proceedings in the deed are to be taken as true, so far as they may become material; and the courts of Michigan will notice and act upon them, so far as to recognize the complainant substantially as a trustee for the creditors of the insolvent, in whose behalf the assignment was made, and will assist him to collect and render the property available for the purposes of his trust; but will not concern themselves with any question relating to the disposition of the proceeds as between him and the creditors of the insolvent, nor interfere between him and the court by whose appointment he acts. It is for that court to hold him to his accountability for the trust property, especially where all parties reside in that State, and the creditors have not appealed to the Michigan court for any such purpose.²

§ 7341. May Sue to Repossess Himself of Property Removed into the Domestic Jurisdiction. — A notable exception to the general rule that a receiver can maintain no action outside of the State appointing him, has been admitted in the case where he has *once acquired title and possession* of property, for the purposes of his trust, and that property has found its way into another State, and is there unlawfully or unjustly detained from him. In such a case it has been held that he may maintain an action in such other State to recover it. This exception to the rule does not rest upon the principle of comity, but rather upon the principle that where the legal title to personal property has once passed and become vested in accordance with the laws of the State where it is situated, the validity of such title will be recognized everywhere.³ Under this rule, it

¹ Graydon v. Church, 7 Mich. 36.

² *Ibid.*

³ Chicago &c. R. Co. v. Keokuk

&c. Packet Co., 108 Ill. 317, 324; s. c. 48 Am. Rep. 557. That such is the rule in regard to title to property, the

has been held that, where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment, which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; and that, while there, it cannot be taken from his possession by creditors of the insolvent debtor, who reside within that jurisdiction.¹ In such a case it was pointed out that it was not the case of an officer of a foreign court seeking, as against the claims of resident creditors, to remove from the State the assets of the debtor situated there at the time of the officer's appointment, and ever since, of which he had never had possession. It was rather the case where a non-resident had acquired a special property in, and right to the possession of, certain chattels, which had found their way into the domestic State, in which case he was entitled to reclaim the chattels as their owner, and the trust upon which he held title to them was a question not to be considered.²

court cite:—*Cammell v. Sewell*, 5 Hurlst. & N. 728; *Clark v. Connecticut Peat Co.*, 35 Conn. 303; *Taylor v. Boardman*, 25 Vt. 581; *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *Waters v. Barton*, 1 Coldw. (Tenn.) 450.

¹ *Chicago & C. R. Co. v. Keokuk & C. Packet Co.*, 108 Ill. 317, 325; *s. c.* 43 Am. Rep. 557.

² *Ibid.* That a *special property* in chattels will support a possessory action for their recovery, see *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580; *s. c.* 35 Am. Rep. 716; *Pond v. Cooke*, 45 Conn. 126; *s. c.* 29 Am. Rep. 668; *McAlpin v. Jones*, 10 La. An. 552; *Hurd v. Elizabeth*, 41 N. J. L. 1. The Supreme Court of California has, by a divided court, Thornton and McFarland, JJ., dissenting, reached the opposite conclusion, even in respect of the right of a receiver appointed in a court of the United States in another State, to reclaim property by replevin in California

which has been in the possession of the receiver in the State of his appointment, and which has been levied upon by a creditor of the insolvent corporation in California. The case was that a receiver of the Wabash railway system had been appointed by the Circuit Court of the United States at St. Louis, in Missouri, and that a freight car had come into the possession of the receiver within the jurisdiction of his appointment and had been sent to California, in the usual course of business of the receiver in operating the railroad, and transferring freight over other lines, and was attached in California by creditors of the railroad company; and the court held that the receiver could not recover it in an action of replevin in California. *Humphreys v. Hopkins*, 81 Cal. 551; *s. c.* 15 Am. St. Rep. 76. The opinion of the majority, though written by a judge of more than usual ability, is weak,

§ 7342. **Illustrations of This Principle.**—Where a manufacturing corporation, domiciled in New Jersey, had contracted to build a bridge in Connecticut, and had become insolvent, and a receiver of its assets had been appointed in New Jersey, who, with the funds of the estate, purchased iron in New Jersey and sent it to Connecticut to be there used in completing the bridge,—it was held that the iron could not be attached in Connecticut by a Connecticut creditor of the New Jersey corporation.¹ The Connecticut court admitted that there would be force in the claim of the attaching creditor, if the property had been in Connecticut at the time of the appointment of the receiver in New Jersey, and if the receiver had never taken possession of it prior to the levy of the plaintiff's attach-

and the conclusion of the court is barbarous. In republishing a report of the case in the American State Reports, Mr. Freeman, the learned editor of that series, adds a note, in which he criticises the decision forcibly, and upholds the view taken by the dissenting judges, and also that taken by the Supreme Court of Illinois in the case previously above cited. At the close of his note, Mr. Freeman points out the disastrous effect upon railway receiverships, of the decision of the California court, in the following language: "It will be observed that the legitimate consequence of the application of the rule supported by the prevailing opinion in the principal case is the substantial denial of the right of the courts to appoint receivers of the property of railways and of other property, which, in its ordinary use, must necessarily cross State lines; for the right to appoint a receiver of such property is fruitless if the property may not be used in its ordinary way without exposing the receiver to its loss at the instance of creditors residing in another State into which it may be taken. If receivers of such property are to be appointed at all, the courts of different States must

necessarily, in the exercise of that comity which they would like to have conceded to their own judicial proceedings, protect the possession of receivers bringing property within States other than that wherein they were appointed. If the receiver of a railway may not use its cars in transporting freight into other States without forfeiting his special property therein, then his receivership is a substantial condemnation to idleness and decay of the property which was intrusted to his care in the hope that, through his agency, it might continue to answer the public and private purposes for which it was originally acquired, and at the same time realize just profits for those owning or having liens upon it." 15 Am. St. Rep. 82. That a *maritime lien* for supplies furnished a vessel operated by a receiver appointed by a court of *another state* than that of the residence of the lienor will hold the vessel, see *The Willamette Valley*, 66 Fed. Rep. 565; affirming *s. c.*, 62 Fed. Rep. 293.

¹ *Pond v. Cooke*, 45 Conn. 126; *s. c.* 29 Am. Rep. 668. See also *Cooke v. Orange*, 48 Conn. 401, a case growing out of the same transaction.

ment. In that case, the court said, "the local law of New Jersey could not vest property in the receiver which was located in Connecticut."¹ "But," said the court, "when property has once vested in a trustee, assignee, or receiver, by the law of the State where the property is situated, it makes no difference whether it is done under the local law of the State or under the common law. The law of another State will not divest the trustee, assignee, or receiver of his right to the property, should he take it into such State in the performance of his duty. The courts of such State will inquire whether he has such right to the property when it comes into the State, as between himself and their own citizens; but when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired."² On the same principle, where personal property on the high seas, belonging to a citizen of Massachusetts, had been transferred to an assignee, by proceedings under the insolvent laws of that State, and the property afterwards found its way into the State of New York, and was attached by a creditor of the Massachusetts insolvent residing in New York,—it was held that the assignee in Massachusetts had the prior right to the property.³ On like grounds, where a receiver, appointed by a

¹ Citing *Upton v. Hubbard*, 28 Conn. 274; *s. c.* 73 Am. Dec. 670; *Paine v. Lester*, 44 Conn. 196; *s. c.* 26 Am. Rep. 442; *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.), 353; *Wil-lits v. Waite*, 25 N. Y. 577.

² *Pond v. Cooke*, 45 Conn. 126, 132; *s. c.* 29 Am. Rep. 668, 672; opinion by Park, C. J.

³ *Crapo v. Kelly*, 16 Wall. (U. S.) 610. The court held that, for the purposes of the suit, the *ship*, though on the high seas, was a portion of the territory of Massachusetts, since it belonged to a citizen of Massachusetts; and that the assignment, by the insolvent laws of Massachusetts, passed title to the ship, in the same manner and with the like effect as if it had been physically within the bounds of that State when the assignment was executed. *Ibid.* This decision was rendered upon a writ of error to the Supreme Court of New York. It

seems that an appeal was taken in the same case to the Court of Appeals of New York; for the case of *Kelly v. Crapo*, is found reported in 45 N. Y. 86, in which, on the same state of facts, the New York Court of Appeals holds, contrary to the decision of the Supreme Court of the United States, that the title of the attaching creditor in New York was paramount. The New York decision was, however, rendered in 1871, while the decision of the Supreme Court of the United States was rendered in 1872. The decision of the New York court proceeds on the ground that the legal fiction of the extension of national territory to its vessels on the high seas, does not apply to a *State* of the American Union; and this was, evidently, the ground of deflection between the opposing conclusions reached by the two courts. In the decision in 16 Wallace, the judges were considerably divided.

chancery court in Mississippi, brought an action in Louisiana to recover four negroes, which, he averred, had been *stolen from his possession* as receiver, — it was held, on exceptions to his petition, which admitted the truth of the facts alleged, — that he was entitled to recover. Spofford, J., said: "Property under the control of the courts of our sister States, when feloniously or fraudulently removed from their jurisdiction, and brought within ours, must, on proof of the facts, be instantly remitted, by the order of our courts; and the person who, under the law of the foreign forum, is the custodian of the property, is the proper person to sue for it here."¹

§ 7343. Real Property Situate in the Foreign Jurisdiction does not Vest in Receiver. — It has been held that the *real property* of a corporation, situated wholly within a foreign jurisdiction, does not vest in a receiver of its assets, and that the appointment of such receiver does not disable the corporation from dealing with it in the jurisdiction in which it is situated.² But where the *insolvent*, in compliance with an order

Mr. Justice Hunt read the opinion of the court; Mr. Justice Clifford read an opinion, concurring in the judgment for special reasons; and Justices Bradley and Field dissented.

¹ *McAlpin v. Jones*, 10 La. An. 552; citing *Johnson v. Imboden*, 4 La. An. 178; *Myers v. Myers*, 8 La. An. 369; *s. c.* 58 Am. Dec. 689; *Wingate v. Wheat*, 6 La. An. 238, 241; *Paradise v. Farmers' &c. Bank*, 5 La. An. 711; *Planters' Bank v. Bass*, 2 La. An. 430, 436; *M'Grew v. Browder*, 2 Mart. (N.S.) (La.) 17. A decision somewhat analogous to the foregoing was rendered in Massachusetts at an early date, in a case where a citizen of New York executed in New York an assignment of his goods there situated, to a citizen of Massachusetts, in trust for the payment of his creditors, the most of whom lived in New York. The assignment was valid, and vested title in the assignee for the purposes of the trust, under the laws of New York. It was held that the assignee was not

liable to be charged in Massachusetts by trustee process, — that is to say, by garnishment, — in respect of the goods by a creditor of the assignor residing in Massachusetts. *Shaw, C. J.*, said: "The trustee took the goods for a lawful purpose, and by a title indefeasible where the transaction took place, and under the laws of New York, to which he was amenable. He was bound, as well in conscience as by law, to execute the trust according to the terms of the conveyance under which he took the property. His coming into this Commonwealth ought not to defeat such a conveyance and discharge him from his legal and conscientious obligations, even though it should be held that, if such an assignment had been made here, it could not hold against attaching creditors, — a point which it is not necessary to decide." *Wales v. Alden*, 22 Pick. (Mass.) 245, 247.

² *Simpkins v. Smith &c. Gold Co.*, 50 How. Pr. (N. Y.) 56.

of the court appointing the receiver, has *executed a deed of assignment*, transferring all his property to the receiver, and the deed of assignment is so executed as to be otherwise valid and operative to transfer title to his real estate situated in another State, the courts of such other State will give effect to it, upon the ground that it has operated to *transfer the legal title* to the receiver, but not on the ground of any authority possessed by the receiver in virtue of his office, beyond the limits of his own State.¹

§ 7344. **Cases Refusing to Extend This Comity.**—Cases are now rarely met with where the courts of a State have refused to extend this comity so as to entertain actions brought by foreign receivers to collect the assets due to the foreign insolvent, whether individual or corporate, where it does not appear that the removal of the assets will prejudice the rights of domestic creditors, — that is to say, will prevent them from getting a preference over the creditors domiciled in the State of the receiver. One recent case is found, where it was held that a trustee appointed in the State of Indiana, to wind up an insolvent corporation there domiciled, was properly repelled by a court of the State of Iowa, in which he had brought an action to recover the balance of an account due by a contract for work and labor done and material furnished to residents of the State of Iowa by the corporation, prior to its insolvency, and where it did not appear that any creditors of the corporation resided in the State of Iowa, or that any citizen of Iowa would be prejudiced in any manner by allowing the receiver to recover. The case nakedly holds that the comity of the State ought not to be exercised, so as to allow a receiver, appointed in another State, to sue for the purpose of collecting an honest debt, although it does not appear that any domestic creditor of the insolvent, in the domestic State, desires to impound the debt.² The reading of such a decision makes one's blood tingle, and almost forces the wish

¹ Graydon v. Church, 7 Mich. 36; *post*, § 7349.

² Ayres v. Siebel, 82 Iowa, 347; *s. c.* 47 N. W. Rep. 989.

that the Civil War had resulted in sponging out State lines and abolishing the tribal theory of our government entirely. It is worthy of note that if a receiver, appointed in Iowa, had brought an action upon a like demand in Indiana, the decision would have been exactly the other way.¹ But later the Supreme Court of Indiana threw away one-half of the comity which courts generally exercise on this question, by holding that a receiver of a partnership firm, appointed in Illinois, could not hold a debt due to the firm by citizens of Indiana, as against creditors of the firm in Connecticut, who had attached by garnishment a debt owing by the citizens of Indiana. No better reason for this wretched decision was given than is found in the following clause of the opinion of the court: "Although non-residents, the attaching creditors are properly in our courts, pursuing a remedy which the State confers upon foreign as well as domestic creditors."²

§ 7345. Foreign Receivers Preferred in Contests with the Debtor and his Privies.—On the principle of the preceding section, a judicial transfer, *in invitum*, of the property of an insolvent debtor, such as will *estop him in the jurisdiction*

¹ Metzner v. Bauer, 98 Ind. 425.

² Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477; s. c. 18 Am. St. Rep. 338. Mitchell, C. J., who wrote the opinion of the court, concluded thus: "The rule which commends itself to our judgment is thus declared: 'Once properly in court and accepted as a suitor, neither the law nor the court administering the law, will admit any distinction between the citizen of its own State and that of another. Before the law and in its tribunals there can be no preference of one over the other.'" Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477; s. c. 18 Am. St. Rep. 338, 344,—citing the following cases: Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; s. c. 38 Am. Rep. 518;

Rhawn v. Pearce, 110 Ill. 350; s. c. 51 Am. Rep. 691; Warner v. Jaffray, 96 N. Y. 248; s. c. 48 Am. Rep. 616; Paine v. Lester, 44 Conn. 196; s. c. 26 Am. Rep. 442. This specious reasoning overlooks the plain fact that, while advancing to citizens of Connecticut remedies possessed by citizens of Indiana, the court denies to creditors in Illinois, represented by the receiver, as they alone can be represented, the remedies given by the laws of Illinois, and pays the Connecticut creditor in full out of the pockets of the Illinois creditors. This is narrow and semi-barbarous technicality, and not that reciprocal justice which should prevail among the courts of our American communities.

where the proceeding takes place, will estop him everywhere.¹ Thus, an assignment under the English bankrupt law was held to *estop the bankrupt* in respect of personal property situated in New York,² though emphasis was laid on the fact that the bankrupt had appeared in England and *voluntarily assented* to the proceedings. So, it has been held in the Chancery Court of New Jersey, that that court will, on principles of comity, extend its aid to a receiver of a foreign corporation seeking to obtain the possession of the property of the corporation situated in New Jersey, as against the officers of the corporation, who are endeavoring, by fraud or subterfuge, to withhold the possession of such property from the receiver, no claims of domestic creditors being involved; and that, to that end, it will *set aside a judgment* at law rendered in a court of New Jersey, fraudulently and collusively concocted by such officers, for the purpose of protecting them in the possession of the property as against the receiver, the creditors, and the stockholders, of the foreign corporation.³

§ 7346. **Foreign Receiver Preferred in Contest with Foreign Creditor.** — That the refusal of the comity of allowing a foreign receiver to maintain an action to recover and withdraw assets belonging to the corporation or other insolvent debtor, rests on the principle of *protecting domestic creditors*, is strikingly illustrated by a series of cases, applied alike to foreign receivers and foreign assignees for creditors, which hold that, as between a foreign receiver, assignee, or other representative of creditors, suing in his representative character, and a particular creditor *of the same State* as the foreign receiver or assignee, the domestic tribunals will give preference to the foreign receiver or assignee. In other words, as between two citizens of the same foreign State, one of them entitled to the assets under the laws of that State, and another citizen of the same State, struggling to get a *preference* not

¹ Hoyt v. Thompson, 5 N. Y. 320;
Plestoro v. Abraham, 1 Paige (N. Y.),
236.

² Matter of Waite, 99 N. Y. 433.

³ Bidlack v. Mason, 26 N. J. Eq.
230; cited with approval in National
Trust Co. v. Miller, 33 N. J. Eq. 155,
159.

allowed by the laws of that State, the domestic tribunal will extend its comity so far as to give effect to the laws of that State.¹ One of the theories which support this conclusion is that an assignment made by operation of law, *in invitum*, of the property of an insolvent debtor, operates as an *estoppel upon the citizens of the State wherein the assignment has been made*. Thus, it has been held that a creditor, who is a citizen and resident of the same State with his debtor, against whom insolvent proceedings have been instituted in such State, is bound by the assignment of his debtor's property made in such proceedings; and that, if he attempts to attach or seize the personal property of his debtor situated in another State, and embraced in the assignment, he may be restrained by injunction by the courts of the State in which he and his debtor reside; and that such an injunction is not a violation of that provision of the constitution of the United States which requires that full faith and credit shall be given in each State to the judicial proceedings of every other State.² Upon the same ground, where a receiver of a corporation had been appointed by a court of competent jurisdiction in Virginia, a creditor of the corporation, residing in Virginia, could not, by a subsequent attachment-execution, recover assets of the corporation situated in Pennsylvania, and claimed by the receiver appointed in Virginia. The reason was thus stated by Agnew, J.: "Now, it is clear that, as to these plaintiffs, who were citizens of Virginia, the appointment of a receiver was not extra-territorial, but was an act binding on them, which the Virginia court would enforce as to them, had their action been brought in Virginia. Then certainly they have no right, after the appointment of a receiver by a court within their own State, binding on them there, to attempt to avoid its effect by escaping from its jurisdiction and coming here to ask us to infringe the comity we owe to the acts of

¹ *Gilman v. Ketcham*, 84 Wis. 60; s. c. 36 Am. St. Rep. 899; 54 N. W. Rep. 395; *Cole v. Cunningham*, 133 U. S. 107; *Reynolds v. Adden*, 136 U. S. 348, 353 (doctrine recognized); *Bagby*

v. Atlantic &c. R. Co., 86 Pa. St. 291; *Bacon v. Horne*, 123 Pa. St. 452.

² *Cole v. Cunningham*, 133 U. S. 107.

their own courts within their jurisdiction. Instead of comity, this would be unfriendliness; for they ask us to aid them in a violation of their own law. Our own citizens would be protected against the extra-territorial act, in a proper case, because they are not bound by it, and our assistance given to the extra-territorial act, resting only in comity, would not be given at the expense of injustice to them. The case does not fall within the first clause, second section, of the fourth article of the constitution of the United States, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.' As to a citizen of Virginia, the appointment of a receiver in Virginia, binding on him there, is not set aside by this clause of the constitution. The equitable transfer of the debt there is binding on him here."¹ So, it has been lately held in Wisconsin that where, under voluntary proceedings for the dissolution of a corporation in another State, a receiver is appointed by a court of that State, and the creditors are *enjoined* from prosecuting actions against the corporation, — the courts of Wisconsin will recognize the right of the receiver to collect debts due to the corporation by residents of Wisconsin, in preference to creditors of the corporation residing in the same State as the State of the receiver, who are seeking, in Wisconsin, to get a preference over other creditors. The court reasoned, as in the preceding case, that while the judicial transfer of the property of the corporation to the receiver in a foreign State, was not binding upon the citizens of Wisconsin, yet it was binding upon the citizens of the foreign State. "The question," said the court, "is one wholly between parties residing in New York, and bound by the proceedings in question, neither of whom is in any position to invoke the assistance of the courts of this State to defeat or deny full effect to the proceeding in New York, or the title resulting from it. It is clear that the adjudication of dissolution and the appointment of the receiver vesting in him the title to the chose in action in question, were binding on these parties, and the courts of New York would have en-

¹ Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291, 294.

forced the receiver's title had this controversy originated there. The plaintiff asks us to aid him in violating the law of his own State and evading the process of its courts."¹

§ 7347. **Distinction between Voluntary Assignments and Assignments in Invitum by Operation of Law.**—In respect of the question under consideration, a distinction is frequently taken between assignments made by the voluntary act of a foreign insolvent for the benefit of his creditors, and assignments made by operation of the law of the foreign jurisdiction, against his will. According to the best opinion, the voluntary assignment, if good by the law of the State or country where it is made, and if made in conformity with the law of the State or country within which the property is situated, is valid in the latter State or country, not on a principle of comity, but *ex proprio vigore*.² It has even been held that a deed of assignment of *real property*, intended for the benefit of creditors, made and recorded according to the law of the State in which the property is situated, is good as against subsequently attaching creditors of the assignor, although the assignment may have been set aside by the courts of the State of his domicile. The question was regarded as not a question of comity, but of right. The court said: "It depends for its solution upon the principle that the *jus disponendi* is essential to the very idea of property. It concerns the right of every person, whether a citizen of this State or of another State, owning property in this State, freely to dispose of that property for a just and lawful purpose; and when such property is owned by an insolvent debtor, there can be no more just or lawful purpose than a disposition of it for the equal benefit of his creditors."³ But a *judicial* assignment of property does not operate *ex proprio vigore* beyond the lines of the State within which the assignment takes place, but operates in other States and countries *ex comitate*, and then only so far as

¹ Gilman v. Ketcham, 84 Wis. 60;
s. c. 36 Am. St. Rep. 899; 54 N. W.
Rep. 395.

² Smith's Appeal, 117 Pa. St. 30;
s. c. 104 Pa. St. 381, 387.

³ First Nat. Bank v. Hughes, 10
Mo. App. 7, 23.

not opposed to the laws and public policy of such State, or to the rights of its own citizens.¹ The distinction above taken is brought out very clearly by Mr. Justice Story, thus: "It is therefore admitted that a *voluntary* assignment, by a party, made according to the law of his domicile, will pass the *personal* estate, whatever may be its locality, abroad as well as at home. The law distinguishes that which results from the exercise of power under the law, from that which comes from the free will of the party: the former is limited in its effect to the country where the law is in force, whilst the latter is given universal and general operation, under the comity of nations."²

§ 7348. Where the Receiver Adopts and Carries out the Contract of the Corporation.—Where a foreign corporation has, at the time of passing into the hands of a receiver, an *uncompleted contract* for the doing of work or the furnishing of materials, and the receiver, under the direction of the court appointing him, adopts and carries out the contract and agrees with the other contracting party so to do,—he is entitled to maintain an action against such contracting party to recover any unpaid balance of the agreed price; and it will be no defense that he is a receiver appointed by a court of a foreign jurisdiction, or that the defendant has been compelled to pay over such balance to a local creditor by process of garnishment, without having received notice from the receiver not to pay it. The reason is that, by the agreement between the receiver and the defendant, under which he went on and completed the contract, there had been a *novation*, and he had the same right to sue for the enforcement of the contract that any other foreign obligee in a contract has, and the trusts upon which he acted in the jurisdiction appointing him receiver were immaterial.³

¹ *Ante*, § 7338.

² Story's Conflict of Laws, § 111. The distinction is also clearly stated in Smith's Appeal, 104 Pa. St. 381, 389, where the above language is quoted. See also Lowry v. Hall, 2 Watts & S. (Pa.) 129, 131; s. c. 37

Am. Dec. 495; Speed v. May, 17 Pa. St. 91; s. c. 55 Am. Dec. 540; Dundas v. Bowler, 3 McLean (U. S.), 397; Livermore v. Jenckes, 21 How. (U. S.) 126.

³ Cooke v. Orange, 48 Conn. 401; Blake Crusher Co. v. New Haven, 46 Conn. 473.

§ 7349. Not Chargeable as Garnishee or with Trustee Process.—It may be assumed that, if a receiver is so venturesome as to go out of the State in which he is appointed, he will not become chargeable, as *garnishee*, or under what is called in some of the New England States "*trustee process*," at the suit of creditors of the estate, in order to get payment in full, instead of presenting their claims for adjudication in the court whose officer he is, having them there allowed, and taking their *pro rata* share. Such was the law declared in Massachusetts in regard to an *assignee*, where a citizen of another State had executed therein an assignment of his goods there situated, to a citizen of Massachusetts, in trust for the payment of his creditors, most of whom lived in such other State, to which assignment the creditors were not parties, but which nevertheless, by the law of the other State, was a valid assignment, and the goods were never brought into the State of Massachusetts. Here it was held that the assignee was not liable to be charged in Massachusetts, for the goods on a trustee process sued out by one of the creditors who was a citizen of Massachusetts.¹

§ 7350. Attachment in Foreign Jurisdiction a Contempt of Court.—Where a receiver has been appointed, if a creditor of the jurisdiction in which he has been appointed, in violation of an injunction which accompanies his appointment, attaches property or funds in another State, of which the receiver would be entitled to possession under the principles of comity, there being no creditor in such other State,—he will be guilty of a contempt of the court appointing the receiver,

¹ *Wales v. Alden*, 22 Pick. (Mass.) 245. It was said: "The trustee took the goods for a lawful purpose, and by a title indefeasible where the transaction took place, and under the laws of New York, to which he was amenable. He was bound, as well in conscience as by law, to execute the trust according to the terms of the conveyance under which he took the

property. His coming into this Commonwealth ought not to defeat such a conveyance and discharge him from his legal and conscientious obligations, even though it should be held that, if such an assignment had been made here, it could not hold against attaching creditors,—a point which it is not necessary to decide." *Ibid.* 247, opinion by Shaw, C. J.

and punishable as such; and this principle has been applied where the receiver was appointed in the State of Illinois, and the attaching creditor was a corporation domiciled in the State of Connecticut, but which had a branch office in the State of Illinois, and the attachment was sued out by the manager of this branch office, in the District of Columbia, against property situated there, which had never been in the possession of the receiver, but to which he claimed the right of possession. It made no difference, in the opinion of the Illinois court, that the attachment suit was really prosecuted by the foreign corporation as plaintiff; since, under the laws of Illinois, the court had jurisdiction of actions against that corporation by service of process upon its resident agent. Nor was it a good objection that a foreign corporation could not be punished for *contempt*; since corporations can only be punished for contempt through their officers, or through those acting in aid of them. Nor was it necessary that the corporation itself, *eo nomine*, should have been made a party to the proceeding, because the manager of its branch office was the real actor.¹

§ 7351. Appointing a Receiver of Property Situated in a Foreign Jurisdiction.—It has been said that where parties to an action both reside in one State, a court in that State has power to appoint a receiver to take possession of the property of a defendant in another State, and that the court will compel the defendant, by process *in personam*, to put the receiver in possession of the property; but it is conceded that the court would have no power to remove, or cause to be removed, other than by the method stated, personal property situated in another State, so as to bring it within the jurisdiction of the

¹ Sercomb v. Catlin, 128 Ill. 556; s. c. 15 Am. St. Rep. 147. That a corporation can only be punished for *contempt* through its officers or through those aiding and abetting it, —see First Congregational Church v.

Muscatine, 2 Iowa, 69; Rapalje on Contempts, §§ 1, 48. See also, as to the punishment of a corporation for contempt, Golden Gate &c. Co. v. Superior Court, 65 Cal. 187; *ante*, § 6448, *et seq.*

State in which the court sits which has appointed the receiver.¹

§ 7352. Auxiliary Receivers Appointed as a Matter of Comity.—In the same spirit of comity and independently of statute, a court possessing in one State the power to appoint a receiver may extend its aid to a receiver of a corporation appointed in another State, for the purpose of enabling him to get possession of property which should, in equity, be applied in payment of the debts of the corporation; and to this end may appoint a receiver of any property within the State of such foreign corporation, and may confer upon him the same powers which it would confer upon a receiver of a domestic corporation, so far as they may be necessary to the recovery and collection of the assets of the foreign corporation; and will give the receiver so appointed the same remedies, and the same aid in the collection of the assets of the foreign corporation, which it would give to the receivers of the domestic corporation.²

§ 7353. Receiver cannot Transfer Jurisdiction to Foreign Court.—A receiver cannot transfer the jurisdiction of making distribution of the assets in his hands to a foreign tribunal, by appearing and answering in a suit instituted in the foreign country. He cannot thus deprive the court which has appointed him of its authority over him and over the fund which he holds as its officer. Within the meaning of this rule, a neighboring State is a foreign country, as much as the republic of Mexico, or the empire of China.³

¹ *Straughan v. Hallwood*, 30 W. Va. 274; s. c. 8 Am. St. Rep. 29. That equity will not compel an insolvent defendant, in an action of detinue instituted in West Virginia, to return to that State property pledged in good faith to a resident in another State,

nor appoint a receiver to bring back such property, — see the same case.

² *National Trust Company v. Miller*, 33 N. J. Eq. 155.

³ *Reynolds v. Stockton*, 43 N. J. Eq. 211; s. c. 3 Am. St. Rep. 305.

TITLE EIGHTEEN.

ACTIONS BY AND AGAINST CORPORATIONS.

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CHAPTER CLXXVII.

POWER TO SUE AND BE SUED.

ART. I. IN GENERAL. §§ 7360-7375.

II. ACTIONS BY CORPORATIONS. §§ 7380-7388.

III. WHAT ACTIONS LIE AGAINST CORPORATIONS. §§ 7391-7415.

ARTICLE I. IN GENERAL.

SECTION

7360. Common-law power of corporations to sue and be sued.

7361. Power to sue coextensive with the power to make contracts.

7362. Exception as to liability for breach of corporate duties.

7363. This power conferred by statute and constitutional provisions.

7364. By what statutes.

7365. By what statutes not conferred.

7366. Corporations deemed "persons" for remedial purposes.

7367. Suable in what manner.

SECTION

7368. Power how affected by want of organization.

7369. *De facto* corporations.

7370. Power how affected by dissolution.

7371. What if the State is a member.

7372. Sovereign States may sue as corporations.

7373. Corporation cannot sue as a common informer.

7374. Power to sue exercised by directors.

7375. Corporation may maintain an action against its own members.

§ 7360. **Common-law Power of Corporations to Sue and be Sued.**—The creation by the legislature of a body corporate, for any purpose, impliedly confers upon it the power to sue and be sued, so far as may be necessary to maintain its corporate rights and to enforce its corporate duties. In general,

it may be said that the power to sue and be sued is, by the principles of the common law, an incident of every corporation.¹

§ 7361. This Power to Sue Coextensive with the Power to Make Contracts. — It may be laid down, as a universal proposition, that the capacity of a corporation to sue and be sued is coextensive with its capacity to make and take contracts; since the power to make a contract, whereby an obligation might accrue to it, would be nugatory, unless it could apply the ordinary legal remedies to enforce that obligation; and "it surely would be a flagrant departure from all principle to hold that such contracts could not be enforced against them."² It is upon these grounds that *counties* are held liable in actions *ex contractu*,³ though in many States they cannot be sued *ex delicto*. It follows, as a necessary consequence, that where the power is conferred upon any collective body of men to make and take contracts in their aggregate capacity, they have the

¹ *Ante*, § 1, *et seq.*; *Libbey v. Hodgdon*, 9 N. H. 394, 396, opinion by Wilcox, J.; *Breene v. Merchants' &c. Bank*, 11 Colo. 97; *s. c.* 20 Am. & Eng. Corp. Cas. 532; 17 Pac. Rep. 280; *Grant County v. Lake County*, 17 Or. 453; *s. c.* 21 Pac. Rep. 447; *Planters' &c. Bank v. Andrews*, 8 Port. (Ala.) 404, 425. See, also, *Berford v. New York Iron Mine*, 56 N. Y. Super. 236. Compare *ante*, § 5. It is scarcely necessary to cite precedents of cases where this power has been ascribed to *railroad companies* — *Baltimore &c. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; *s. c.* 65 Am. Dec. 254 — to *turnpike companies* — *Dunningtons v. North Western Turnp. Road*, 6 Gratt. (Va.) 160 — or indeed to any particular kind of corporation; because we shall see, from an examination of each case, that the question was whether the party suing or being sued as a corporation was indeed a body corporate.

This, for instance, was the question where an action had been brought against the State Sinking Fund of Kentucky, and where the court held that it was liable to be sued, because it was a body corporate, although in its interests and functions closely connected with the State, against which no action could be brought. *Sinking Fund Commissioners v. Northern Bank*, 1 Met. (Ky.) 174. Such, also, was the question where the right to bring an action for an injury resulting from negligence against the Metropolitan Fire Department of New York, was challenged, the court holding it liable to be sued as a corporation. *Clarissy v. Metropolitan Fire Department*, 7 Abb. Pr. (N. S.) (N. Y.) 352.

² *McLoud v. Selby*, 10 Conn. 390; *s. c.* 27 Am. Dec. 689.

³ *Ward v. Hartford Co.*, 12 Conn. 404, 407.

right to sue, and are liable to be sued, in respect to such contracts in such aggregate capacity. The conferring of such a power places them in the category of what are termed *quasi-corporations*, and it is not necessary, in order to support a right of action against them in respect of a contract which they have made when acting within their statutory powers, that such a right of action should be given by any statute in express terms.¹

§ 7362. **Exception as to Liability for Breach of Corporate Duties.** — A class of cases mark a clear exception to this rule; and these cases are those which hold that *quasi-corporations*, such as *counties*, are not liable to be sued for a violation or neglect of a corporate duty, as they are not corporations in the full sense of the term, but are rather to be regarded as *geographical subdivisions of the State*. It cannot be said that they have any corporate duties to perform. At least this is the narrow ground upon which certain courts have proceeded in reaching the conclusion that counties, which are termed quasi-corporations, are not liable at common law for the mere *neglect of a corporate duty*.²

* *McLoud v. Selby*, 10 Conn. 390; s. c. 27 Am. Dec. 689; *Ward v. Hartford County*, 12 Conn. 404, 407. Thus, *school districts in New England* are regarded as quasi-corporations in respect of this capacity, and the ground on which they are so regarded was thus well stated by Bissell, J.: "That these corporations are capable of suing and being sued, would seem to be strongly inferable from the powers and privileges conferred upon them by the statute. They have power to erect school-houses, to purchase lands on which to erect them, to levy and collect taxes, to appoint treasurers and collectors, and to do all necessary acts for the purpose of sustaining and regulating schools. They may, therefore, possess property and may make contracts; and may

not these contracts be enforced? Let it once be admitted (as indeed it must be admitted) that these corporations have the power to make contracts, and there is an end of the question. For it surely would be a flagrant departure from all principle to hold that such contracts could not be enforced against them. A mechanic builds a school-house, in pursuance of a contract entered into with the school district. Could it be endured that he might not sue on that contract because an action was not given by statute?" *McLoud v. Selby*, 10 Conn. 390; s. c. 27 Am. Dec. 689.

² *Russell v. Men of Devon*, 2 T. R. 667; s. c. 1 Thomp. Neg. 575. This distinction is recognized in *Riddle v. Proprietors*, 7 Mass. 169; s. c. 5 Am. Dec. 35. It appears to be recognized

§ 7363. **This Power Conferred by Statute and Constitutional Provisions.**—The power to “sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever,” if not an incident to a corporation, is conferred in every incorporating act,¹—as, for instance, by the act of Congress incorporating the Union Pacific Railroad Company.² *Constitutional provisions* exist in many States, providing, in distinct terms, that all corporations may sue or be sued in all courts, in like manner as natural persons.³

§ 7364. **By What Statutes.**—Under a grant of “all such rights, privileges, and immunities as by law are incident or

in the New England decisions in respect of the liability of *towns* for the *repair of highways*, those courts placing that liability upon *statutes*, and not upon any obligation arising at common law to perform a corporate duty: See *Mower v. Leicester*, 9 Mass. 247; *s. c.* 6 Am. Dec. 63. The distinction is recognized in Illinois, and is well stated by Breese, J., in *Waltham v. Kemper*, 55 Ill. 346; *s. c.* 8 Am. Rep. 652. The most authoritative American case upon the subject, where a very great number of decisions are referred to by Gray, C. J., in his usual exhaustive manner, is *Hill v. Boston*, 122 Mass. 344; *s. c.* 23 Am. Rep. 332; 2 Thomp. Neg. 698,—where a municipal corporation is placed, in this regard, on the footing of a county, and is held not liable to an action for an injury suffered by reason of the unsafe condition of a staircase in a *school-house* by which a child is hurt while attending school. That *counties* are not liable to actions for failing to keep in repair their highways and bridges has been held in the following (among many other) cases: *Larkin v. Saginaw County*, 11 Mich. 88; *s. c.* 82 Am. Dec. 63; *Hedges v. Madi-*

son County, 6 Ill. 567; *Huffman v. San Joaquin County*, 21 Cal. 426; *Reardon v. St. Louis County*, 36 Mo. 555; *Swineford v. Franklin County*, 6 Cent. L. J. 434; *Brabham v. Hinds County*, 54 Miss. 363; *s. c.* 28 Am. Rep. 352; *Covington County v. Kinney*, 45 Ala. 176; *Sims v. Butler County*, 49 Ala. 110. Exceptions to this rule have been conceded in various States, upon grounds which it will not be in place here to state. See 1 Thomp. Neg. 616, *et seq.*

¹ *Bank v. Deveaux*, 5 Cranch (U. S.), 61, 85.

² *Smith v. Union Pac. R. Co.*, 2 Dill. (U. S.) 279. See also *Land v. Coffman*, 50 Mo. 243; *Lathrop v. Union Pac. R. Co.*, 1 MacArthur (U. S.), 234.

³ With some variation of language, this provision is found in the following constitutions, and doubtless in many others: Ala. Const. 1875, art. 13, § 12; Cal. Const. 1879, art. 12, § 4; Kan. Const. 1859, art. 12, § 6; Mich. Const. 1850, art. 15, § 11; Minn. Const. 1857, art. 10, § 1; Neb. Const. 1875, art. 11, § 3; Nev. Const. 1864, art. 8, § 5; N. C. Const., Amend. of 1876, art. 8, § 3.

necessary to corporations, and what may be necessary to the corporations herein constituted," it is held that the right to sue exists.¹ As elsewhere seen,² statutes relating to actions and to jurisdiction, which use such general words as "person,"³ "debtor,"⁴ "creditor,"⁵ and even "citizen,"⁶ are held to include corporations.⁷

§ 7365. **By What Statutes not Conferred.**—A statute incorporating the members of a *voluntary association*, to whom moneys were due, and conferring upon the corporation the power to receive all those moneys to its use, and to give receipts to the debtors which would be evidence in any action to recover such moneys, was held not to empower the corporation to maintain an action at law in its own name to collect the same,—though it might give effectual discharges to the debtors on receiving payment.⁸ The decision seems unsound. Since the body became incorporated with power to receive the moneys, the right of action accrued to it by implication of law, under the principles above considered. A statute providing for an *appeal from an award of arbitrators*, upon the defendants entering into a recognizance with one or more sureties in the nature of special bail to make certain payments, or in default thereof to surrender the defendant or defendants to the jail of the proper county, has no application to corporations; since these bodies, being political, can neither be surrendered nor imprisoned. A corporation, therefore, might have its appeal without entering into a recognizance.⁹

§ 7366. **Corporations Deemed "Persons" for Remedial Purposes.**—The word "person" in a statute is interpreted

¹ *Marsh v. Astoria Lodge*, 27 Ill. 421.

² *Ante*, § 5689.

³ *Ante*, §§ 11, 5689; *post*, §§ 7366, 7790, 7804, 7900, 8059.

⁴ *Ante*, § 6468.

⁵ *Post*, § 7790.

⁶ *Ante*, § 12; *post*, §§ 7448, 7900.

⁷ A *resolve* of the legislature, authorizing a part of a society to hold meet-

ings, choose officers, levy taxes, and repair their meeting-house, has been held to give a right to sue for the destruction of such meeting-house after it is repaired. *Tilden v. Metcalf*, 2 Day (Conn.), 259.

⁸ *Scots Charitable Soc. v. Shaw*, 8 Mass. 532.

⁹ *Carpentier v. Delaware Ins. Co.*, 2 Binn. (Pa.) 264.

as including corporations aggregate, when the circumstances in which such corporations are placed are identical with those of natural persons who are expressly included in the statute,¹ unless there is something in the statute showing a legislative intention to restrict its application to natural persons.²

§ 7367. *Suable in What Manner.*—A private corporation is a creature of the State, and must be *sued in such manner as the legislature provides*;³ but if there is no statute prescribing the mode, the ordinary legal remedies applicable in the case of natural persons will be equally applicable in the case of corporations, except in so far as the differences which exist between artificial and natural bodies prevent them from being applied.

§ 7368. *Power how Affected by Want of Organization.*—In strictness, a body of adventurers, not having a valid charter, or not duly organized as a corporation, cannot maintain an action in that character;⁴ though, as elsewhere seen,⁵ *the defendant may be estopped by his conduct from setting up that they are not a corporation.* On the other hand, if a body of adventurers, assuming to act as a corporation, but who have not been legally organized as such, threaten an injury to a

¹ *Ante*, §§ 11, 5689, 7366; *post*, §§ 7790, 7804, 8059; *Gaskell v. Beard*, 33 N. Y. St. Rep. 852; *s. c.* 11 N. Y. Supp. 399.

² *Crafford v. Warwick Co.*, 87 Va. 110; *s. c.* 12 S. E. Rep. 147; 10 L. R. A. 129. See also *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42; *s. c.* 26 N. E. Rep. 239. Therefore, by statute in Massachusetts (Pub. Stats. Mass., ch. 3, cl. 16), a corporation may in that State maintain a petition to quiet title to lands. *Jeffries Neck Pasture v. Ipswich*, *supra*. Lord Coke in commenting upon the statute of 31 Elizabeth, chapter 7, respecting the erection of cottages, where the language is "no person shall," etc., says:

"This extends as well to persons, politicke and incorporate, as to naturall persons whatsoever." 2 Co. Inst. 736. See also *Bank v. Merchants' Bank*, 1 Rob. (Va.) 573. A corporation has been held to be an "inhabitant" under a statute providing for the reparation of bridges (2 Co. Inst. 703), and an "inhabitant and occupier," and therefore liable as such to pay poor rates. *Rex v. Gardner*, Cowp. 79, 83.

³ *Holgate v. Oregon & C. R. Co.*, 16 Or. 123; *s. c.* 17 Pac. Rep. 859.

⁴ *Doboy & C. Tel. Co. v. De Magathias*, 25 Fed. Rep. 697; *Workmen's Accommodation Bank v. Converse*, 29 La. An. 369.

⁵ *Ante*, § 1853; *post*, § 7647, *et seq.*

third person, he may, it has been held, maintain a preventive action against them in their assumed corporate name.¹ We have already seen that an action is not maintainable against a corporation for obligations contracted in its behalf, prior to its organization, in the absence of some act of ratification or adoption.² But this does not concern the capacity of a corporation to be sued, as much as the *causes* for which it may or may not be sued.

§ 7369. **De Facto Corporations.** — If, under principles already considered,³ the corporation *exists de facto*, it may exercise the power to sue, and the question of its having the right to exercise it will be deemed one which can only be raised by the State,⁴ except in those cases where it is proceeding to assert rights which, from their nature, can only exist in a corporation, *e. g.*, to condemn land for the purposes of a railroad, under a statute granting such a power to corporations.⁵ A body which *might* have been properly organized as a corporation under an enabling statute, and which has attempted, though possibly without complying with the requisite formalities, so to organize itself, and which has acted as a corporation, executing deeds and releases in its corporate

¹ *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566. This case presents the incongruity of an injunction being procured against a threatened trespass by a defendant, impleaded as a corporation, on the ground that it had never been legally organized as such; and because of this absurdity, Pettit, J., dissented. Statutes exist, imposing limitations on the power of corporations to sue, until they have *complied with certain formalities*. For instance, section 299 of the Civil Code of California provides that every corporation must file in the office of the clerk of every county in the State in which it holds any property, except in the county where its original articles of incorporation

are filed, a certified copy of such articles, and prohibits a corporation failing to comply with this provision from maintaining or defending any action or proceeding in relation to such property, its rents, issues, or profits, until it does so comply. This, it has been held, does not prevent it from *defending an action* brought against it to recover for work and labor alleged to have been performed upon its property. *Weeks v. Garibaldi & Co. Min. Co.*, 73 Cal. 599; *s. c.* 15 Pac. Rep. 302.

² *Ante*, § 480; *Franklin & Co. Ins. Co. v. Hart*, 31 Md. 59.

³ *Ante*, § 495, *et seq.*

⁴ *Post*, § 7670.

⁵ *Post*, § 7660.

name, and which in that name has recovered judgment in a former action against the defendant now impleaded, will, on the principle of being a corporation *de facto*, if not *de jure*, be allowed to sustain an action for damages for a nuisance.¹ As to what will be *evidence of the existence of a corporation*, we may recur to what has preceded, and refer to what will follow; with the statement, for our present purposes, that *general reputation* that the plaintiffs have been conducting business as a corporation, coupled with the fact that the obligation sued on was payable to them in their corporate name, will be sufficient to prevent a dismissal of their complaint on the ground that formal proof of their organization as a corporation has not been made.²

§ 7370. **Power, how Affected by Dissolution.** — So, after a corporation becomes dissolved, it can neither sue nor be sued, unless the faculty of suing or being sued is prolonged by statute for the purpose of winding up its affairs.³ But the mere *insolvency* of a corporation does not of itself determine this power, nor cut off any remedy which its creditors might otherwise have against it;⁴ unless the governing statute otherwise

¹ *Baltimore &c. R. Co. v. Fifth Baptist Church*, 108 U. S. 317. Corporations formed by the legislatures of certain States, while in armed *rebellion* against the United States, had power, after the suppression of the rebellion, to sue in the Federal courts, if their acts of incorporation had no relation to anything else than the domestic concerns of the State, and were, neither in their apparent purpose nor in their operation, hostile to the Union, nor in conflict with the constitution, but were mere ordinary legislation, such as might have been had if there had been no war or no attempted secession, and such as is of yearly occurrence in all the States. *United States v. Insurance Companies*, 22 Wall. (U. S.) 99.

² *Holmes v. Gilliland*, 41 Barb.

(N. Y.) 568; *ante*, § 561; *post*, § 7647. Thus, it has been held that the fact that the clerk of a corporation has not been sworn and has not filed, in the office of the register of deeds, the certificate of his appointment required by law (*South Bay Meadow Dam Co. v. Gray*, 30 Me. 547), or the fact that the amount of the capital stock of the corporation has not been fixed pursuant to the governing statute (*City Hotel v. Dickinson*, 6 Gray (Mass.), 586), — does not disable it from maintaining actions in its corporate name.

³ *Ante*, §§ 6720, 6721; *Building Asso. v. Anderson*, 7 Phila. (Pa.) 106.

⁴ *Van Pelt v. United States Metallic Spring &c. Co.*, 13 Abb. Pr. (N. S.) (N. Y.) 325.

provides, as is frequently the case, notably in the case of *national banks*,¹ where the policy of the statute is to have a ratable judicial administration of all its assets for the benefit of its creditors. The deplorable consequences of a corporate dissolution at common law, when not provided against by a provision of the charter or by some general statute,² might be avoided by making an *assignment in trust* of all assets of the corporation to trustees for the purpose of winding up its affairs. This was the course pursued previous to the expiration of the charter of the bank of the United States.³ In one case where this course was pursued, and, pending an appeal, the charter of the corporation expired, it was held that the court might inquire as to the fact of the assignment, and, upon being satisfied of the fact, might permit the case to proceed, without noticing on the record the dissolution of the corporation.⁴

§ 7371. **What if the State is a Member.**—Although an action cannot be brought against a sovereign State without its own consent, yet if it chooses so far to cast off its sovereignty as to become a member of a private corporation, in that character it may be sued.⁵ It follows that the fact that the State is a member of a corporation, otherwise liable to suit,⁶ or even that it is the sole proprietor,⁷ does not prevent the corporation from being sued; and such a corporation may be sued in a court of the United States, where the requisite jurisdictional grounds exist.⁸

§ 7372. **Sovereign States may Sue as Corporations.**—A State, being a corporation, may sue to enforce a contract in

¹ *Ante*, §§ 7268, 7269.

² *Ante*, § 6718, *et seq.*

³ *Bank of United States v. McLaughlin*, 2 Cranch C. C. (U. S.) 20.

⁴ *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499. See also *May v. State Bank*, 2 Rob. (Va.) 56; *s. c.* 40 Am. Dec. 726.

⁵ *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904.

⁶ *Moore v. Wabash Canal*, 7 Ind. 462.

⁷ *Western & C. R. Co. v. Taylor*, 6 Heisk. (Tenn.) 408; *Hutchinson v. Taylor*, 6 Heisk. (Tenn.) 634.

⁸ *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904.

the courts of another State of the American Union.¹ A foreign government may sue in the courts of one of the American States.²

§ 7373. **Corporation cannot Sue as a Common Informer.** It has been held, under a statute,³ giving an action for a penalty to *any person or persons*, that a corporation cannot sue as a *common informer*.⁴

§ 7374. **Power to Sue Exercised by Directors.**—The power of private corporations is, under nearly all charters and schemes of incorporation which we have examined, committed to a board of directors or trustees. Where the governing statute provides that the corporate powers shall be exercised by a board of directors, the corporation can obtain redress of injuries done to it *only through the action of its board of directors*, and if they are unable or unwilling to act, the artificial entity is incapable of obtaining a remedy;⁵ though, on principles elsewhere considered,⁶ the refusal of the corporate officers to proceed to obtain redress of a corporate grievance, by the appropriate action, may of itself open a remedy to the stockholders in equity. But it is not necessary, in order to make it appear that an action is rightfully brought by the corporation, that a *resolution* of the board of directors, authorizing or directing the bringing of the action, should be produced; though it has been said that it would be otherwise if the suit were brought in the name of the corporation solely for the use of somebody else. In that case it might be necessary, if such an action could be maintained at all, to show that there was authority for permitting the third party to use the name of the corporation.⁷ On the other hand, it is not necessary to

¹ *Indiana v. Woram*, 6 Hill (N. Y.), 33; s. c. 40 Am. Dec. 378.

² *Mexico v. Arrangois*, 11 How. Pr. (N. Y.) 1, 6.

³ 7 Geo. II., ch. 7.

⁴ *Weaver's Company v. Forrest*, 2 Strange, 1241.

⁵ *Arkansas River Land &c. Co. v.*

Farmers' Loan &c. Co., 13 Colo. 587; s. c. 22 Pac. Rep. 954.

⁶ *Ante*, § 4479, *et seq.*

⁷ *Kenton &c. Man. Co. v. McAlpin*, 5 Fed. Rep. 737, *per* Swing, D. J. But this is doubtful. If, for instance, a corporation has made an *assignment of a non-negotiable instrument*, it would

produce a *resolution* of the board of directors in order to prove that the *withdrawal of a suit*, brought by a corporation, has been made by the proper authority; but if the act be done by its agent or attorney, no other proof of authority will be required.¹

§ 7375. **Corporation may Maintain an Action against its Own Members.**—As already seen,² a corporation may contract with and sue one of its own stockholders, officers, or corporators, in his individual capacity.³

ARTICLE II. ACTIONS BY CORPORATIONS.

SECTION	SECTION
7380. Corporations entitled to what remedies.	7385. Special statutory remedies in favor of corporations.
7381. May maintain actions of <i>assumpsit</i> .	7386. Remedies on commercial paper.
7382. May sue in trespass.	7387. Action by corporation on promise made to its officer.
7383. May maintain actions sounding in damages.	7388. Demand in actions by corporations.
7384. May have summary remedies.	

§ 7380. **Corporations Entitled to What Remedies.**—Generally speaking, corporations have the same remedies at common law, in equity, and under statutes, which are accorded

be necessary, under the common-law system of pleading, for the assignee to bring an action upon it in the name of the corporation to his use. The corporation would not be responsible for costs, and hence could not refuse the use of its name. The fact of the assignment would, of itself, be a consent to that use. Nor could it prevent the use of its name by a receiver (*ante*, §§ 6979, 6980), or by its assignee for creditors.

¹ *Union Man. Co. v. Pitkin*, 14 Conn. 174. The power of the board of directors to authorize the institution of an action, the very nature of which is to destroy the corporation itself,—as for instance to direct the filing of a petition to have the corpo-

ration adjudged a bankrupt, has been denied. *Re Lady Bryan Min. Co.*, 2 Abb. (U. S.) 527. But, as the directors clearly have the power to direct the *making of an assignment* of all the assets of a corporation for the benefit of its creditors (*ante*, § 6473), it is difficult to see how this holding can be maintained.

² *Ante*, §§ 1075, *et seq.*; 4462.

³ *Wausau Boom Co. v. Plumer*, 35 Wis. 274. The *trustees of schools and school lands*, in Mississippi, are corporate bodies, and, as such, may maintain an action against a member of their own bodies. *Connell v. Woodward*, 5 How. (Miss.) 665; *s. c.* 37 Am. Dec. 173.

to individuals under like circumstances. This is seen by what follows in this article.¹

§ 7381. **May Maintain Actions of Assumpsit.**—The old idea was that a corporation could not maintain an action of *assumpsit*, because it could only contract by its common seal, and hence could sue only in *covenant*. But this idea is exploded, and the settled law is that a corporation can sue in *assumpsit* whenever an individual can.² Thus, an incorporated bridge company may maintain *assumpsit* for the *use and occupation* of premises held by its tenant.³ As already seen,⁴ *assumpsit* may be maintained by a corporation against a shareholder upon his express promise to pay his proportion of the legal assessments upon stock issued to him.⁵

§ 7382. **May Sue in Trespass.**—Although the old conception was that a corporation could only act by its seal, still it did not follow that it could not be *acted upon* except by its seal. It could own property, and if a *trespass* were committed thereon, it could maintain an action of trespass to recover damages therefor.⁶

§ 7383. **May Maintain Actions Sounding in Damages.**—Corporations, like individuals, constantly maintain actions,

¹ That a corporation cannot have *equitable relief* in behalf of its *stockholders*, when they are without equity, see *Arkansas River Land &c. Co. v. Farmers' Loan &c. Co.*, 13 Colo. 587; *s. c.* 22 Pac. Rep. 954. That a corporation may follow its property as a *trust fund* when an individual might, — see *Erie R. Co. v. Vanderbilt*, 5 Hun (N. Y.), 123.

² *London Gas Light &c. Co. v. Nicholls*, 2 Car. & P. 365; *ante*, § 5046.

³ *Southwark Bridge Co. v. Sills*, 2 Car. & P. 371.

⁴ *Ante*, § 1823.

⁵ *Worcester Turnp. Co. v. Willard*, 5 Mass. 80; *s. c.* 4 Am. Dec. 39; *Gilmore v. Pope*, 5 Mass. 491; *Andover* 5868

&c. *Turnp. Co. v. Gould*, 6 Mass. 40; *s. c.* 4 Am. Dec. 80; *Goshen &c. Turnp. Co. v. Hurtin*, 9 Johns. (N. Y.) 217; *s. c.* 6 Am. Dec. 273; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238; *s. c.* 7 Am. Dec. 459. Under the common-law system of pleading, a corporation may maintain *assumpsit* upon a contract to take its stock at a specific price, or it may declare on a contract to take stock agreeably to the provisions of its charter; and to such a declaration the common counts may be added. *Beene v. Cahawba &c. R. Co.*, 3 Ala. 660.

⁶ *Greenville &c. R. Co. v. Partlow*, 14 Rich. (S. C.) 237; *Second Cong. Soc. v. Waring*, 24 Pick. (Mass.) 304.

the object of which is the recovery of damages for wrongs done to them, — as, for instance, where a stockholder and officer of a corporation, and a third person, conspire to cripple the corporation by a manipulation of its shares, and the *conspiracy* is successful.¹ For example, a corporation may maintain an action for *libel*, upon averment and proof of *special damages*.² This would clearly be true in respect of a *slander of its goods or property*.

§ 7384. **May have Summary Remedies.** — It has been held not unconstitutional for the legislature to give a summary remedy for the collection of its debts to a corporation created for the *public benefit*.³

§ 7385. **Special Statutory Remedies in Favor of Corporations.** — When it was the fashion to create corporations by *special acts* of the legislature, special remedies were often accorded to them; but the decisions relating to such remedies may, for the most part, be regarded as obsolete.⁴

§ 7386. **Remedies on Commercial Paper.** — Some of the cases take this distinction, — that where a corporation has *no power to acquire commercial paper*, yet, if it does acquire it, it cannot maintain an action thereon, but may maintain an action for *money had and received* to recover what it gave for the paper.⁵ That is to say, while it cannot maintain an action on the instrument which it had no power to take, it can main-

¹ *Ilion Bank v. Carver*, 31 Barb. (N. Y.) 230.

² *Knickerbocker &c. Ins. Co. v. Ecclesine*, 11 Abb. Pr. (N. Y.) 385; *s. c.* 42 How. Pr. (N. Y.) 201.

³ *Bank of Newbern v. Taylor*, 2 Murph. (N. C.) 266.

⁴ That the Ohio statute of 1844, regulating practice in the courts, did not apply to suits of incorporated banks, — see *Clinton Bank v. Hart*, 19 Ohio, 372. That the statute of the same State, authorizing a joint action by a bank against a drawer and

indorser, applied to banks of *other States*, — see *Lewis v. Bank of Kentucky*, 12 Ohio, 182; *s. c.* 40 Am. Dec. 469. Construction of Ohio statute of 1824 relating to suits where banks are parties: *Goodenow v. Duffield*, *Wright* (Ohio), 455. That a bank could not ask the aid of a court of *equity* against a party to a joint and several contract before exhausting legal remedies, — see *Bank of Chillicothe v. Yoe*, 4 Ohio, 125.

⁵ *Ante*, §§ 5714, 5744, 5748.

tain an action to recover its money which it had no power to pay out, and which it ought not to have parted with.¹ In other words, it has a right to rescind the *ultra vires* contract, and to recover what it has lost under it. But the better doctrine is that it can do this only where the other party has successfully avoided his obligation under the contract on the ground of its being *ultra vires*.²

§ 7387. **Action by Corporation on Promise Made to its Officer.**—Elsewhere we have seen that a deed conveying land to the *trustees* of a corporation is a deed to the corporation itself.³ An analogous rule is that a promise made to the officers of a corporation for its benefit, and upon a consideration proceeding from it, is enforceable in the form of an action by the corporation, — as, for instance, an agreement to pay, to the directors of a corporation, money due to the corporation itself.⁴

§ 7388. **Demand in Actions by Corporations.**—A corporation *must make demand where an individual must*, and need not make demand where an individual need not, prior to bringing and maintaining an action. Demand is generally necessary only where there is a bailment and a custody originally rightful, and where the bailee may justly assume that it is the pleasure of the bailor that his custody of the thing bailed should continue until the contrary is made known to him. It would be justly regarded as a grievance to him if his bailor could make a demand of the return of the subject of the bailment in the first instance by bringing an action to recover it, or to recover damages for its detention. But where the bailee has asserted rights *adverse* to those of the bailor, this obviously excuses demand. Thus, if the treasurer of a corporation receives money belonging to it, and asserts rights thereto

¹ Waddill v. Alabama &c. R. Co., 35 Ala. 323. Compare Phelps v. Masterton &c. Stone Dressing Co., 3 Rob. (N. Y.) 517.

² *Ante*, § 6004.

³ *Ante*, § 5113. Compare *ante*, § 5038.

⁴ Thompson v. Marion &c. Gravel Road Co., 98 Ind. 449.

inconsistent with the right of the corporation to demand the same, and makes charges in the corporate books in extinguishment of his obligation to pay over the money to the corporation, a *demand* is not necessary before suit brought by the corporation to recover the money.¹

ARTICLE III. WHAT ACTIONS LIE AGAINST CORPORATIONS.

SECTION	SECTION
7391. What actions will lie against corporations.	7406. Actions for violations of public duties.
7392. When <i>assumpsit</i> will lie against corporations.	7407. Specific performance.
7393. When not.	7408. Mode of compelling performance of agreement to arbitrate.
7394. Trespass.	7409. Bills in equity for discovery.
7395. Case.	7410. Mode of procedure to compel discovery in equity.
7396. Trover.	7411. Further of this subject.
7397. Replevin.	7412. Statutory substitutes for discovery.
7398. Ejectment.	7413. Bill of interpleader by agent of corporation.
7399. Forcible entry and detainer.	7414. Actions to recover payments voluntarily made.
7400. Slander — Libel — Slander of goods.	7415. Demand in actions against corporations.
7401. Book account.	
7402. Account stated.	
7403. Use and occupation.	
7404. Actions on clauses of charter.	
7405. Actions on by-laws.	

§ 7391. What Actions will Lie against Corporations. — Without going into the ancient history of this subject, it may be said here that it is settled that where the law imposes an obligation upon a corporation, which it fails or refuses to discharge, it may be held civilly liable therefor, at law or in equity, in any appropriate *form of action* where the system of common-law pleading prevails, and on appropriate allegations and proofs, under the system of equity and under the codes.²

§ 7392. When Assumpsit will Lie against Corporations. — Thus, although there are some ancient and untenable hold-

¹ East New York &c. R. Co. v. Elmore, 5 Hun (N. Y.), 214.

² For a general statement of the doctrine of the liability of a corpora-

tion to an action by one sustaining damage in consequence of its *failure to discharge a duty imposed by law*, — see Seagraves v. Alton, 13 Ill. 366.

ings to the contrary,¹ a corporation may now be sued in *assumpsit on express or implied promises*, in the same manner as an individual.² This action will lie against it for *refusing to permit a transfer of its shares* upon its books, at the suit of a person lawfully entitled to demand the same;³ or upon a refusal of the corporation to permit a stockholder to *subscribe for additional stock* to which he is entitled.⁴ So, if a railroad corporation occupies land after its agent has been notified by the owner that rent will be charged, it is liable in *assumpsit for use and occupation*.⁵

§ 7393. When not. — *Covenant*, and not *assumpsit*, being the form of action at common law upon a *sealed instrument*,

¹ *Breckbill v. Lancaster Turnp. Co.*, 3 Dall. (U. S.) 496; *Frankfort Bank v. Anderson*, 3 A. K. Marsh. (Ky.) 1. An exception to this rule was admitted where a local act authorized a corporation to make *promissory notes*: *Slark v. Highgate Archway Co.*, 5 Taunt. 792. But all American corporations have this power, unless it is prohibited to them: *Ante*, § 5730.

² *Rex v. Bank of England*, 1 Doug. 524; *Davis v. Georgetown Bridge Co.*, 1 Cranch C. C. (U. S.) 147; *Gray v. Portland Bank*, 3 Mass. 364, 382; *s. c.* 3 Am. Dec. 156; *Worcester Turnp. Co. v. Willard*, 5 Mass. 80; *s. c.* 4 Am. Dec. 39; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; *s. c.* 22 Wend. (N. Y.) 348; 34 Am. Dec. 317; *Foster v. Essex Bank*, 17 Mass. 479, 503; *s. c.* 9 Am. Dec. 168; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 98; *s. c.* 19 Am. Dec. 306; *Poultney v. Wells*, 1 Aiken (Vt.), 180; *Gassett v. Andover*, 21 Vt. 342; *Stone v. Congregational Society*, 14 Vt. 86; *Antipoeda Baptist Church v. Mulford*, 8 N. J. L. 182; *North Whitehall v.*

South Whitehall, 3 Serg. & R. (Pa.) 117; *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & R. (Pa.) 6, 16; *s. c.* 8 Am. Dec. 675; *Dunn v. St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Danforth v. Scoharie & c. Turnp. Road*, 12 Johns. (N. Y.) 227, 231; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.), 299; *Waring v. Catawaba Co.*, 2 Bay (S. C.), 109; *Hayden v. Middlesex Turnp. Corp.*, 10 Mass. 397; *s. c.* 6 Am. Dec. 143; *Proctor v. Webber*, 1 D. Chip. (Vt.) 371, 456, note; *Chesapeake & c. Canal Co. v. Knapp*, 9 Pet. (U. S.) 541; *Hunt v. San Francisco*, 11 Cal. 250; *Cape Sable Co.'s Case*, 3 Bland (Md.), 606; *Seagraves v. Alton*, 13 Ill. 366.

³ *Rex v. Bank of England*, 1 Doug. 508, 524; *Kortright v. Buffalo Commercial Bank*, 20 Wend. (N. Y.) 91; *s. c.* affirmed, 22 Wend. (N. Y.) 348; 34 Am. Dec. 317; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *s. c.* 19 Am. Dec. 306; *ante*, § 2462.

⁴ *Gray v. Portland Bank*, 3 Mass. 364; *s. c.* 3 Am. Dec. 156.

⁵ *Illinois Cent. R. Co. v. Thompson*, 116 Ill. 159. That a corporation must *first be put in default* before it will be liable upon an implied contract, — see *Seagraves v. Alton*, 13 Ill. 366.

assumpsit cannot be maintained against a corporation upon a written agreement to which the agent of the corporation has put a seal, though not the common seal of the corporation. Such an instrument is nevertheless the deed of the corporation.¹ But the *scroll* or *private seal* of the *chief engineer* of a railroad corporation affixed to a contract is not the seal of the company, and will not make the contract a specialty, so as to prevent *assumpsit* against the company for its breach.²

§ 7394. **Trespass.**—It being settled in the modern law, contrary to earlier opinion,³ that a *corporation can commit trespass*,⁴ both upon person and property, through its agents acting in its behalf,—it follows that where the common-law system of pleading prevails, an *action of trespass* will lie against a corporation for a *direct injury* done within the general scope of its corporate powers.⁵ The doctrine applies equally to *municipal corporations*,⁶ and, in Illinois, to towns organized under the township law;⁷ but with this limitation, that the act complained of must have been such as might have been lawfully accomplished had the municipal authorities proceeded according to law; since where the act complained of lies wholly outside of the general or special powers of the municipal corporation, it can in no event be liable.⁸

¹ Porter v. Androscoggin &c. R. Co., 37 Me. 349.

² Saxton v. Texas &c. R. Co., 4 N. M. 201; s. c. 16 Pac. Rep. 851. Compare *ante*, § 5053.

³ *Ante*, § 6302.

⁴ *Ante*, § 6303.

⁵ Lyman v. White River Bridge Co., 2 Aiken (Vt.), 255; s. c. 16 Am. Dec. 705; Whiteman v. Wilmington &c. R. Co., 2 Harr. (Del.) 514; s. c. 33 Am. Dec. 411; Underwood v. Newport Lyceum, 5 B. Mon. (Ky.) 129; s. c. 41 Am. Dec. 260; Hopkins v. Atlantic &c. Railroad, 36 N. H. 9; s. c. 72 Am. Dec. 287, 292; Crawfordsville &c. R. Co. v. Wright, 5 Ind. 252;

M'Cready v. Guardians of the Poor, 9 Serg. & R. (Pa.) 94; s. c. 11 Am. Dec. 667. That an action of trespass, for *assault and battery*, will lie against a railroad company,—see St. Louis &c. R. Co. v. Dalby, 19 Ill. 352; *ante*, §§ 6304, 6306.

⁶ Allen v. Decatur, 23 Ill. 332; s. c. 76 Am. Dec. 692; Chicago v. McGraw, 75 Ill. 566, 570; Sheldon v. Kalamazoo, 25 Mich. 387; Chicago v. Turner, 80 Ill. 419, 420.

⁷ Wolf v. Boettcher, 64 Ill. 316, 321.

⁸ Chicago v. Turner, 80 Ill. 419, 420.

§ 7395. *Case*. — An action of *trespass on the case*, for *malfeasance*, will lie against a corporation aggregate.¹ This form of action may, for instance, be maintained by a purchaser of the shares of stock of an incorporated bank against the corporation for its refusal to *transfer the shares* to him on its books.²

§ 7396. *Trover*. — As a corporation may, through its agents, have the custody of *personal property*, and as it may sometimes have that custody wrongfully, it follows that it is liable in the common-law action of *trover*, where the common-law system of pleading prevails, or in an action of a similar nature under the modern codes of procedure, by the owner of goods and chattels, for the *conversion* of them to its own use.³

§ 7397. *Replevin*. — For the same reason, an action of *replevin* will lie against a corporation, — the object of this action being to recover, if possible, the *specific goods* or chattels and *damages* for their detention, and if it is not possible to recover them, then to recover their *value*, and also *damages* for their detention.⁴

§ 7398. *Ejectment*. — The ancient notion that trespass could not be maintained against a corporation prevented, of course, corporations being made defendants in suits of *ejectment*. But this principle was early abandoned, and it has

¹ New York *v.* Bailey, 2 Denio (N. Y.), 433; Harlem *v.* Emmert, 41 Ill. 319.

² Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. St. 345; *ante*, § 2463.

³ Yarborough *v.* Bank of England, 16 East, 6; Sherman *v.* Commercial Printing Co., 29 Mo. App. 31. That *trover* lies, by a shareholder, against the corporation for the conversion of his shares, — see *ante*, § 2455.

⁴ It has been held that a *stock subscription list*, like a promissory note or other written obligation, may be the

subject of an action of *replevin* or other possessory action; and an instance of such an action is found in Louisiana, where it was held that an alternative judgment for \$40,000, in case of default in obeying the order of the court to deliver the list, was invalid, the subscriptions being on credit and the judgment not recognizing or reserving defendant's right to receive a corresponding amount of stock. People's Brewing Co. *v.* Boeinger, 40 La. An. 277; s. c. 21 Am. & Eng. Corp. Cas. 333; 4 South. Rep. 82.

long been regarded as the established law that the method of trying the title of land by ejectment extends to corporations of every kind, whether in the character of plaintiffs or defendants.¹

§ 7399. **Forcible Entry and Detainer.** — The same principle will support the statutory action of forcible entry and detainer against a corporation aggregate.²

§ 7400. **Slander — Libel — Slander of Goods.** — A corporation may maintain an action for a *libel*;³ and one corporation may maintain an action against another which *slanders its business* and represents its product to be of inferior quality.⁴

§ 7401. **Book Account.** — An action of “book account” may be maintained either by or against a corporation.⁵

§ 7402. **Account Stated.** — An action may be maintained against a corporation to recover upon an *account stated*, in like manner as against an individual, — the same presumption existing that if the account, when rendered, is not correct, the alleged debtor will make objection to it within a reasonable time. The presumption would, no doubt, have the same

¹ 1 Kyd on Corp. 187. See Den v. Fen, 10 N. J. L. 237.

² It has been held that a statute declaring any person who shall “enter into or upon any lands, tenements, or other possessions, and detain or hold the same with force and strong hand, or with weapons,” etc., guilty of a forcible entry and detainer (Mansf. Ark. Dig., § 3347), is applicable to the possession by a *railroad company* of a railroad, or part of a railroad, there being no reason in the nature of a possession of a section of a railroad line which takes it out of the language of such a statute, or out of the general principle which lies at the foundation of all actions of forcible entry and detainer. Iron Moun-

tain &c. R. Co. v. Johnson, 119 U. S. 608. This action is a species of statutory bill of peace, and proceeds on the principle that the law will not sanction the obtaining by violence of the possession of real estate, but, without entering into an inquiry as to title or right of possession, will compel the party, who has made a forcible entry, to surrender the possession, and litigate his right to possession in the courts.

³ *Ante*, § 7383.

⁴ Buffalo Lubricating Oil Co. v. Standard Oil Co., 42 Hun (N. Y.), 153; *ante*, § 6316.

⁵ Vermont Mut. Fire Ins. Co. v. Cummings, 11 Vt. 503; Hunneman v. Fire District, 37 Vt. 40.

force in the case of a commercial corporation as in that of a commercial partnership; but in the case of other corporations, which act more slowly, it is conceived that it might be somewhat relaxed.¹

§ 7403. **Use and Occupation.** — While an action of *assumpsit* will lie against a corporation for the use and occupation of land, the plaintiff waiving the tort and suing upon an implied contract,² yet it has been held that a statutory "action of *contract*" for the use of a railroad, cannot be maintained by the owner against persons who did not recognize his title, but used the railroad *adversely* to him, under a *bona fide* claim of right, by virtue of a lease from another person.³

§ 7404. **Actions on Clauses of Charter.** — Where a clause in the charter of a corporation provides that any trustee or manager shall have a claim and lien upon the proceeds of the sales of the company's property, for expenses or debts incurred by him for its benefit, this gives a remedy at law against the company to recover such expenses and debts.⁴

§ 7405. **Actions on By-laws.** — Where a right arises under the provisions of a by-law, an action, generally an action of *debt* at common law, will lie to enforce that right, — a subject already considered.⁵

¹ Where resolutions were adopted by the trustees of a religious society, acknowledging the justness of a claim made by the plaintiff against the corporation, fixing the amount thereof, and agreeing to pay the same in a specified time, and were duly certified by the secretary of the board of trustees, and transmitted to the plaintiff, who thereupon assented to the proposition contained in the resolutions, and agreed to accept the sum offered by the trustees, — it was held that an action would lie against the corporation, notwithstanding it had omitted

to make a record of the vote of its board of trustees upon the resolutions, and that the plaintiff could recover upon the *promise* contained in the resolutions, under a count upon an *account stated*. *St. Mary's Church v. Cagger*, 6 Barb. (N. Y.) 576.

² *Ante*, § 7392.

³ *Kittredge v. Peaslee*, 3 Allen (Mass.), 235.

⁴ *Stephens v. Green Hill Cemetery Co.*, 1 Houst. (Del.) 26.

⁵ *Ante*, § 949. See *Watson v. Clerke*, Carth. 75: s. c. Comb. 138.

§ 7406. **Actions for Violations of Public Duties.**—In respect of the right of action against corporations, a distinction must be taken and constantly borne in mind, between the violation of a duty which the corporation owes to the public *distributively*, and the violation of a duty which it owes to the public *in its aggregate capacity*,—that is to say, to the State. In respect of its liability for a violation of a duty of the former kind, the corporation may be sued by the person to whom it owed the duty, and who was injured and damnified by its violation. In respect of a violation of a duty of the latter kind, the corporation can only be proceeded against by the State itself. A number of decisions will be found which really rest upon this distinction and conform to it, but in which the distinction itself is not clearly expressed. When a private person brings an action against a corporation in respect of the violation of some general public duty, it is sometimes loosely said that the liability of the corporation for the violation of such a duty cannot be raised in this collateral way, and that the only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where express legislative permission is granted therefor.¹ This language does not lead the mind to a clear understanding of any principle; though the result of the decisions is that where the duty is undertaken by the corporation towards the members of the public distributively,—as where a railroad company undertakes to carry a passenger safely, or where a telegraph company undertakes to transmit a message properly, or where a canal company undertakes to keep its canal in a navigable condition for the use of its patrons, or where a municipal corporation undertakes to open a highway and keep it in repair,—the corporation is liable in an action to any individual damaged by its failure to perform the particular duty assumed.² But where the duty is one that

¹ *Martindale v. Kansas City &c. R. Co.*, 60 Mo. 508, 510.

² *Shewalter v. Firner*, 55 Mo. 218; *Land v. Coffman*, 50 Mo. 243; *Cham-*

bers v. St. Louis, 29 Mo. 543, 576; *North Missouri Pac. R. Co. v. Winkler*, 33 Mo. 354; *Christian University v. Jordan*, 29 Mo. 68, 71.

is assumed towards the public generally, or towards a considerable portion of the public in the aggregate,—as where a railway company fails to complete its road according to its charter, establishes it on a route not permitted by its charter, or establishes a depot at a place not permitted, or prohibited by law, or abandons some portion of its route and leaves the inhabitants of that vicinity without adequate service,—the injury is of that public nature which, unless the legislature has expressly given a private action to an individual, can only be redressed by a proceeding on the part of the State.¹ The principle here laid down is somewhat analogous to the right of action for a *nuisance*. If the injury flowing therefrom is one sustained by the public, or by a neighborhood generally, and is not special or peculiar to the plaintiff, he has no right of action; the injury is to the public, and it must be redressed by a public prosecution by indictment² or information, or sometimes by an information in equity brought by the Attorney-General.³

§ 7407. **Specific Performance.**—Courts of equity powers will compel the specific performance of their contracts by corporations, where they would exert the same power against individuals.⁴ The question of the power of a court of chancery, by exerting its process *in personam* against parties before it, to compel them to perform acts relating to *real property in*

¹ Kinealy *v.* St. Louis &c. R. Co., 69 Mo. 658; Martindale *v.* Kansas City &c. R. Co., 60 Mo. 508, 510; Brainard *v.* Railroad Co., 48 Vt. 107; Brooklyn Park Comm'rs *v.* Armstrong, 45 N. Y. 234; *s. c.* 6 Am. Rep. 70; Field on Damages, § 39; Mills on Eminent Domain, § 317.

² Holman *v.* Townsend, 13 Met. (Mass.) 297; Stetson *v.* Faxon, 19 Pick. (Mass.) 147; *s. c.* 31 Am. Dec. 123; Quincy Canal *v.* Newcomb, 7 Met. (Mass.) 276; *s. c.* 39 Am. Dec. 778; Smith *v.* Boston, 7 Cush. (Mass.) 254; Stone *v.* Fairbury R. Co., 68 Ill.

394; *s. c.* 18 Am. Rep. 556; Proprietors *v.* Nashua &c. R. Co., 10 Cush. (Mass.) 385; Kinealy *v.* St. Louis &c. R. Co., 69 Mo. 658, 663. Compare Jackson *v.* Jackson, 16 Ohio St. 163, 168; Little Miami Co. *v.* Naylor, 2 Ohio St. 235; *s. c.* 59 Am. Dec. 667; Railroad Company *v.* Compton, 2 Gill (Md.), 20; Attorney-General *v.* West Wisconsin R. Co., 36 Wis. 466.

³ *Post*, §§ 7774, 7782.

⁴ Montclair Township *v.* New York &c. R. Co., 45 N. J. Eq. 436; *s. c.* 18 Atl. Rep. 242.

another jurisdiction, is a disputable one. It has been held that a court of chancery in one State has no jurisdiction to compel a domestic corporation to go into another State and specifically execute a contract to make improvements on lands, and, on its default, to enforce the decree by attachment and sequestration of its property in the home State.¹

§ 7408. **Mode of Compelling Performance of Agreement to Arbitrate.**—It is generally agreed that a court of equity will not compel the specific performance of an agreement to arbitrate.² Suppose, then, that there is a provision in the charter of a corporation requiring it to sell its property and business to the public at the expiration of a certain period, at a price and upon terms to be fixed by arbitrators, and, when the period arrives, the corporation refuses to join in the appointment of arbitrators as required by the charter,—what is the remedy? It is held that, while the duty to appoint arbitrators will not be specifically enforced in equity, yet the corporation may be compelled to do so by *mandamus*; or the State may proceed in *quo warranto* to forfeit its charter, by reason of its willful refusal to perform one of the conditions on which it accepted it, and thus take back to itself the franchise and confer it upon the proper body for the benefit of the public.³

§ 7409. **Bills in Equity for Discovery.**—The object of a bill of discovery in equity is to enable one party to search the conscience of his antagonist, and to compel him to make dis-

¹ Port Royal R. Co. v. Hammond, 58 Ga. 523.

² Milnes v. Gery, 14 Ves. 400; Blundell v. Brettargh, 17 Ves. 232, 241; Street v. Rigby, 6 Ves. 815, 817; Agar v. Macklew, 2 Sim. & Stu. 418; Wilkes v. Davis, 3 Mer. 507; Gourlay v. Somerset, 19 Ves. 429; Tobey v. Bristol, 3 Story, 800; Norfleet v. Southall, 3 Murph. (N. C.) 189, 190; Providence v. St. John's Lodge, 2 R. I. 46; Hopkins v. Gilman, 22 Wis.

476; Greason v. Keteltas, 17 N. Y. 491; Tscheider v. Biddle, 4 Dill. (U. S.) 55; Hug v. Van Burkleo, 58 Mo. 202; Biddle v. Ramsey, 52 Mo. 153, 158; King v. Howard, 27 Mo. 21, 25.

³ St. Louis v. St. Louis Gas Light Co., 70 Mo. 69, 114; citing Union Pac. R. Co. v. Hall, 91 U. S. 343; People v. Manhattan Gas Works, 45 Barb. (N. Y.) 136; United States v. Union Pac. R. Co., 3 Dill. (U. S.) 524.

closures upon oath, of facts necessary to the preservation of the rights of the former, which he otherwise might not be able to prove. The remedy has lost most of its efficacy since the adoption of modern statutes removing the exemption of parties from being witnesses in civil cases. Corporations could answer only under their common seal; whereas natural persons (peers excepted) are bound to answer under oath.¹ Therefore, in order to prevent a failure of justice arising from the circumstance that a corporation cannot take an oath and cannot be indicted for perjury for making an answer willfully false, the practice has long been settled to join the officers of the corporation, such as its secretary, book-keeper, or other officer, and even its members, as defendants in bills in chancery for the purpose of compelling them to make discovery for it.² On the one hand, when discovery is sought of an

¹ Mitf. on Plead. 10.

² Wych v. Meal, 3 P. Wms. 310; Anon., 1 Vernon, 117; Moodalay v. Morton, 1 Bro. C. C. 469; Dummer v. Chippenham, 14 Vesey, 245; Brumly v. Westchester Co. Man. Society, 1 Johns. Ch. (N. Y.) 366. "It seems to be settled that a bill will lie *against a corporation and its officers*, to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone." Field, J., in Post v. Toledo &c. R. Co., 144 Mass. 341; s. c. 59 Am. Rep. 86, 92; citing McComb v. Chicago &c. R. Co., 19 Blatchf. (U. S.) 69; Costa Rica v. Erlanger, 1 Ch. Div. 171; Glasscott v. Copper Miners' Co., 11 Sim. 305; Moodalay v. Morton, 1 Bro. C. C. 469. See, on the subject of discovery, Colgate v. Compagnie Française, 23 Fed. Rep. 82; MacGregor v. East India Co., 2 Sim. 452; Bolton v. Liverpool, 1 Myl. & K. 88. It is said that in suits against a corporation, as it answered under its common seal and not under oath, the practice was early estab-

lished in Massachusetts of making one or more of its officers or members co-defendants, and of compelling them to make disclosure of such facts within their knowledge as the corporation, if a natural person, could have been compelled to disclose, although their answers could not be used as evidence against the corporation. Their answers enabled the plaintiff to ascertain, in advance of a trial, what the facts within their knowledge were, and to propound proper interrogatories to them or to other persons as witnesses. Field, J., in Post v. Toledo &c. R. Co., 144 Mass. 341; s. c. 59 Am. Rep. 86, 90; citing Wright v. Dame, 1 Met. (Mass.) 237. The practice of *joining an officer of the corporation in a bill against it for a discovery*, where the plaintiff is entitled to a discovery, is explained in McComb v. Chicago R. Co., 19 Blatchf. (U. S.) 69. The reason of the rule is stated by Lord Chancellor Talbot in the leading case of Wych v. Meal, 3 P. Wms. 310, which seems to have finally established the practice, to be

officer of a corporation impleaded as a defendant in equity, the officer must be made a party for that purpose, although no substantial relief is sought against him.¹ On the other

that the plaintiff ought to have discovery, and though the corporation might answer under its common seal, it would not be responsible for *perjury*. It is an exception to the general rule that a *witness* cannot be joined for purposes of discovery. A limitation of the rule is that the officer cannot be joined as a party for the discovery of what he did not learn as an officer, or of the facts which he knew before he became an officer. It has also been held that the plaintiff may join a member of the corporation for the purposes of discovery, although the latter is not an officer or agent of the corporation (*Wright v. Dame*, 1 Met. (Mass.) 237); and it has been held in the English Court of Chancery that *members* of the corporation may be joined with an officer in such a bill. *Glasscott v. Copper Miners' Co.*, 11 Sim. 305. But, outside of the rule above stated, a bill for a discovery, in aid of a defense to an action, cannot be maintained against one who is not a party to the record at law, though he may be interested in the subject of the action, — Lord Cottenham saying: "The cases of officers of corporations stand on principles entirely peculiar to themselves, and have obviously no application to the present case." *Queen of Portugal v. Glyn*, 7 Clark & Fin. 466. It is scarcely necessary to add that the plaintiff may *waive* his right to have an officer of the corporation joined who can answer under oath and be responsible for the penalties of perjury; and that he may therefore maintain a bill for a discovery against the corporation alone in aid of an action against it at law, although it does not answer

under oath. *Colgate v. Compagnie Française*, 23 Fed. Rep. 82. In the case of *Costa Rica v. Erlanger*, 1 Oh. Div. 171, there was a cross-bill for a discovery against the plaintiff and the president of the plaintiff Republic. The only questions were as to staying the original action till answer, and as to the right to choose the officer of the plaintiff Republic who should make the discovery. One of the leading cases on this subject was that of a "bill against a corporation to discover writings. The defendants answered under their common seal, and so, being not sworn, will answer nothing in their own prejudice. Ordered that the clerk of the company, and such member or members as the plaintiff shall think fit, answer on oath, and that the master settle the oath." *Anon.*, 1 Vern. 117, Anno 1682. So, in a case against the East India Company an officer of the company was made defendant in a bill for discovery of orders and entries in the books of the company, and a demurrer to the bill was overruled. *Wych v. East India Co.*, 3 P. Wms. 309, Anno 1734. In like manner, a demurrer to a bill against the East India Company and their secretary, praying for a general examination of witnesses in India, and that the defendants might discover by what authority the plaintiff was dispossessed of a lease for supplying Madras with tobacco (the plaintiffs intending to bring an action), was overruled. *Moodalay v. Morton*, 1 Bro. C. C. 469, Anno 1785.

¹ *Virginia & c. Man. Co. v. Hale*, 93 Ala. 542; *s. c.* 9 South. Rep. 256.

hand, if no substantial relief is sought against him, and if no discovery is demanded from him in the bill, he is not properly joined as a party, especially where the bill waives answer under oath.¹ Moreover, it is a principle that *mere witnesses*, who are shown to be cognizant of the alleged facts, cannot be joined for a discovery.² Upon this principle, it is held that where a bill in equity is filed by a creditor against a corporation, and also against its *directors and officers*, but no relief is prayed except as against the corporation, and no fraud, conspiracy, or breach of trust is charged against the directors and officers, they cannot be joined as defendants for the sole purpose of discovery.³ It is of the essence of a discovery that it should be *under oath*, and a party is impleaded as defendant for the purposes of discovery in order to compel him to *answer* under oath. When, therefore, the bill does not require an answer under oath, the officers of the corporation are improperly joined for discovery.⁴ Even though the answers of the corporation to the demand of the bill for a discovery cannot be read as evidence against the corporation, yet they may be of use in directing the plaintiff how to draw his interrogatories for the purpose of obtaining a better discovery.⁵ The former, as well as the present, officers of a corporation can be made parties to a suit against it, for the purpose of compelling them to make discovery of facts within their official knowledge.⁶

§ 7410. Mode of Procedure to Compel Discovery in Equity.—The practice is where the complainant desires a discovery in a suit in equity against a corporation, to join with the

¹ Colonial &c. Mort. Co. v. Hutchinson Mort. Co., 44 Fed. Rep. 219.

² Howe v. Best, 5 Madd. 19; Story Eq. Plead., § 235, note 2; Norwood v. Memphis &c. R. Co., 72 Ala. 563.

³ Norwood v. Memphis &c. R. Co., 72 Ala. 563; Tutweiler v. Tuscaloosa Coal &c. Co., 89 Ala. 391; s. c. 7 South. Rep. 398.

⁴ Tutweiler v. Tuscaloosa &c. Coal Co., 89 Ala. 391; s. c. 7 South. Rep.

398. Compare Zelnick v. Brigham &c. Co., 74 Ala. 598; Watts v. Eufaula Nat. Bank, 76 Ala. 474. For a bill not alleging facts entitling the plaintiff to a discovery from the directors, see Camp v. Taylor (N. J.), 19 Atl. Rep. 968.

⁵ Wych v. Meal, 3 P. Wms. 310.

⁶ Fulton Bank v. Sharon Canal Co., 1 Paige (N. Y.), 219.

corporation as defendant, any director, officer, agent, or individual member from whom he seeks such discovery.¹ This is regarded as an exception to the general rule of chancery practice that one who may be a witness cannot be made a defendant to a bill for discovery.² The officers of a corporation will, in many cases, be made parties for the mere purpose of compelling them to make discovery of doings of the corporation, where no relief is sought against them as individuals.³ Although no relief is sought against the officers or agents, but merely a discovery, yet this discovery cannot be had from them unless they be *joined with the corporation as defendants* in the action; but the *answer* in such a case will be *under the seal of the corporation*, according to the knowledge and information and belief of its officers, ascertained from all proper sources of information.⁴

§ 7411. Further of This Subject. — Where the officers of a corporation are thus joined for the purpose of discovery, the discovery is limited to matters coming to their knowledge in

¹ Wych v. Meal, 3 P. Wms. 310; Dummer v. Chippenham, 14 Ves. 245; Moodalay v. Morton, 1 Bro. C. C. 469; Le Texier v. Anspach, 15 Ves. 159, 164; Gibbons v. Waterloo Bridge Co., 5 Price, 491, 493; Glasscott v. Copper Miners' Co., 11 Sim. 305; Many v. Beekman Iron Co., 9 Paige (N. Y.), 188; Bronson v. La Crosse &c. R. Co., 2 Wall. (U. S.) 283, 303, *per* Nelson, J.; Fulton Bank v. New York &c. Canal Co., 1 Paige (N. Y.), 311, *per* Walworth, Ch.

² Le Texier v. Anspach, 15 Ves. 159, 164; Gibbons v. Waterloo Bridge Co., 5 Price, 491, 493; Many v. Beekman Iron Co., 9 Paige (N. Y.), 188; Story Eq. Pl., § 234.

³ Dummer v. Chippenham, 14 Ves. 245, 252.

⁴ French v. First Nat. Bank, 7 Ben. (U. S.) 488; s. c. 11 Nat. Bank. Reg. 189; Brumley v. Westchester Co.

Man. Soc., 1 Johns. Ch. (N. Y.) 366. Also it has been said that a bill for a discovery will lie against the members of a corporation without joining the corporation where the members are personally liable for its debts. Middletown Bank v. Russ, 3 Conn. 135, 139; s. c. 8 Am. Dec. 164. Where the officers or members of the corporation are joined with the corporation for purposes of discovery only, and the complainant, by mistake, inserts a prayer for relief against such officers, as well as against the company, the officers can not *demur* to the discovery and relief generally. They should make the discovery sought, and *demur to the relief*; or should answer the bill generally, and then object, at the hearing, that they have been improperly made parties to the suit, for relief as well as for discovery. Many v. Beekman Iron Co., 9 Paige (N. Y.), 188

the course of their service as officers, and cannot be extended to other matters.¹ The objection that a discovery may subject the company to a forfeiture of its charter, is not sufficient to support a general demurrer to a bill for discovery and relief, even if it would have authorized a demurrer to the discovery of particular facts.² Where a corporation, being a party to a suit, is directed by an order of court to do a specific thing to effectuate certain relief to which the other party is entitled, an officer of the corporation may, in aid of such relief, be compelled, by a *subpœna duces tecum* on the order of a master, to produce certain specified books and documents of the corporation.³

§ 7412. **Statutory Substitutes for Discovery.** — The subject of discovery in equity has lost most of its importance, by reason of the fact that statutory substitutes for this remedy have been enacted generally in England⁴ and America.⁵ The

¹ "No case has gone so far as to join an officer of a corporation for the purpose of discovery of matters which were not within his knowledge as such officer, or learned by him while in the service, or as a member of the corporation; nor, as in this case, matters which took place before the corporation was formed, or in which it had no part; though it appears that by and through other sources of information the officer happens to have obtained such knowledge." *Per Choate, D. J., in McComb v. Chicago & C. R. Co.*, 7 Fed. Rep. 426; *s. c.* 11 Reporter, 422.

² *Robinson v. Smith*, 3 Paige (N. Y.), 222; *s. c.* 24 Am. Dec. 212.

³ *Erie R. Co. v. Heath*, 8 Blatchf. (U. S.) 413.

⁴ In England it is no longer the practice, nor even proper, to make an officer or member of a corporation a party to a bill against it for purposes of discovery. In accordance with the fifty-first section of

the Common Law Procedure Act of 1854, it has been provided, by the rules of court, that "if any party to an action be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly." Rules of Court 1875, Order XXXI., Rule 4. See *Wilson v. Church*, 9 Ch. Div. 552. Doubtless the more recent court rules deal with the subject in a similar way.

⁵ These statutes and their interpretation are considered at length in 1 Thomp. Trials, § 731, *et seq.* For the construction of the New York statute, see *Ibid.*, § 743, *et seq.*

necessity of this species of relief has been almost obliterated by statutes which have been generally enacted in the United States, under which *parties may be compelled to testify as witnesses*, subject to the constitutional immunity against self-incrimination. Therefore, although the directors and other managing officers of the defendant corporation may be joined for the purpose of relief against them, yet they can be examined as witnesses, and the court will consider their adversary character to the plaintiff, and will accordingly allow them to be examined by means of *leading questions*.¹ A statutory provision to the effect that *any party to an action* may be examined as a witness at the instance of any adverse party or parties, after issue joined in said action and before trial thereof, is a statutory substitute for the bill of discovery in equity.² Accordingly, where a corporation is a party to the record, it does not follow that its officers are parties to the action. As stated by the court in one case: "A corporation has a distinct legal existence as a person, or party capable of suing and being sued, and process against it brings only such artificial body into the court. By statute, process may be served on some designated officers of the corporation, but such service brings the corporation, and not the individual served, into court."³

§ 7413. Bill of Interpleader by Agent of Corporation.— It is said that the grounds upon which the right to prefer a bill of interpleader rests, and consequently the appropriate allegations in such bill, are: 1. That two or more persons have preferred a claim against the complainant. 2. That they claim the same thing. 3. That the complainant has no beneficial interest in the thing claimed. 4. That he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.⁴ It is a settled rule, both at law

¹ 1 Thomp. Trials, § 359.

² Apperson v. Mutual Benefit Life Ins. Co., 38 N. J. L. 272; Wilson v. Webber, 2 Gray (Mass.), 558.

³ Apperson v. Mutual Benefit Life Ins. Co., 38 N. J. L. 272, 273.

⁴ Atkinson v. Manks, 1 Cow. (N. Y.) 691, 703; Gibson v. Goldthwaite, 7 Ala. 281; s. c. 42 Am. Dec. 592.

and in equity, that an agent shall not be heard to dispute the title of his principal to property which the agent has received from, or for the use of, such principal; neither will he be heard to say that he will hold such property for the benefit of a stranger.¹ So, it has been held that, where one person receives money for another as his *agent*, and the money is claimed by a third person, who gives notice of his claim, a bill of interpleader will not lie; for a mere agent receiving money for the use of another cannot, by notice, be converted into an implied trustee. His possession is the possession of his principal.² But it seems that where the adverse claimants of the fund in the hands of the agent both claim to derive their title from his principal, by assignment or otherwise, the principle which forbids the agent to bring a bill of interpleader does not apply; for, by preferring such a bill, he does not deny or question the title of his principal. Accordingly, it has been held that such a bill might be maintained, upon the following facts: The bill alleged that several defendants (naming them) had set up claims to money collected by the complainant on notes and bills which had been placed in his hands for collection by the Tombigbee Railroad Company; that two of the defendants had brought suits at law for its recovery; that two of them claimed the entire sum as assignees of the corporation; and that the other defendant claimed a part thereof under an order of transfer by one of the assignees; that the complainant had no interest in the sum collected by him (at least beyond his commission, which it was competent for him to retain); but that he held the sum for the use of the party entitled thereto; and that he could not determine, without hazard to himself, which of the defendants was entitled to the money, and thereupon offered to bring the same into court.³ In such a case it has been held that the corporation is not a necessary party to the bill, because, having made an assignment of the thing or fund in

¹ Gibson v. Goldthwaite, *supra*.

Morley v. Thompson, 3 Madd. 564, note in index.

² Gibson v. Goldthwaite, *supra*; citing Bowyer v. Pritchard, 11 Price, 115; Lowe v. Blank, 3 Madd. 277;

³ Gibson v. Goldthwaite, 7 Ala. 281; s. c. 42 Am. Dec. 592, 597.

controversy, it has parted with its title, and consequently with its interest in the controversy.¹

§ 7414. **Actions to Recover Payments Voluntarily Made.**—

The rule that a payment voluntarily made under a mistake of law, but with a full knowledge of the facts, cannot be recovered back, rests upon general principles of public convenience, and applies to a corporation as well as to a natural person.²

§ 7415. **Demand in Actions against Corporations.**—It is conceived that *no demand is necessary* in order to maintain an action against a corporation, except where it would be necessary in the case of an individual. But before a *stockholder* can bring an action to prevent or redress *breaches of trust* committed by the *officers* of the corporation in the management of its affairs, he must make a demand on the directors to sue in the name of the corporation, absurd as this, in some cases, may be;³ though some courts have held that no such demand is necessary where it must be made upon the persons who themselves are guilty of the wrong.⁴ A demand against a corporation must, of course, be made upon an agent authorized to represent it in respect of the matter of the demand.⁵

¹ *Gibson v. Goldthwaite*, 7 Ala. 281; *s. c.* 42 Am. Dec. 592, 597.

² *Railway Company v. Iron Company*, 48 Ohio St. 44; *s. c. sub nom. Valley R. Co. v. Lake Erie Iron Co.*, 1 L. R. A. 412; *s. c.* 18 N. E. Rep. 486.

³ *Ante*, §§ 4499, 4500, *et seq.*; also § 4521.

⁴ *Wickersham v. Crittenden*, 93 Cal. 17; *s. c.* 28 Pac. Rep. 788.

⁵ *Langworthy v. New York & C. R. Co.*, 2 E. D. Smith (N. Y.), 195; *Commercial Bank v. Bonner*, 13 Smedes

& M. (Miss.) 649. How demand made upon the corporation to lay a foundation for an action to enforce a stockholder's individual liability,—see *Haynes v. Brown*, 36 N. H. 545; *Harvey v. Chase*, 38 N. H. 272. Thus, a demand made by a *passenger*, or by his assignee, for his *baggage* where his check has been lost, is a good demand if made upon the *baggage-master* of the railroad company. *Cass v. New York & C. R. Co.*, 1 E. D. Smith (N. Y.), 522.

CHAPTER CLXXVIII.

JURISDICTION AS DEPENDING UPON RESIDENCE AND CITIZENSHIP.

ART. I. OF STATE COURTS. §§ 7421-7440.

II. FEDERAL JURISDICTION AS DEPENDENT UPON DIVERSE CITIZENSHIP. §§ 7447-7458.

III. REMOVAL OF SUCH ACTIONS FROM THE STATE TO THE FEDERAL COURTS. §§ 7462-7478.

IV. "INHABITANCY" OF CORPORATIONS FOR THE PURPOSES OF FEDERAL JURISDICTION. §§ 7484-7489.

ARTICLE I. OF STATE COURTS.

SECTION

7421. Residence of corporations for the purpose of State jurisdiction.

7422. Influence on State decisions of the change in Federal doctrine.

7423. Corporation resides at its principal office.

7424. Theory that it resides wherever it exercises its franchises.

7425. Further of this theory.

7426. Suable in any county in the State.

7427. Venue the same as in the case of natural persons.

7428. In the county where the contract was broken or the injury occurred.

7429. The same subject continued.

7430. Where the cause of action accrues.

SECTION

7431. Validity of statutes making corporations suable in any county.

7432. Local actions.

7433. Transitory actions.

7434. Changing the venue.

7435. Residence of a corporation the residence of its president.

7436. National banks are State corporations for jurisdictional purposes.

7437. Jurisdiction and venue in respect of corporations chartered by the United States other than national banks.

7438. State jurisdiction in the case of interstate corporations.

7439. Actions against branches of corporations.

7440. Actions in the county in which the agent with whom the contract was made resides.

§ 7421. Residence of Corporations for the Purposes of State Jurisdiction. — A considerable disposition has manifested

fested itself among the State courts to follow the Federal courts in dealing with the subject of the residence of corporations for the purposes of jurisdiction. At an early period of American jurisprudence, when it was the doctrine of the Federal courts that they would look behind the corporate entity to discover the residence of the individuals composing it, for the purpose of settling the question of jurisdiction as dependent upon diverse State citizenship,¹ some of the State courts applied the same principle in respect of their own jurisdiction.²

§ 7422. **Influence on State Decisions of the Change in Federal Doctrine.**—But with the change in the Federal doctrine on this subject, under which the Federal courts conclusively presume that a corporation created under the laws of a particular State is a *citizen* of that State for the purposes of their jurisdiction, the State courts have entirely abandoned the conception of looking behind the intangible person, to discover the residence of the members composing it for any purpose connected with their jurisdiction. No such idea is discoverable in any of the modern books of reports. On the other hand, the State, as well as the Federal doctrine, now is, that a corporation has no individuality, except in its corporate capacity; that its local *status* is not dependent upon the citizenship of the individuals composing it; that an action by

¹ *Bank of United States v. De-veaux*, 5 Cranch (U. S.), 61, 87; *Hope Ins. Co. v. Boardman*, 5 Cranch (U. S.), 57.

² *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202; *s. c.* 33 Am. Dec. 395. Thus, it being a principle of the jurisprudence of Kentucky, seemingly enacted by statute, that actions could not be brought in the courts of that State by non-residents against non-residents, but that if the plaintiff were a non-resident, the defendant must be a citizen,—if a citizen of Rhode Island brought an action in Kentucky against a Kentucky corporation, it was necessary for him to

individualize the character of the members, and to state in some part of the record that they were citizens of Kentucky; but his failure to do so was regarded as a mere defect in the declaration, and not in the writ, and was *amendable*. *Lexington Man. Co. v. Dorr*, 2 Litt. (Ky.) 256. So, in Connecticut, the court, for the purpose of determining the residence of a corporation with reference to the question of jurisdiction, regarded the stockholders as the real parties defendant, and settled the question according to their residence. *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 202; *s. c.* 33 Am. Dec. 395.

a corporation in its corporate name is conclusively presumed to be brought by the citizens of the State under whose laws the corporation is created; and that no averment or evidence to the contrary is admissible to defeat the jurisdiction of the court in which the action is brought.¹ This doctrine is based upon the theory that a corporation, from the necessity of the case, can have but one domicile, and that it cannot migrate, but must dwell in the place of its creation.² But this conception, in so far as it relates to State jurisdiction, is now greatly modified, because even those courts which reiterate it, sustain actions against foreign corporations in their own jurisdictions.³ But it remains that the courts of a State do not lose jurisdiction over corporations created by their own legislatures or under their own laws, from the mere fact that such a corporation may make a *de facto* migration into another State, by establishing its principal office and the residence of its chief officers there.⁴ The jurisdiction of a State court over

¹ Educational Society v. Varney, 54 N. H. 376. That a State court will not look behind the corporate entity to scrutinize its membership for the purpose of determining a question of jurisdiction or venue, was held in Connecticut &c. R. Co. v. Cooper, 30 Vt. 476; s. c. 73 Am. Dec. 319. See also Moxie Nerve Food Co. v. Baumbach, 32 Fed. Rep. 205. That the question of jurisdiction is determined by the state of facts existing at the commencement of the action, and is not affected by a subsequent assignment of the cause of action, — see Erwin v. Oregon R. &c. Co., 28 Hun (N. Y.), 269.

² See a note on this doctrine to Young v. South Tredegar Iron Co., 4 Am. St. Rep. 760.

³ As was done in Educational Society v. Varney, 54 N. H. 376. So in Newport &c. Bridge Co. v. Woolley, 78 Ky. 523, where a company organized to construct a bridge across the

Ohio River between Cincinnati and Newport, had been incorporated under the laws of Kentucky, it was held that it could not have two domiciles, and that its domicile was in Ohio, and yet an action was sustained against it in Kentucky. *Ante*, § 47. But, as already pointed out (*ante*, §§ 47, 319, 320, 688), an interstate corporation created by the concurrent legislation of both States, is not a non-resident of one of such States, because the incorporators had previously obtained a charter in another State and effected an organization there, and still carries on business there. Railroad Co. v. Barnhill, 91 Tenn. 395; s. c. 30 Am. St. Rep. 889; 19 S. W. Rep. 21 (distinguishing Memphis &c. R. Co. v. Alabama, 107 U. S. 581). See also *post*, §§ 7438, 7452, 7472, 7490, 7499, 7817, 7891, 8012, 8020, 8028.

⁴ Baltimore &c. R. Co. v. Gallahue, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254.

corporations of the State, in respect of their doings in other States, when those doings relate to *land*, or other *fixed property in such other States*, by proceedings *in personam*, rests rather upon the consideration of the power of a court of equity in one State to compel its own citizens to do acts affecting the title to or *status* of land in another State.¹

§ 7423. **Corporation Resides at its Principal Office.**—In the absence of special statutes, such as those providing that actions may be brought against a railroad company in any county through which its road passes, and that service may be had upon any station agent, etc., many decisions concur in the proposition that, for the purposes of jurisdiction, the residence of a corporation is the place *where its principal business is carried on*.² What the principal office or place of

¹ Under the doctrine of the English Court of Chancery, the power exists, and it is frequently exercised in this country,—in one case under the notice of the writer, by removing a domestic corporation from the office of *trustee* of property situated in another State, and by enjoining it from proceeding further in an action there pending in relation to such property, at the suit of persons interested in such property, some of whom were residents of the domestic State. *Gibson v. American Loan &c. Co.*, 58 Hun (N. Y.), 443; *s. c.* 35 N. Y. St. Rep. 192; 12 N. Y. Supp. 444.

² *Chicago &c. R. Co. v. Bank of North America*, 82 Ill. 493; *Jenkins v. California Stage Co.*, 22 Cal. 537; *Holgate v. Oregon Pac. R. Co.*, 16 Or. 123; *s. c.* 17 Pac. Rep. 859 (or in the county in which the cause of action arose); *Caldwell v. Vicksburg &c. R. Co.*, 40 La. An. 753; *s. c.* 5 South. Rep. 17 (holding that a railroad corporation must be sued at its domicile for damages arising from a *passive breach* of its obligations, such

as *negligence* or *non-feasance*); *Montgomery v. Louisiana Levee Co.*, 30 La. An., pt. I., 607 (holding the same doctrine); *Western Union Tel. Co. v. Conant*, 11 Colo. 111; *s. c.* 17 Pac. Rep. 107 (subject to statutory exceptions); *Southwestern R. Co. v. Paulk*, 24 Ga. 356 (subject to special statutory exceptions); *Wallace v. Thomas*, 34 Ga. 543 (subject to the same exceptions); *Clark v. Chapman*, 45 Ga. 486 (subject to the same exceptions); *Speer v. Atlanta &c. Railroad*, 30 Ga. 135 (subject to the same exceptions); *Edwards v. Union Bank*, 1 Fla. 136; *Cape Sable Co.'s Case*, 3 Bland (Md.), 606; *Thorn v. Central R. Co.*, 26 N. J. L. 121. This is so under section 395 of the Civil Code of California. *Cohn v. Central &c. R. Co.*, 71 Cal. 488; *s. c.* 12 Pac. Rep. 498; *Jenkins v. California Stage Co.*, 22 Cal. 537. *Contra*, reasoning of *Thornton, J.*, in *California South. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394. It is so under section 948 of the Code of Civil Procedure of New York, even where the corporation

business of a corporation is, for the purposes of jurisdiction, will be a *question of fact*, upon which question it is plain that the recitals in its certificate of incorporation, or in its articles of association, are not conclusive.¹

may conduct a large part of its business elsewhere. *Rossie Iron Works v. Westbrook*, 13 N. Y. Supp. 141. So, in Vermont, the residence of a *railway company*, for the purpose of actions *in its favor*, is the county or town upon the line of its road where its principal office and the center of its business operations are situated, the same being its legally defined route, without reference to the residence of its members. *Connecticut &c. R. Co. v. Cooper*, 30 Vt. 476; *s. c.* 73 Am. Dec. 319.

¹ *Rothschild v. Dithredge Flint Glass Co.*, 22 N. Y. Civ. Proc. 314; *s. c.* 20 N. Y. Supp. 373. It is so under section 44 of the Civil Code of Oregon. *Holgate v. Oregon &c. R. Co.*, 16 Or. 123. It is so under a similar statute in Pennsylvania. *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422. Under a statute of Kentucky (Ky. Civ. Code, §§ 51, 71), service upon the chief officer of an insurance company in the county where its principal office is located, will confer jurisdiction upon the court of another county in which the action is brought, and in which a regularly authorized agent of the company issued the policy sued on. *Kentucky Mut. &c. Co. v. Logan*, 90 Ky. 364; *s. c.* 12 Ky. L. Rep. 327; 33 Am. & Eng. Corp. Cas. 416; 14 S. W. Rep. 337. Under a statute providing that an *application for a receiver* of a railroad company must be made in the judicial district in which the principal business office of the company is located, the application is properly made in the city of New York, where the articles of consolidation, by which the corporation

had been created, declared that "the principal office should be there," and where the by-laws provided that the meetings of stockholders should take place there, "at the principal business office," and where the company had reported to the railroad commissioners that its general office was there, and it appeared that in its transfer books and other books of account the place was styled "the office of the company." *Olmstead v. Rochester &c. R. Co.*, 44 Hun (N. Y.), 627 *mem.*; *s. c.* 8 N. Y. St. Rep. 856. Where the office of the *treasurer* of a religious corporation was the principal office, and the one at which most of its business was transacted, an action against it was properly brought there, although its church edifice was in another judicial district. *St. Michael's &c. Church v. Behrens*, 13 Daly (N. Y.), 548; *s. c.* 1 N. Y. St. Rep. 627. In the case of a ferry company plying between Brooklyn and New York, a court in Brooklyn, having jurisdiction of all actions against corporations *transacting their general business* within that city, or established by law therein, had jurisdiction of an action against the company for a collision occurring on the river; and the fact that the office of its attorney, where its records were kept, its directors met, etc., was in New York City, did not change its establishment so as to divest this jurisdiction. *Crofut v. Brooklyn Ferry Co.*, 36 Barb. (N. Y.) 201. Under a statute providing that "where one of the parties is a corporation, not a town, parish, or school district, an action may be brought in any county in

§ 7424. **Theory that It Resides wherever It Exercises its Franchises.** — There is another doctrine, which does not confine the residence of a corporation to its principal place of business within the State, but which gives it a residence, for the purposes of jurisdiction, wherever it spreads out and exercises its franchises. It was stated in an early case, by the Supreme Court of Illinois, thus: "The residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised."¹ It was accordingly held that a *railroad corporation* had a legal existence *in any county* in which it operated its road;² and this doctrine has been accepted and followed in other States.³ On the same principle, a *foreign corporation* may have a *domestic residence*, for the purposes of jurisdiction and procedure, in any county where it has an established place of business, and exercises its franchises, — at least where it has its principal office.⁴ Such being the principle, where the

which such corporation shall have a place of business," it was held that where a railroad passed over parts of two counties, the corporation might maintain an action in the county in which it had an office, where its books and records were kept in accordance with a vote of its directors, and where a large share of its business was transacted, although it had at the same time an office in the other county, where the residue of its business was transacted, and where its treasurer and clerk resided. *Androscoggin &c. R. Co. v. Stevens*, 28 Me. 434.

¹ *Bristol v. Chicago &c. R. Co.*, 15 Ill. 436, 437. Again quoted in *Chicago &c. R. Co. v. Bank of North America*, 82 Ill. 493, 496.

² *Bristol v. Chicago &c. R. Co.*, *supra*.

³ *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Crutsinger v. Missouri Pac. R. Co.*, 82 Mo. 64; *Baldwin v. Missis-*

sippi &c. R. Co., 5 Iowa, 518; *Richardson v. Burlington &c. R. Co.*, 8 Iowa, 260. Many other decisions could be cited to the effect that a corporation may have a constructive residence for the purposes of jurisdiction at places other than that of its principal office: *Glaize v. South Carolina R. Co.*, 1 Strob. L. (S. C.) 70; *Cromwell v. Charleston Ins. &c. Co.*, 2 Rich. L. (S. C.) 512. And the same is true of the *situs* of a corporation for the purpose of *taxation*: *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580, 586. See *post*, § 8094, *et seq.*

⁴ *Chicago &c. R. Co. v. Bank of North America*, 82 Ill. 493; *post*, §§ 7891, 7988, *et seq.* So, it has been held that, for the purpose of the application of the *statute of limitations*, the residence of a corporation is in the State whither it has removed its offices and effects, and where it exercises its functions and franchises. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

constitution of a State declares that no person shall be sued elsewhere than in the county in which he resides, an act of the legislature declaring that railroad companies may be sued for injuries done by them to stock, etc., in the counties in which the injuries may have been committed, is *not unconstitutional*, since the company may be deemed to reside in those counties.¹

§ 7425. **Further of This Theory.**—Under this principle, for the purpose of determining the time within which a railroad company may appeal from a judgment rendered against it by a justice of the peace, in a county other than where its principal office is situated, but within which its road lies, it is to be deemed a *resident*, and not a *non-resident* of the county, within the meaning of the statute regulating the appeal.² Another court has laid down, theoretically, at least, a still broader doctrine, to the effect that a *private corporation has no commorancy* or residence at any place within the State creating it, but that for the purposes of jurisdiction it resides throughout the limits of the State. Such corporations were not, therefore, in Massachusetts, within the provisions of a general statute prescribing what actions must be brought in the county where one of the parties *lives*, but they might *bring an action* in whatever county they chose.³

¹ *Davis v. Central Railroad &c. Co.*, 17 Ga. 323. The court reasoned that the meaning of the constitutional provision was that all civil cases were to be tried in the county in which the defendant resided, such county being ascertained by the law of residence which may happen to be in existence at the time when the case arises, or, perhaps, when it should be tried. *Ibid.*, p. 335. There is a note on the residence and citizenship of corporations in 35 Am. & Eng. Rail. Cas. 507.

² *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Crutsinger v. Missouri Pac. R. Co.*, 82 Mo. 64.

³ *Taunton &c. Turnp. Corp. v. Witing*, 9 Mass. 321. Under a statute of the same State, providing that actions may be brought by or against a corporation "in any county in which such corporation has an established or usual place of business" (Gen. Stats. Mass. 1860, ch. 123, § 5, subsec. 3), it is held that a toll-house of a turnpike company, at which tolls are collected and tickets sold by an agent of the corporation, and where workmen employed by the corporation are sometimes paid by the treasurer, is "an established or usual place of business" which the corporation "has" within the county. "The

§ 7426. **Suable in Any County in the State.**—The rule as to venue deducible from the foregoing section is that a corporation, whether foreign or domestic, having a general residence in the State for the purposes of jurisdiction, is deemed to reside throughout the entire limits of the State,¹ and especially in those counties where it carries on its business and exercises its franchises,² and is hence suable in any county where it has an agent upon whom process against it may lawfully be served.³ It should be carefully kept in mind, how-

statute," say the court, "is not intended to promote the convenience of the company only, but also of persons having claims against it. And we can have no doubt that wherever a plaintiff can find the corporation regularly carrying on any part of its business, there he may bring his suit against it." *Rhodes v. Salem Turnp. & Co.*, 98 Mass. 95, 97. And so, it was early held in South Carolina that a corporation may be made a party to a suit, by service of a writ on its president, in any district where the plaintiff resides, or the cause of action accrues, and that its appearance may be enforced when necessary, by a *distringas* on its property in such district. *Glaize v. South Carolina R. Co.*, 1 Strobb. L. (S. C.) 70. See *Cromwell v. Charleston Ins. & Co.*, 2 Rich. (S. C.) 512.

¹ *Yadkin Nav. Co. v. Benton*, 1 Hawks (N. C.), 422; *Morehead v. Atlantic & R. Co.*, 7 Jones L. (N. C.) 500; *New Albany & R. Co. v. Haskell*, 11 Ind. 301; *Cincinnati & R. Co. v. Knowlton*, 11 Ind. 339; *Davis v. Central R. & Co.*, 17 Ga. 326; *East Tennessee & R. Co. v. Atlanta & R. Co.*, 49 Fed. Rep. 608; *Bonner v. Hearne*, 75 Tex. 242; *s. c.* 12 S. W. Rep. 38; 6 Rail. & Corp. L. J. 262; *Stone v. Travellers' Ins. Co.*, 78 Mo. 658, *per* Hough, J. (construing Rev. Stats. Mo. 1879, § 3481); *Estill v. New*

York & R. Co., 41 Fed. Rep. 849, 853 (construing the same statute, and following the preceding case). The statute reads, "when all the defendants are non-residents of the State, suit may be brought in any county."

² *Dade Coal Co. v. Haslett*, 83 Ga. 549; *s. c.* 10 S. E. Rep. 435; *Home Protection v. Richards*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Bristol v. Chicago & R. Co.*, 15 Ill. 436; *Baldwin v. Mississippi & R. Co.*, 5 Iowa, 518; *Richardson v. Burlington & R. Co.*, 8 Iowa, 260; *Sherwood v. Saratoga & R. Co.*, 15 Barb. (N. Y.) 650; *Belden v. New York & R. Co.*, 15 How. Pr. (N. Y.) 17; *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Houston & R. Co. v. Ford*, 53 Tex. 364; *Humphreys v. Newport News & Co.*, 33 W. Va. 135; *s. c.* 10 S. E. Rep. 39; *Galveston & R. Co. v. Horne*, 69 Tex. 643; *s. c.* 9 S. W. Rep. 440; *Evansville & R. Co. v. Spellbring*, 1 Ind. App. 167; *s. c.* 27 N. E. Rep. 239; *Louisville & R. Co. v. Saucier* (Miss.), 1 South. Rep. 511; *St. Louis & R. Co. v. Traweek*, 85 Tex. 65; *s. c.* 19 S. W. Rep. 370 (under Rev. Stats. Tex., art. 1198, subsec. 21); *New Albany & R. Co. v. Haskell*, 11 Ind. 301.

³ *Humphreys v. Newport News & Co.*, 33 W. Va. 135; *s. c.* 10 S. E. Rep. 39; *New Albany & R. Co. v. Haskell*, 11 Ind. 301; *Cincinnati & R.*

ever, that this rule is not so much a theory of the courts as to the legal *situs* of a corporation for the purposes of jurisdiction, as it is a rule in particular States, founded on the express language of *statutes*; and that, in so far as the States have the same rule, it is rather a rule depending upon a concurrence of legislation, than upon a concurrence of judicial decisions.¹ The word "non-resident" in this statute includes corporations, according to a principle of interpretation elsewhere referred to.² The point upon which these statutes more frequently concur is that a transitory action may be brought against a *railroad company* in any county through which it operates its road, provided it has an agent in that county upon whom process may lawfully be served, and this, irrespective of the question of the place where the cause of action accrued, or the injury was done.³

Co. v. Knowlton, 11 Ind. 339; Morehead v. Atlantic &c. R. Co., 7 Jones L. (N. C.) 500.

¹ For instance, the code of Indiana enacts that "any action against any corporation may be brought in any county where the corporation has an office, for the transaction of business, or any person resides, upon whom process may be served, unless otherwise provided in this act" (2 Rev. Stats. Ind., p. 222, § 796); under which statute a railroad corporation is a resident for jurisdictional purposes in every county in which it has an office or agency and an officer or agent upon whom process may be served. New Albany &c. R. Co. v. Haskell, 11 Ind. 301; Cincinnati &c. R. Co. v. Knowlton, 11 Ind. 339. So, a statute of Missouri enacts that "when all the defendants are non-residents of the State, suit may be brought in any county." Rev. Stats. Mo. 1879, § 3481, cl. 4.

² *Post*, § 8060; and hence a *foreign corporation* doing business in Missouri, and having a residence there for juris-

dictional purposes, is suable in any county of the State. Estill v. New York &c. R. Co., 41 Fed. Rep. 849; s. c. 8 Rail. & Corp. L. J. 86.

³ Galveston &c. R. Co. v. Horne, 69 Tex. 643; s. c. 9 S. W. Rep. 440 (under Rev. Stats. Tex., art. 1198, § 21); Bonner v. Hearne, 75 Tex. 242; s. c. 6 Rail. & Corp. L. J. 262; 12 S. W. Rep. 38 (holding that, under the same statute and under the Texas Act of April 21, 1887, relating to receivers, an action may be brought against a railroad company for the appointment of a receiver in any county where it is otherwise suable); Bristol v. Chicago &c. R. Co., 15 Ill. 436; Baldwin v. Mississippi &c. R. Co., 5 Iowa, 518; Richardson v. Burlington &c. R. Co., 8 Iowa, 260; Sherwood v. Saratoga &c. R. Co., 15 Barb. (N. Y.) 650; Slavens v. South Pac. R. Co., 51 Mo. 308; Houston &c. R. Co. v. Ford, 53 Tex. 364; Evansville &c. R. Co. v. Spellbring, 1 Ind. App. 167; s. c. 27 N. E. Rep. 229; Louisville &c. R. Co. v. Saucier (Miss.), 1 South. Rep. 511; Belden v. New York &c. R. Co., 15

§ 7427. **Venue the Same as in the Case of Natural Persons.**—In the absence of special statutory provisions relating to the venue of civil actions by and against corporations, it is a sound conclusion that the same rules prevail which have been established by general statutes,—in other words, that the same rules prevail in the case of corporations as in the case of natural persons. It has been so held in respect of actions by corporations.¹ So, a constitutional provision requiring all civil cases to be tried in the county in which the defendant resides, is held to apply to corporations as well as to natural persons.²

§ 7428. **In the County where the Contract was Broken or the Injury Occurred.**—Another rule, founded entirely, it may be assumed, on constitutional and statutory provisions, is to the effect that, a corporation being a resident of the State for jurisdictional purposes, an action against it may be brought in the county where the injury, which is the special matter of the action, was done, or where the contract, which is the subject of the action, was broken; or (at the pleasure of the plaintiff) in the county where the chief office or place of business

How. Pr. (N. Y.) 17 (holding that a railroad company is not a non-resident of any county through which its road passes, in such a sense as authorizes an action against it by a *short summons*, but that, being a resident, it must be sued by a *long summons*). So, a railroad company, having an office in New York City, where it sold tickets and checked baggage, was suable there by *long summons*: *Jay v. Long Island R. Co.*, 2 Daly (N. Y.), 401. Under statutes of West Virginia, a foreign corporation doing business in that State, having no principal officer or president, or other chief officer resident therein, may be sued in any county wherein it does business, where the cause of action

arose out of the State, if process can be legally served in such county. *Humphreys v. Newport News & Co.*, 33 W. Va. 135; *s. c.* 10 S. E. Rep. 39. A railroad company is a "private corporation," within the meaning of a statute (Rev. Stats. Tex., art. 1198, subsec. 21) providing that suits against any private corporation may be commenced in any county where the cause of action arose, or in which such corporation has an agency or representative, etc. *St. Louis & C. R. Co. v. Traweek*, 84 Tex. 65; *s. c.* 19 S. W. Rep. 370.

¹ *Holbrook v. Peoria Bridge Co.*, 3 Ill. 32.

² *Central Bank of Georgia v. Gibson*, 11 Ga. 453.

of the corporation is situated. Thus, under the constitution of California, "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."¹

¹ Cal. State Const. 1879, art. 12, § 16. This provision is regarded as *permissive*, and not mandatory. It does not prevent the bringing of suits in other counties, at the option of the plaintiff, and the right to change the venue, where this is done, is not absolute. It does not, for instance, prohibit the prosecution of an action against a *national bank* in San Joaquin County, upon a contract which was to be performed in Fresno County, where the contract did not name the county wherein payment was to be made by the bank. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491; *s. c.* 24 Pac. Rep. 157. Under this provision, where a railroad company was sued for damages resulting from its wrongful refusal to carry the plaintiff's lumber to market, and there was nothing in the body of the complaint to show where the breach of obligation occurred, it was held that the action was presumptively brought in the proper county, and that it devolved upon the railroad company to show that the breach did not occur in that county, in order to entitle it to a change of venue to the county where it had its principal place of business. *Chase v. South Pac. Coast R. Co.*, 83 Cal. 468; *s. c.* 23 Pac. Rep. 532. It is to be observed that the above constitutional provision reads "a corporation or an association." It is held that an *association* of persons organized for a particular purpose may be sued for

negligence in the county where the liability arose, although not formally incorporated. *Kendrick v. Diamond Creek Consolidated Gold Min. Co.*, 94 Cal. 137; *s. c.* 29 Pac. Rep. 324. Where the action was brought against a corporation upon a contract made in the county of San Francisco, to be performed outside the State, and where the alleged breach of contract occurred outside the State, and the action was brought in the county of Los Angeles, the defendant was entitled to a *change of venue* to the county of San Francisco, because the action was not brought in the proper venue in the first instance,—not having been brought where the contract was to be performed, or where the obligation or liability arose, or the breach occurred, within the meaning of this constitutional provision. *Cohn v. Central Pac. R. Co.*, 71 Cal. 488; *s. c.* 12 Pac. Rep. 498. This constitutional provision has been held to apply to cases of torts as well as to cases of contracts. *Lewis v. South Pac. Coast R. Co.*, 66 Cal. 209; *s. c.* 4 West Coast Rep. 615. A *foreign corporation* in California has no residence in any particular county, in such a sense that it can be sued alone in that county; but the plaintiff may select the county in which he will bring his action, provided he can get service of process there. *Thomas v. Placerville &c. Min. Co.*, 65 Cal. 600; *s. c.* 3 West Coast Rep. 777.

§ 7429. **The Same Subject Continued.**— But in Montana the place of trial of an action against a *railroad corporation*, for personal injuries sustained by its employé, will not be changed from the county in which the accident occurred, on the ground that the defendant's principal place of business is in another county.¹ So, in Louisiana, suits against railroad companies for damages may be brought in the parish where the damage was done, or the injury received.² So, in Texas where the cause of action is a *fraud* committed by the corporation through its agent, the action is properly brought within the county where the fraud was committed, and where the agent resides, although otherwise the corporation may have no residence in that county.³ So, under the Code of Civil Procedure of Kansas, an action against a *foreign railroad company* for personal injuries may be brought in the county within the State where the road is operated and where the injuries occurred, although the defendant is merely a *lessee*.⁴ So, in Georgia, a statute providing that railroad corporations shall be suable in the counties in which injuries shall be committed, is subject to no constitutional objection;⁵ and an action against a railroad company for refusal to issue a through bill of lading over its own line and a connecting road, *must* be brought in the county where the refusal occurred or the defendant resides.⁶ The provision of the Nebraska Code,⁷ authorizing the bringing of an action against an insurance company in any county where the cause of action or some part thereof arose, is remedial, and not restrictive in its nature; and the action may be brought where the cause of action or some part thereof arose, although the company has no agent in that county.⁸ Under section

¹ *Oels v. Helena &c. Co.*, 10 Mont. 524; s. c. 26 Pac. Rep. 1000.

² *Houston v. Vicksburg &c. R. Co.*, 39 La. An. 796; s. c. 2 South. Rep. 562.

³ *First Nat. Bank v. Turner* (Tex.), 15 S. W. Rep. 710. See 1 Sayles Tex. Civ. Stat., art. 1198, § 7. In this case the corporation was a co-defendant, and the action was brought in the county of the plaintiff's residence.

⁴ *Hannibal &c. R. Co. v. Kanaley*, 39 Kan. 1; s. c. 17 Pac. Rep. 324.

⁵ *Davis v. Central Railroad &c. Co.*,

17 Ga. 323. So much of the Georgia statute (Ga. Code, § 3320) as makes a railroad company liable to be sued in the county where an injury is inflicted by the running of *cars*, includes an injury inflicted by the running of *hand-cars*. *Thomas v. Georgia R. &c. Co.*, 38 Ga. 222.

⁶ *Coles v. Central R. &c. Co.*, 82 Ga. 149; s. c. 9 S. E. Rep. 127.

⁷ Neb. Code, § 55.

⁸ *Insurance Co. v. McLimans*, 28 Neb. 653; s. c. 44 N. W. Rep. 991.

6 Thomp. Corp. § 7431.] ACTIONS BY AND AGAINST.

73 of the Civil Code of Kentucky,¹ an action against a common carrier for a personal injury cannot be brought in a county which is neither the residence of any of the parties, nor the place where the injury was done.²

§ 7430. **Where the Cause of Action Accrues.** — The statutes of several of the States permit an action to be brought against a corporation in the county where the cause of action accrued.³ Under such a statute, it has been held that a cause of action against a *life insurance company*, under a policy for the payment of indemnity in the event of death, accrues within the county where the assured died, although the contract of insurance may have been made in another county.⁴

§ 7431. **Validity of Statutes Making Corporations Suable in Any County.** — Stated generally, there can be no doubt that a statute making a corporation, having a residence within the State for the purposes of jurisdiction, suable in any county in the State, does not deprive the corporation of any rights guaranteed by the Federal or by any State constitution,⁵ — though there may be contrary provisions in recent State constitutions. It has been held that a constitutional provision declaring that corporations “shall have the right to sue, and shall be subject to be sued in all courts in all cases as natural persons,”⁶ has no reference to the subject of venue in civil actions, which belongs only to the remedy or form of procedure; and that it does not inhibit the passage of a general law authorizing a corporation to be sued in any county in which

¹ Which reads as follows: “An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured; or in which he resides, if he resides in a county into which the carrier passes.”

² *Sherrill v. Chesapeake &c. R. Co.*, 89 Ky. 302; *s. c.* 12 S. W. Rep.

465. Similarly, see *Harper v. Newport News &c. Co.*, 90 Ky. 359; *s. c.* 14 S. W. Rep. 346.

³ Such was *Wagn. Mo. Stat.* 294, § 28.

⁴ *Rippstein v. St. Louis Mut. Life Ins. Co.*, 57 Mo. 86.

⁵ *Davis v. Central R. &c. Co.*, 17 Ga. 323; *Home Protection v. Richards*, 74 Ala. 466.

⁶ *Const. Ala.*, art. 14, § 12.

it transacts business through its agents, though an individual citizen can only be sued in the county of his residence. On the contrary, according to the reasoning of the court, such a law is based upon sound reasons, growing out of the difference between natural and artificial persons, and does not violate the essential principles of justice, nor establish an unjust or unreasonable discrimination against corporations.¹

§ 7432. **Local Actions.**—By the principles of the common law, any action founded upon a *local thing* must be brought in the county where the cause of action arises.² Actions which are local by the principles of the common law, are not rendered transitory by permissive statutes, enacting that when one of the parties to an action is a corporation other than a county, town, school district, or parish, “the action may be brought in any county in which such corporation shall have any established or usual place of business,” etc., “or if the other party to such action is a natural person, the action may be brought in the county where such party lives.”³

¹ Home Protection *v.* Richards, 74 Ala. 466; Mobile Life Ins. Co. *v.* Pruett, 74 Ala. 487.

² Metcalf, J., in Vermont &c. R. Co. *v.* Orcutt, 16 Gray (Mass.), 116, 117; citing Com. Dig., Action, N. 5; 5 Dane Abr. 653. The learned judge proceeds to state the difference at common law between local and transitory actions thus: “In other books it is said that the venue is local when the cause of action could have happened in one county only. Smith on Actions at Law (3d ed.), 79, 102; (7th ed.) 75, 96; 15 Petersd. Ab. (Amer. ed.) 241; 1 Chit. Pl. (6th Amer. ed.) 298; Steph. Pl. 289; Gould Pl., ch. 3, § 107. Thus, an action on the case upon the custom of England, against an innkeeper for not safely keeping the goods of his guest, is local,—Clench, J., saying: ‘If it be an action upon the case upon a

contract, or for words, and the like transitory thing, it may be brought in any country, but in this case it ought to be brought where the inn is.’ Anon., Godb. 42, and 1 Nels. Ab. 33. See also Williams *v.* Land, 4 Taunt. 729. So of an action for a nuisance by obstructing the navigation of a river. Mersey & Irwell Navigation Co. *v.* Douglas, 2 East, 502.”

³ Gen. Stats. Mass., ch. 123, § 5; Vermont &c. R. Co. *v.* Orcutt, 16 Gray (Mass.), 116. Therefore, an action by a railroad company for an injury to its culvert must be brought in the county where the culvert is situated. *Ibid.* So, a statute providing that actions must be brought and tried in the county in which the defendants, or some of them, reside at the commencement of the action (Cal. Code Civ. Proc., § 395), has no proper application to an action affect-

§ 7433. **Transitory Actions.**—On the contrary, transitory actions against corporations *follow the corporation in its de facto migrations*, and may be brought wherever the corporation has a residence, for the purposes of jurisdiction.¹

§ 7434. **Changing the Venue.**—Under some statutory systems, if the action is brought in the wrong county, the venue may be changed to the right county.² Where the statute requires an *affidavit* by the party in support of the grounds upon which a change of venue is demanded, judicial construction has adopted the conclusion that in the case of a corpora-

ing land, such as a proceeding by a railroad corporation to *condemn land* for its purposes; but the strongest reasons favor the conclusion that such an action is to be brought in the county where the land lies. "The compensation for the land sought to be taken is to be determined upon testimony, and the witnesses most competent to speak upon this subject will usually be found in the county referred to." *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394. A *drainage district* in Illinois is a quasi-municipal corporation, and where it includes within its boundaries a portion of the territory of two counties, it is deemed to have a residence, for jurisdictional purposes, in every part of its territory, and its corporate authorities are presumed to reside throughout its territory. It follows that its commissioners may maintain a proceeding in the Circuit Court of a county other than that in which it was originally organized, and in which its records are kept, for the purpose of enlarging its boundaries, under the provisions of an enabling statute. If the action is local, either by reason of the locality of the drainage dis-

trict, or of the lands sought to be annexed thereto, the jurisdiction may as well be in the one county as in the other. *Mason &c. Special Drainage District v. Griffin*, 134 Ill. 330, 338; *s. c.* 25 N. E. Rep. 995.

¹ *New Orleans &c. R. Co. v. Wallace*, 50 Miss. 244. Thus, an action to recover an indemnity stipulated for in a *policy of fire insurance*, may be brought wherever service can be had upon the corporation, and the jurisdiction is not restricted to the State within which the property was situated, or the contract made, although there may be a statute in that State designating the county in which such an action shall be brought. *Insurance Co. v. McLimans*, 28 Neb. 653; *s. c.* 44 N. W. Rep. 991; 19 Ins. L. J. 542. So, it has been held that a *railroad company*, created under the laws of another State, may be sued in Mississippi for a *personal injury* inflicted within the territory of another State. *New Orleans &c. R. Co. v. Wallace*, 50 Miss. 244.

² See Cal. Code Civ. Proc., § 396. Construction of this section and practice under it: *Jenkins v. California Stage Co.*, 22 Cal. 537; *Edwards v. Southern Pac. R. Co.*, 48 Cal. 460.

tion the affidavit must be made by an *officer*,¹ and hence it cannot be made by a mere *local agent*, in a case where the party demanding the change is a *foreign insurance company*.² So, the *attorney* of a foreign corporation could not make the affidavit, notwithstanding the inconvenience which the rule entailed.³ These decisions seem to be too narrow. By analogy to what has been held, with reference to the removal of causes to the Federal courts, it would follow that any attorney or agent of the corporation, duly authorized to make the application, and personally capable of deposing to the facts, may make such an affidavit.⁴

§ 7435. Residence of a Corporation the Residence of its President.—In Kentucky there is a statutory rule to the effect that the residence of a corporation, which is a common carrier, is the county in which its *chief officer or agent*, if in the State, resides when the action is commenced.⁵

§ 7436. National Banks are State Corporations for Jurisdictional Purposes.—National banks are *State*, and not *Federal*, corporations, for jurisdictional purposes. Under the original national currency act they were deemed domestic, and not foreign, corporations, within the State wherein they were

¹ *Western Bank of Scotland v. Tallman*, 15 Wis. 92.

² *Wheeler & Wilson Man. Co. v. Lawson*, 57 Wis. 400.

³ *Western Bank of Scotland v. Tallman*, 15 Wis. 92.

⁴ *Post*, § 7469. Compare *Market Nat. Bank v. Hogan*, 21 Wis. 317. The decisions just cited from Wisconsin illustrate the difficulties which beset courts when they endeavor to legislate,—to supply by judicial construction a legislative *casus omissus*. The Wisconsin statute relating to changes of venue did not have in view the case where a corporation might be a party, and did not make any provision for changing the venue

in such a case. Other legislatures have been more provident. In Pennsylvania, as early as 1834, a railroad company might remove an action pending against it to another county at any time before the jury was sworn; and upon the presentation of the affidavit, required by the act, made by the president of the company, further proceedings were *coram non judice*. *Railroad v. Cummins*, 8 Watts (Pa.), 450.

⁵ *Harper v. Newport News &c. Co.*, 90 Ky. 359; *Sherrill v. Chesapeake &c. R. Co.*, 89 Ky. 302. Compare *Chesapeake &c. R. Co. v. Heath*, 87 Ky. 651.

created.¹ On the other hand, they were liable to be sued in the courts of a State other than that of their creation, provided jurisdiction could be obtained over them in any of the recognized modes of obtaining jurisdiction in a domestic tribunal over a foreign corporation.² According to some judicial opinion, they were *citizens* of the State within which they were created, in such a sense that an action brought by them against a citizen of the State was *not removable to a Federal court*.³ But the contrary was held in the Federal courts, until the question was settled by Congress in the Act of July 12, 1882, which enacts as follows: "The jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun."⁴ Under this act, notwithstanding other provisions of the Revised Statutes of the United States,⁵ a Circuit Court of the United States has no jurisdiction if all the parties to the suit are citizens of the State within which the national bank is situated.⁶ The State courts, in dealing with national banks, do not exercise a new and special jurisdiction conferred upon them by Congress, but proceed in the exercise of the ordinary jurisdiction conferred upon them by their own constitutions and laws.⁷ The State

¹ *Market Bank v. Pacific Bank*, 64 How. Pr. (N. Y.) 1. Compare *post*, §§ 7475, 7476, 7899.

² *Cooke v. State Nat. Bank*, 50 Barb. (N. Y.) 339; *s. c.* 3 Abb. Pr. (N. S.) (N. Y.) 339.

³ *Davis v. Cook*, 9 Nev. 134.

⁴ 20 U. S. Stat., ch. 290, § 4.

⁵ Rev. Stat. U. S., §§ 5209, 5239.

⁶ *Whittemore v. Amoskeag Bank*, 134 U. S. 527. The act refers only to suits commenced after its passage: *First Nat. Bank v. Morgan*, 132 U. S.

141. Prior to the passage of this act, the venue of actions in State courts against national banks was restrained to "the county or city in which said association is located," etc. 13 U. S. Stat., ch. 106, § 8; Act Feb. 18, 1875; 18 U. S. Stat. 316, 320, ch. 80; Rev. Stat. U. S., § 5198. But this was a *personal privilege* which the bank might waive. *First Nat. Bank v. Morgan*, 132 U. S. 141.

⁷ *First Nat. Bank v. Overman*, 22 Neb. 116; *Claffin v. Houseman*, 93

courts have jurisdiction of actions against a national bank to recover the *penalty for taking usurious interest* denounced by section 5198 of the Revised Statutes of the United States.¹ Such an action is properly brought in any County or District Court of the State in which the national banking association is located, having jurisdiction of the amount involved.²

§ 7437. Jurisdiction and Venue in Respect of Corporations Chartered by the United States Other than National Banks.—A corporation chartered by an act of Congress cannot insist, as of right, that it shall sue and be sued exclusively in courts of the United States and of the State, in which the principal office is located;³ but Congress has power to confer this right in express terms.⁴

§ 7438. State Jurisdiction in the Case of Interstate Corporations.—We have elsewhere had occasion to consider the anomalous nature of a corporation which has been *created by the concurrent legislation of two States*, and we have had occasion to note the idle judicial casuistry which has been employed when dealing with the *status* of such a corporation.⁵ We have had occasion to note the theory that such concurrent action operates to create *two corporations*, and that one of these two corporations which has been created by the legislature of one

U. S. 130; Schuyler Nat. Bank v. Bollong, 28 Neb. 684; *s. c.* 24 Neb. 821.

¹ Schuyler Nat. Bank v. Bollong, 24 Neb. 821; *s. c.* on second appeal, 28 Neb. 684.

² Schuyler Nat. Bank v. Bollong, 28 Neb. 684.

³ Bank v. Deveaux, 5 Cranch (U. S.), 61.

⁴ Osborn v. Bank, 9 Wheat. (U. S.) 738; Bank v. Planters' Bank, 9 Wheat. (U. S.) 904; Rev. Stat. U. S., § 629, subsec. 10; Kennedy v. Gibson, 8 Wall. (U. S.) 498; Bank of Bethel v. Pahquioque Bank, 14 Wall. (U. S.) 383; Bank of Omaha v. Doug-

lass County, 3 Dill. (U. S.) 298; Foss v. First Nat. Bank, 3 Fed. Rep. 185; Commercial Bank v. Simmons, 6 Chic. Leg. N. 344. As to the removal of causes in the case of corporations created by act of Congress, see *post*, § 7475. A corporation chartered by the United States, and having a domicile in Pennsylvania for the purposes of jurisdiction, may be *sued in any county* in that State where legal service of process may be had. Eby v. Northern Pac. R. Co., 13 Phila. (Pa.) 144.

⁵ *Ante*, §§ 47, 319, 320, 688. Compare *post*, §§ 7452, 7472, 7490, 7799, 7817, 8012, 8020, 8128.

of the concurring States, is a *domestic* corporation within that State; whereas the other of these two corporations created by the legislation of the neighboring State is a *foreign* corporation in the former State, but a *domestic* corporation in the latter.¹ The result of this weak casuistry is that there are *two* corporations in each State, one domestic, and the other foreign.² But there is but *one board of directors*. This board has been elected at *one election*; it proceeds under a *single collection of by-laws*; it sits in *one place only*; and no practical man of business ever dreams of a conception so fanciful as the conception that this body is really two bodies. But whatever may be the theory, all courts, State and Federal, agree that there is *one domestic corporation in each State*, subject to the jurisdiction of its courts, in like manner as any corporation created by or under its legislation, and, as such, capable of suing and being sued there,³ although upon a cause of action arising in the other State.⁴ But it is *possible* for such an anomalous state of things to exist, as for a franchise to operate an *interstate bridge*, or an *interstate railway*, to be held by one collection of persons, natural or incorporate, under a grant of the legislature of one of the adjoining States, and by another such collection of persons under a similar grant from the legislature of the other adjoining State,—in which case an action by the possessors of the franchises granted by one State, against the possessors of the franchises granted by the other State, can only be maintained in the other State, because they are a foreign corporation in respect of the former State, and have no domicile there for jurisdictional purposes.⁵ Coming now to

¹ *Ante*, §§ 47, 319.

² *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286.

³ *Guinault v. Louisville &c. R. Co.*, 41 La. An. 571; *s. c.* 6 South. Rep. 850.

⁴ *Mississippi & Tennessee R. Co. v. Ayres*, 16 Lea (Tenn.), 725.

⁵ The text is perhaps justified by a case where a bill was filed by the plaintiffs, owners of a charter from the State of South Carolina, of the

Augusta bridge over the Savannah River, which divides South Carolina from Georgia, against the city council of Augusta, in Georgia, owners of a charter of the same bridge from the State of Georgia, for an account of tolls collected by the defendants, and for an injunction to restrain them from collecting more than one moiety of tolls, and also from collecting any tolls whatever at a new bridge which

the manner in which the courts of one of these concurring States will deal with such a corporation, we find that the Court of Appeals of Maryland has asserted the doctrine that a corporation owing its existence in part to the legislature of the State of Maryland, and in part to the legislature of another State, may be restrained, in Maryland, from expending its funds for any other than corporate purposes anywhere.¹ The difficulty of accepting the conclusion is, that the courts of the other concurring State might get hold of the same corporation and make an opposing order. This is plain when the doctrine of the Maryland court is considered. The court held that, where a corporation is chartered in two separate States, and exercises its franchise in each, a plea to the jurisdiction in the courts of either State is not tenable, on the ground that the corporate property lies in a different State, or that it owes its corporate existence in part to another State.² These difficulties point to the propriety of *interstate corporations being chartered by Congress under its power to regulate commerce* between the States. Indeed it is a matter of surprise that these interstate corporations, created by the concurrent legislation of different States, have been able to get along as well as they have, without more frequent complications in respect of jurisdiction; and the fact that they have been able to do so is very creditable to our State judicatories.

§ 7439. Actions against Branches of Corporations.—It was customary, in the early days of our industrial development, for the legislatures of the different States to incorporate *banks* with the power to establish branches at different places in the States. These branches were not distinct corporations

they had built in violation of plaintiff's charter. It was averred in the bill that, of so much of the Augusta bridge as lay within the territorial limits of South Carolina, the plaintiffs were the owners, and it was incidentally stated that the defendants owned some lots in Hamburg in South Carolina. A plea to the juris-

diction, because the defendants were non-residents of South Carolina, was sustained. *McKinne v. Augusta*, 5 Rich. Eq. (S. C.) 55.

¹ *State v. Northern Railway Co.*, 18 Md. 193.

² *State v. Northern Railway Co.*, 18 Md. 193.

unless the act of the legislature made them so, but were mere *agencies* of the principal corporation. Upon any contract made with the corporation through such a branch, the *action was against the principal bank*, that is to say, against the corporation itself, and not against the branch bank, which was the mere agent.¹

§ 7440. Actions in the County in Which the Agent with Whom the Contract was Made Resides. — Some of the States have, in their legislation, adopted the principle that an action may be brought against a corporation in the county in which the agent resides, with whom the contract, which is the subject of the action, was made; and under statutes of Kentucky, an action may be so brought, although the plaintiff resides in another county.²

ARTICLE II. FEDERAL JURISDICTION AS DEPENDENT UPON DIVERSE CITIZENSHIP.

SECTION

7447. Early doctrine that a corporation was not a "citizen," under Federal Constitution and Judiciary Act.

7448. New doctrine that a corporation is a "citizen" of the State creating it, for the purposes of Federal jurisdiction.

7449. Conclusively presumed to be a citizen of the State creating it.

7450. Effect of this rule on domestic corporations.

7451. Further of this rule.

7452. Rule where the corporation is

SECTION

created by the concurrent legislation of two States.

7453. All the substantial parties must be of diverse citizenship.

7454. Application of this rule of jurisdiction to joint-stock companies.

7455. Federal jurisdiction in the case of corporation owned by a State.

7456. Manner of pleading Federal jurisdiction.

7457. Further of this subject.

7458. Manner of averring citizenship.

¹ Bank of Virginia v. Craig, 6 Leigh (Va.), 399; Tompkins v. Branch Bank, 11 Leigh (Va.), 372; Mason v. Farmers' Bank, 12 Leigh (Va.), 84. Where an action was brought against the president and directors of a branch bank, the defect was not merely a *misnomer*, but there was *no action* against the party

responsible on the contract. The defect was not *aided by verdict*, nor cured by any statute of *jeofails*, and neither party could have judgment for costs: Mason v. Farmers' Bank, 12 Leigh (Va.), 84.

² Owen v. Howard Ins. Co., 87 Ky. 571; s. c. 10 S. W. Rep. 119; 10 Ky. L. Rep. 608.

§ 7447. **Early Doctrine that a Corporation was not a "Citizen," under Federal Constitution and Judiciary Act.**—The constitution of the United States provides that the judicial power of the United States shall extend to all controversies between *citizens* of different States.¹ Under this provision, the eleventh section of the Judiciary Act of 1789 defined the jurisdiction of Circuit Courts of the United States to be a jurisdiction existing in suits "between a *citizen* of the State where the suit is brought, and a *citizen* of another State." It was early decided that a corporation, as such, could not be a "citizen" within the meaning of the Federal constitution. At the same time, the concession was made that corporations might litigate in the Federal courts when, as between the opposing party and the members of the corporation, there was the requisite diversity of citizenship.² Chief Justice Marshall said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently, cannot sue or be sued in the courts of the United States, unless the rights of members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union."³ Under the rule as thus established, the members of the corporation, suing or sued in the corporate name, were regarded as *joint plaintiffs or defendants*, and subject to the rule established in an earlier case, that where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction.⁴ In other words, in an action by or against a corporation, it was necessary that there should be a diversity of citizenship existing between the

¹ Const. U. S., art. 3, § 2.

² *Bank v. Deveaux*, 5 Cranch (U. S.), 61; *Hope Ins. Co. v. Boardman*, 5 Cranch (U. S.), 57.

³ *Bank v. Deveaux*, 5 Cranch (U. S.), 86.

⁴ *Strawbridge v. Curtiss*, 3 Cranch (U. S.), 267. See also *Ward v. Arredondo*, 1 Paine (U. S.), 410.

opposing party and *every* member of the corporation. This position was reluctantly assented to by the Supreme Court of the United States;¹ but when later the position was taken that a corporation created by one State could not be sued in the Circuit Courts of the United States by a citizen of another State, unless all the members of the corporation were citizens of the State in which the suit was brought,—the court, in a weak and inconclusive opinion,² reversed a rule of interpretation and of jurisdiction to which it had long adhered, and astonished the country with the proposition that a corporation aggregate is a “citizen.”³

§ 7448. New Doctrine that a Corporation is a “Citizen” of the State Creating It, for the Purposes of Federal Jurisdiction.—That the judges of the Supreme Court of the United States assented reluctantly to the doctrine stated in the preceding section illustrates one of the most pitiable characteristics of judicial administration,—the habitual greed of jurisdiction exhibited by courts and judges, and the insincerity manifested by them in interpreting constitutional provisions and statutes relating to their own jurisdiction. The

¹ Commercial &c. Bank *v.* Slocomb, 14 Pet. (U. S.) 60.

² Louisville &c. R. Co. *v.* Letson, 2 How. (U. S.) 497.

³ A majority of the court, although recognizing the authority of the case of Bank *v.* Deveaux, 5 Cranch (U. S.), 61, from the year 1809 up to the present time, 1844, had done so most reluctantly. *Per* Mr. Justice Wayne in Louisville &c. R. Co. *v.* Letson, 2 How. (U. S.) 497, 555. See in this connection Sullivan *v.* Fulton Steamboat Co., 6 Wheat. (U. S.) 450; Breithaupt *v.* Bank, 1 Pet. (U. S.) 238; Commercial &c. Bank *v.* Slocomb, 14 Pet. (U. S.) 60; Irvine *v.* Lowry, 14 Pet. (U. S.) 293; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 586; Kirkpatrick *v.* White, 4 Wash. C. C. (U.

S.) 595; Bank *v.* Willis, 3 Sumn. (U. S.) 472; Com. *v.* Milton, 12 B. Mon. (Ky.) 212, 227; *s. c.* 54 Am. Dec. 522. Speaking of the case of Bank *v.* Deveaux, 5 Cranch (U. S.), 61, and that of Strawbridge *v.* Curtiss, 3 Cranch (U. S.), 267, Mr. Justice Wayne said: “By no one was the correctness of them more questioned than by the late Chief Justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different.” Louisville &c. R. Co. *v.* Letson, 2 How. (U. S.) 555.

question was one of extreme simplicity. It related solely to the meaning with which the framers of the constitution and of the Judiciary Act had used one of the plainest, simplest, and best-understood words in our language, the word "citizen." Never before had it been regarded as referring other than to a single person endowed with the ordinary political privileges and franchises of the country of which he was a resident. Never before had it been used to designate a body of persons, collected or organized in any manner, or with any faculty whatever. The judges knew this. They knew that the men who used the word "citizen" in those instruments had no idea that they were describing an artificial collection of persons. The Federal courts were courts of limited jurisdiction. It was the true office of interpretation, in doubtful cases, to repel rather than absorb jurisdiction, on the well-understood principle that presumptions are against the jurisdiction of courts whose powers are limited. It is to be borne in mind that the question did not involve the mere question of the jurisdiction of the national courts; it involved something more. All jurisdiction had been apportioned between the national and the State judicatories; and hence the Federal judicatories, in seizing upon a jurisdiction which had not been conferred upon them by the constitution or the Judiciary Act, seized a portion of the jurisdiction belonging to the States, and defrauded the State tribunals of a portion of their rightful jurisdiction. It was a plain case of a theft of jurisdiction. It illustrated a charge which Mr. Jefferson in one of his letters, written some years before, had made against the tendencies of the Federal judiciary, "working like gravity, by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."¹ Overruling their former decisions, and under a miserable pretext which involved the distortion of a plain word from its natural meaning to

¹ Letter of Mr. Jefferson to Mr. Hammond, Aug. 18, 1821; reprinted in 28 *Am. Law Rev.* 148.

a meaning which had never before been assigned to it, the court now announced the following rule: "A corporation created by and doing business in a particular State, is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars, it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued."¹ This statement of the law was probably extra-judicial, but its authority was established by later decisions against the vigorous dissent of a minority of the court.²

§ 7449. Conclusively Presumed to be a Citizen of the State Creating It.—The jurisdiction thus seized upon, to continue in the language of Mr. Jefferson,³ continued to "advance its stealthy step like a thief," until the court had reached the doctrine that, for the purposes of Federal jurisdiction, a corporation is *conclusively presumed* to be a citizen of the State under whose laws it is created,⁴ and conversely that it cannot be a citizen of a State other than the State under whose laws it has been created.⁵ Stated in another way, this doctrine is

¹ Louisville &c. R. Co. v. Letson, 2 How. (U. S.) 558.

² Rundle v. Delaware &c. Canal Co., 14 How. (U. S.) 80; Marshall v. Baltimore &c. R. Co., 16 How. (U. S.) 314. See also Nashua &c. Corp. v. Boston &c. Corp., 136 U. S. 356; Booth v. St. Louis Fire Engine Man. Co., 40 Fed. Rep. 1; Maltz v. American Express Co., 1 Flip. O. C. (U. S.) 611; Covington Drawbridge Co. v. Shepherd, 20 How. (U. S.) 227; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.), 283; West-

ern Union Tel. Co. v. Dickinson, 40 Ind. 444; s. c. 13 Am. Rep. 295; Her-ryford v. Aetna Ins. Co., 42 Mo. 148.

³ Letter to Mr. Hammond, Aug. 18, 1821; reprinted 28 Am. Law Rev. 148.

⁴ Steamship Co. v. Tugman, 106 U. S. 118; Fish v. Chicago &c. R. Co., 53 Barb. (N. Y.) 472; Park Bank v. Nichols, 4 Biss. (U. S.) 315; Williams v. Missouri &c. R. Co., 3 Dill. (U. S.) 267.

⁵ Southern Pac. Co. v. Denton, 146 U. S. 202; Williams v. Missouri &c. R. Co., 3 Dill. (U. S.) 267.

that, although a corporation is not itself a citizen, yet for all the purposes of Federal jurisdiction founded upon diverse citizenship, the stockholders who compose the corporate body by and under the name given them by the statutes of a State, are to be treated as citizens of that State, and are estopped from denying that they are such.¹ And this is so, although all of its business may be prosecuted elsewhere, and all of its offices and places of business may be outside of the State by whose laws it has been created, and all its stockholders may be residents of the State in which it is impleaded in the Federal court as a "citizen" of such other State.² The most striking commentary which can be made upon the impropriety, if not the criminality, involved in the seizure of this jurisdiction, is found in the manner in which it operates in respect of what is now known as the "tramp corporation." Under the rule thus established, a number of citizens of one State can organize themselves into a corporation under the laws of another State, through the mere aid of an attorney employed there, without acquiring a residence, or even temporarily coming within such State, for the purpose of engaging in business in their own State, and can thus succeed in bringing all actions by and against them within the jurisdiction of the Federal courts, ousting the jurisdiction of their own State courts over such actions. A shameful illustration of the manner in which this usurped jurisdiction has been perverted and corrupted is found in the case where certain co-adventurers organized a corporation in the State of Kentucky, none of them being citizens of that State, their purpose not being to build any railroad in that State, or to own or operate any property whatever there, but their sole apparent purpose being to build, lease, and operate railroads in other States and Territories, and at the same time to defraud the courts of the various States and Territories through which their roads should lie, of jurisdiction of all important

¹ See *Fargo v. McVicker*, 55 Barb. (N. Y.) 437.

R. Co., 23 Fed. Rep. 565; *Booth v. St. Louis Fire Engine Man. Co.*, 40

² *Pacific R. Co. v. Missouri Pac. Fed. Rep.* 1.

actions by and against them, and to place such actions exclusively within the cognizance of the Federal tribunals.¹

§ 7450. Effect of This Rule on Domestic Corporations. — Where a corporation, created by one State, has been domesticated by another State,² the true principle seems to be that it does not become a "citizen" of the State domesticating it, unless it is re-endowed, so to speak, by such State with the franchise of being a corporation, so as to become, to all intents and purposes, a domestic corporation of that State, subject to its laws, and to the jurisdiction of its courts, as such. Since the decision of the Supreme Court of the United States in the leading case of *Bank of Augusta v. Earle*,³ it has been a doctrine constantly repeated by judges, that a corporation can have no legal existence out of the territorial limits of the sovereignty by which it was created. "Its place of residence is there," observed Mr. Justice Davis, "and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."⁴ And this is the law as settled by the highest court of England.⁵

¹ We allude to the Southern Pacific [Railroad] Company. See *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297; *Southern Pac. Co. v. Denton*, 146 U. S. 202.

² *Post*, § 7890.

³ 13 Pet. (U. S.) 587.

⁴ *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210, 216. See also *Ohio & C. R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Hatch v. Chicago & C. R. Co.*, 6 Blatchf. (U. S.) 105; *Pomeroy v. New York & C. R. Co.*, 4 Blatchf. (U. S.) 120; *Day v. Newark India Rubber Co.*, 1 Blatchf. (U. S.) 628.

⁵ *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 416; *s. c.* 35 Eng. L. & Eq.

37. Lord St. Leonards dissented, holding that a company may have two domiciles; and places of business may, for the purpose of founding jurisdiction, be treated as places of domicile, and service of process upon the corporate agents there is sufficient. Perhaps his Lordship meant by this nothing more than that a foreign corporation, having a place of business in England and trading there, might be sued there. Later decisions clearly settle this to be the law. *Newby v. Von Oppen*, L. R. 7 Q. B. 293. Compare *Mackereth v. Glasgow & C. R. Co.*, L. R. 8 Ex. 149; *post*, § 7881, *et seq.*

§ 7451. **Further of This Rule.**—The artificial rule of jurisdiction which we are now considering is such that a corporation cannot acquire a residence within a particular State for the purposes of Federal jurisdiction, founded on diverse citizenship, unless it is reincorporated in such State. The mere fact that the statutes of a State allow foreign corporations, under certain circumstances, to be sued in the courts of the State, has no application to courts of the United States, and no influence upon this rule of jurisdiction.¹ So, for the purposes of this rule of jurisdiction, a corporation organized in one State does not become a citizen of another State, by reason of establishing its principal place of business there, and appointing, under a statute of such State, an attorney or agent upon whom process in actions against it may be served.² On the other hand, the fact that a corporation has established an agency in another State, and is doing business there, under statutes of the latter State requiring it to receive service of process made upon such agency, and to comply with State regulations as to its mode of doing business, does not impair its right to appear in the national courts as a citizen of the State of its creation,³ or to remove to a court of the United States an action brought against it in a court of the State where it has thus acquired a domicile for the purposes of its business.⁴ But, as already seen, whenever the effect of the legislation of a State is to *adopt* or *re-create a foreign corporation* as one of its own, it becomes a citizen of the State adopting it, as well as of the State to which it owes its original creation.⁵

§ 7452. **Rule where the Corporation is Created by the Concurrent Legislation of Two States.**—We have already had occasion several times to consider the *status* of this species of corporation, with the conclusion, universally acquiesced in,

¹ Southern Pac. Co. v. Denton, 146 U. S. 202.

² St. Louis R. Co. v. Pacific R. Co., 52 Fed. Rep. 770.

³ Hatch v. Chicago &c. R. Co., 6 Blatchf. (U. S.) 105.

⁴ *Ibid.*; Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Hobbs v. Manhattan Ins. Co., 56 Me. 417; s. c. 96 Am. Dec. 472.

⁵ James v. St. Louis R. Co., 46 Fed. Rep. 47; *ante*, § 7438.

that it is a *domestic corporation of each of the two States* by whose concurrent legislation it is created, in so far as it can exercise its franchises within such State.¹ This doctrine, as already seen, has been always recognized by the Supreme Court of the United States; and yet that court, extending its artificial rule of jurisdiction still further, has held that it may be regarded as a *foreign corporation* for the purpose of suing a domestic citizen or corporation of either of the States by which it is created.²

§ 7453. All the Substantial Parties must be of Diverse Citizenship.—In a suit by or against a corporation, if one of the parties opposed to the corporation is a citizen of the same

¹ *Ante*, §§ 47, 319, 320, 688, 7438; *post*, §§ 7472, 7490, 7799, 7817, 8012, 8020, 8128.

² *Nashua &c. R. Corp. v. Boston &c. R. Corp.*, 136 U. S. 356; *s. c.* 42 Am. & Eng. Rail. Cas. 688. This decision reversed a decree of the Circuit Court of the United States for the District of Massachusetts, and three of the judges of the Supreme Court (Fuller, C. J., and Gray and Lamar, JJ.), dissented. Blatchford, J., did not sit, or take any part in the decision. It was therefore a decision of a bare majority of the court, and cannot be regarded as settling the proposition of jurisdiction involved therein. The theory of the decision is that railroad corporations thus created, although joined in their interests, and in the operation of their roads, in the issuing of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it is created; and that the union of name, of officers, of business, and of property does not change their distinctive character as separate cor-

porations. *Ibid.*, 136 U. S. 382. Thus, the corporation has an existence as a *domestic* corporation in each one of the States, and at the same time it is endowed by the Federal judiciary with the additional faculty of being a *foreign* corporation for the purpose of suing a citizen or corporation in either one of the States under whose laws it exists as a domestic corporation. The case was that of a railroad corporation extending its railroad from a place in New Hampshire to a place in Massachusetts. It was allowed, on the ground of diverse citizenship, to maintain an action in a Federal tribunal in the State of Massachusetts. Such a corporation may thus fire across the line from either of its domiciles. Perched upon either of its eyries, it may be either and at once both a domestic and a foreign corporation. It may sue a citizen of Massachusetts in a Federal tribunal in that State on the ground of its being a citizen of New Hampshire; and it may sue a citizen of New Hampshire in a Federal tribunal in that State on the ground of its being a citizen of Massachusetts. Compare *Minot v. Philadelphia &c. R. Co.*, 2 Abb. (U. S.) 323.

State wherein the corporation has its legal existence, there is not that requisite diversity of citizenship between the parties to the controversy, which is necessary to give a Federal court jurisdiction of the case.¹ So, in an action by a corporation against several other corporations, one of which has its legal existence in the same State as the plaintiff, the Federal court has not jurisdiction.² But a Federal court will not suffer its jurisdiction to be ousted by the joinder or non-joinder of merely *formal parties*. It will decide upon the merits of the case between the *substantial parties* to the suit, whenever this can be done without prejudice to the rights of others.³ A plaintiff bringing an action in a State court against a corporation created under the laws of a State other than that in which the suit is instituted, cannot prevent the *removal of the cause* to the Federal court by joining as parties defendant certain directors or officers of the corporation, citizens of the same State as the complainant, against whom no specific relief is prayed in the nature of a personal liability, nor any discovery sought in regard to matters peculiarly within their knowledge.⁴ "The test of this is," said Blatchford, J., "that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, *ipso facto*, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official

¹ Coal Co. v. Blatchford, 11 Wall. (U. S.) 172; Dormitzer v. Illinois &c. Bridge Co., 6 Fed. Rep. 217; Walsh v. Memphis &c. R. Co., 6 Fed. Rep. 797; Donohoe v. Mariposa L. & M. Co., 5 Sawy. (U. S.) 163. See also Myers v. Dorr, 13 Blatchf. (U. S.) 22.

² The Sewing Machine Companies' Case, 18 Wall. (U. S.) 553.

³ Wormley v. Wormley, 8 Wheat.

(U. S.) 421; Carneal v. Banks, 10 Wheat. (U. S.) 181.

⁴ Hatch v. Chicago &c. R. Co., 6 Blatchf. (U. S.) 105. Thus, the directors and treasurer of a railroad corporation are merely nominal parties to a bill seeking to restrain the corporation from extending its line and from using any of its moneys or property for that purpose.

relation ceases, the relief asked and the injunction issued, become, as to him, utterly futile."¹

§ 7454. **Application of This Rule of Jurisdiction to Joint-stock Companies.**—It has been held, in one of the departments of the Supreme Court of New York, on a question of the right to *remove* an action *to a court of the United States*, that a voluntary association, unincorporated, but composed of many members, and organized similarly to a corporation, and authorized by the laws of its State to sue and be sued in the name of one of its officers, stands upon the same ground with a corporation in respect to the right to sue and be sued in the national courts.² But it is apparent that this doctrine can only apply to a joint-stock company which has *one* of the faculties of a corporation, and which is, *quoad hoc*, a corporation, namely, to such a company as has been invested, by the law of the State of its creation, with the faculty of suing and of being sued by an artificial name. The court reason that, in respect to the power to sue and defend, an association of persons *authorized to sue by one name* representing the whole body, is the same as a corporate body, by whatever designation it may be known. The reason why the members of a legal corporation are treated, for the purposes of Federal jurisdiction, as citizens of the State, applies aptly to every aggregation of persons invested by State law with the faculty of suing and being sued by a new name.³

§ 7455. **Federal Jurisdiction in the Case of Corporation Owned by a State.**—The jurisdiction of courts of the United States is not affected by any interest which a particular State may have in the suit, unless the State is a party on the record.⁴ The mere fact that the State has an interest in a corporation does not render the State a necessary party to the record in a suit by or against the corporation, nor in any manner distin-

¹ Hatch v. Chicago &c. R. Co., 6 Blatchf. (U. S.) 105.

² *Ibid.*

³ Fargo v. McVicker, 55 Barb. 738, 852. (N. Y.) 437.

⁴ Osborn v. Bank, 9 Wheat. (U. S.)

guish this from corporations in general. "When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."¹

§ 7456. **Manner of Pleading Federal Jurisdiction.** — As the *jurisdiction of the courts of the United States is special and limited*, the rule of procedure in those courts is that *the jurisdiction should be made to appear* upon the face of the declaration or complaint, or elsewhere on the record, whether the jurisdiction depends upon diverse citizenship,² or upon a Federal question being involved in the litigation.³ It being also a rule of Federal jurisdiction founded upon diverse citizenship, that a corporation is a citizen of the State under whose laws it is created, and that all its members are to be conclusively presumed to be citizens of such State,⁴ it is necessary, in pleading the jurisdictional facts in a declaration at law or bill in equity, where one of the parties is a corporation, either to state that it is a citizen of the State under whose laws it has been created, or to state the same fact by an equivalent averment, as by averring that it was created under the laws of such State. For instance, an allegation

¹ Marshall, C. J., in *Bank v. Planters' Bank*, 9 Wheat. (U. S.) 904, 907. See also *Louisville &c. R. Co. v. Letson*, 2 How. (U. S.) 497, 551.

² *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194; *Wolfe v. Hartford &c. Ins. Co.*, 148 U. S. 389; *Menard v. Goggan*, 121 U. S. 253; *Continental Ins. Co. v. Rhoades*, 119 U. S. 237; *Brown v. Keene*, 8 Pet. (U. S.) 112, 115; *Brock v. Northwestern Fuel Co.*, 130 U. S. 341; *Provident Sav. Soc. v. Ford*, 114 U. S. 635, 651.

³ *Metcalfe v. Watertown*, 128 U. S. 586; *Colorado Cent. Min. Co. v. Turck*,

150 U. S. 138; *Southern Pac. Co. v. Denton*, 146 U. S. 202.

⁴ *Louisville &c. R. Co. v. Letson*, 2 How. (U. S.) 497; *Marshall v. Baltimore &c. R. Co.*, 16 How. (U. S.) 314, 328; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 233; *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286, 296; *Muller v. Dows*, 94 U. S. 444; *Steamship Co. v. Tugman*, 106 U. S. 118, 121; *Memphis &c. R. Co. v. Alabama*, 107 U. S. 581, 585; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 451.

that a corporation is "doing business in the State of Iowa," does not necessarily import that it was created by the laws of that State, and is not a sufficient allegation to show Federal jurisdiction founded upon diverse citizenship, within the meaning of this rule.¹ And so, under the Federal Removal Act of March 2, 1867,² giving a right of removal from the State to the Federal courts, on the ground of prejudice and local influence, in suits in any State court "in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State," it is necessary that this diverse State citizenship should be shown, either on the face of the declaration, or in the petition or affidavit for removal.³

§ 7457. **Further of This Subject.** — Under the rule established in *Bank v. Deveaux*,⁴ it was necessary, in actions by or against a corporation aggregate, prosecuted in the Federal courts, that it should appear from the pleadings that all the members of that corporation were citizens of some State of the United States other than that State of which the opposing party or parties were citizens.⁵ But with the overthrow of this case as authority, allegations to this effect were no longer

¹ *Brock v. Northwestern Fuel Co.*, 130 U. S. 341.

² 14 U. S. Stat. 558.

³ A declaration, in an action brought in Mississippi by a citizen of Illinois, did not show this fact, which merely averred that the defendant was a corporation created by an act of the legislature of the State of New York, located and doing business in the State of Mississippi. *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210. So, in an action by a State, against a corporation, brought in the *Supreme Court of the United States*, an averment that the defendant is a "body politic under the law of and doing business in" another State, does not exhibit jurisdiction, under that clause

of the Federal constitution (Const. U. S., art. 3, § 2), by which the Federal jurisdiction extends to "controversies between a State and citizens of another State." *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553. The reasoning was that, for aught that appeared, the corporation may have been created by the laws of Pennsylvania, and the Supreme Court of the United States has no original jurisdiction of a suit brought by a State against its own citizens.

⁴ 5 Cranch (U. S.), 61; *ante*, § 7447.

⁵ *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. (U. S.) 450; *Breithaupt v. Bank*, 1 Pet. (U. S.) 238; *Bank v. Willis*, 3 Sumn. (U. S.) 472.

necessary. "The persons who act under these faculties and use this corporate name," said Mr. Justice Grier, "may be justly *presumed* to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be *estopped* in equity from averring a different domicile, as against those who are compelled to seek them there, and can find them there and nowhere else."¹

§ 7458. **Manner of Averring Citizenship.** — It must not be inferred from the foregoing that, in an action by or against a corporation, it is sufficient, in order to give jurisdiction, to aver that the corporation is "a citizen" of the State where the suit is brought. Such an averment does not show that this body is a corporation, or by the law of what State it was created. "This court does not hold," said Mr. Justice Curtis, "that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State, within the meaning of the constitution."² Corporations are regarded as citizens for the purpose of suing and being sued; and it is sufficient to aver the place of creation and business of the corporation.³ However, an averment of incorporation in one State and residence in another does not show the corporation, for the purposes of suit, to be a citizen of the latter State. Such an averment shows that, for the purpose mentioned, the corporation is a citizen of the State first named.⁴

¹ *Marshall v. Baltimore &c. R. Co.*, 16 How. (U. S.) 314, 328. See also *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227; *s. c.* 21 How. (U. S.) 112; *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 178; *Hatch v. Chicago &c. R. Co.*, 6 Blatchf. (U. S.) 105; *Coal Co. v. Blatchford*, 11 Wall. (U. S.) 172; *The Sewing Machine Companies' Case*, 18 Wall. (U. S.) 553, 574; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, 82; *Railway Co. v. Whitton*, 13 Wall.

(U. S.) 270; *Cowles v. Mercer Co.*, 7 Wall. (U. S.) 118, 121; *Express Co. v. Korentze*, 8 Wall. (U. S.) 342, 351; *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445, 453.

² *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 405; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Warren Man. Co. v. Etna Ins. Co.*, 2 Paine (U. S.), 501.

³ See *Marshall v. Baltimore &c. R. Co.*, and other cases cited to the preceding section.

⁴ *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210.

ARTICLE III. REMOVAL OF SUCH ACTIONS FROM THE STATE
TO THE FEDERAL COURTS.

SECTION	SECTION
7462. Right of foreign corporations to remove on the ground of diverse citizenship.	7471. Conclusiveness of the affidavit.
7463. Submission to local jurisdiction does not preclude this right of removal.	7472. Right of removal in cases of a corporation created by the concurrent legislation of two or more States.
7464. Further of this doctrine.	7473. Alien corporations entitled to remove.
7465. This right of removal extends to "tramp corporations."	7474. Controversy must be wholly between different parties.
7466. Invalidity of stipulation not to remove.	7475. Removal of actions against corporations organized under a law of the United States.
7467. Further of this subject.	7476. Further of this subject.
7468. Right of removal on the ground of prejudice or local influence.	7477. Suits arising under the laws of the United States.
7469. Authority of the officer to make the affidavit.	7478. Removal by alien corporations.
7470. Substance of the affidavit.	

§ 7462. **Right of Foreign Corporations to Remove on the Ground of Diverse Citizenship.** — Since the Supreme Court of the United States took the departure of holding that a corporation aggregate is a "*citizen*" of the State under whose laws it is created, for the purposes of Federal jurisdiction founded upon diverse citizenship,¹ it has been held, by analogy, that corporations are "*citizens*" within the meaning of acts of Congress providing for the removal of suits from the State to the Federal courts;² and such is now the settled law. Thus, under the statute of the United States giving a right of removal on the ground of *prejudice* or *local influence*,³ which provided that, when an action is brought in any State court "in which there is a controversy between a citizen of the State in which the suit is brought, and a *citizen of another State*," etc., ". . . such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating," etc., may have the cause removed to the Circuit Court

¹ *Ante*, § 7448.

² *Herryford v. Ætna Ins. Co.*, 42 Mo. 148; *Stanley v. Chicago &c. R. Co.*, 62 Mo. 508; *Farmers' Loan &c.*

Co. v. Maquillan, 3 Dill. (U. S.) 379.

³ Act Cong. March 2, 1867; 14 U. S. Stat. 558; Rev. Stat. U. S., § 639.

of the United States for final hearing,—it has been held that a *corporation*, resident of another State, may make such an affidavit and effect a removal of the cause to the Federal court.¹ When, therefore, a corporation makes an application for the removal of a cause in which it is impleaded as defendant, from a State court to a Circuit Court of the United States, in the manner prescribed by the act of Congress, it is *error in the State court to proceed further* in the matter, and any subsequent step is *coram non judice*.²

§ 7463. Submission to Local Jurisdiction does not Preclude Right of Removal.—Although a foreign corporation may have submitted to the jurisdiction of the domestic State, by complying with the conditions upon which alone it is permitted to do business therein, yet such a corporation, in every case, remains a “citizen” of the State of its creation, within the rule of Federal jurisdiction already referred to;³ and consequently it retains, in all such cases, its right to remove to the Circuit Court of the United States any action brought against it in a State court, which otherwise comes within the terms of the act of Congress authorizing such a removal by a non-resident citizen.⁴ For instance, a State statute requiring

¹ *Mix v. Andes Ins. Co.*, 74 N. Y. 53; s. c. 30 Am. Rep. 260. In *Cooke v. State Nat. Bank*, 52 N. Y. 96; s. c. 11 Am. Rep. 667,—the contrary was held, on the ground that a corporation *could not make the affidavit* required by the statute; but this holding was expressly overruled in the case just cited. To the *contrary of the text*, see *Mahone v. Manchester & C. R. Co.*, 111 Mass. 72; s. c. 15 Am. Rep. 9; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; s. c. 21 Am. Rep. 757. The above text is supported throughout by Federal cases hereafter cited in this chapter. What controversy deemed a “*suit*” within the removal acts: proceeding for *condemnation of land* is: *Patterson v.*

Mississippi & C. Broom Co., 3 Dill. (U. S.) 465.

² *Herryford v. Ætna Ins. Co.*, 42 Mo. 148.

³ *Ante*, § 7448.

⁴ *Herryford v. Ætna Ins. Co.*, 42 Mo. 148; *Morton v. Mutual Fire Ins. Co.*, 105 Mass. 141; s. c. 7 Am. Rep. 505; *Myers v. Murray*, 43 Fed. Rep. 695; s. c. 11 L. R. A. 216; 32 Am. & Eng. Corp. Cas. 25; *Henning v. Western Union Tel. Co.*, 43 Fed. Rep. 97; *Baughman v. National Water Works Co.*, 46 Fed. Rep. 4; *Taylor Co. v. Baltimore & C. R. Co.*, 35 Fed. Rep. 161, 170; *Fisk v. Chicago & C. R. Co.*, 2 Abb. Pr. (N. s.) (N. Y.) 453; s. c. 53 Barb. (N. Y.) 472; *Western Union Tel. Co. v. Dickinson*, 40 Ind. 444;

foreign insurance companies doing business within the State to appoint resident agents upon whom all lawful process against them may be served, with like effect as if they were *domestic companies*, does not so operate that a foreign insurance company, by appointing such an agent and accepting service of process as provided by the statute, precludes itself from removing the cause to the Circuit Court of the United States in a proper case.¹

§ 7464. Further of This Doctrine.—Unquestionably, the settled doctrine is that where the domestic State endeavors, by its legislation, to make all foreign corporations domestic corporations, for the purposes of State jurisdiction, this does not operate to make them such for the purposes of Federal jurisdiction, and that such a statute is void in so far as it attempts to restrain the right of the domesticated corporation

s. c. 13 Am. Rep. 295; *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. Rep. 515 (disapproving *Scott v. Texas Land &c. Co.*, 41 Fed. Rep. 225).

¹ *Morton v. Mutual Fire Ins. Co.*, 105 Mass. 141; *s. c.* 7 Am. Rep. 505. So held in *Knorrr v. Home Ins. Co.*, 25 Wis. 143; *s. c.* 3 Am. Rep. 26; denying *Stevens v. Phoenix Ins. Co.*, 24 How. Pr. (N. Y.) 517, and *New York Piano Co. v. New Haven Steamboat Co.*, 2 Abb. Pr. (N. s.) (N. Y.) 358, and approving *Dennistoun v. New York &c. R. Co.*, 1 Hilt. (N. Y.) 62, and *Fisk v. Chicago &c. R. Co.*, 3 Abb. Pr. (N. s.) (N. Y.) 454; *s. c.* 53 Barb. (N. Y.) 472. The doctrine of the text is also supported by *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417; *s. c.* 96 Am. Dec. 472. To the same effect are *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1; *s. c.* 7 Am. Dec. 287; *Herryford v. Aetna Ins. Co.*, 42 Mo. 148; and *Amsden v. Norwich Union Fire Ins. Soc.*, 44 Fed. Rep. 515. On the contrary, it has been held in Michigan that a foreign insurance company,

by doing business in Michigan under the statutes of that State, and accepting service of process in conformity with the same, *waives its right of transfer* to the Federal court. *People v. Circuit Court*, 21 Mich. 577; *s. c.* 4 Am. Rep. 504. But this view has been disaffirmed by the Supreme Court of the United States, whose authority on the question is final and decisive. *Post*, § 7466. It was held by the Court of Appeals of Virginia, that a corporation of another State, leasing and operating a railway in Virginia, is subject to be sued in Virginia as a domestic corporation, and is not entitled to remove the action from the State to the Federal court. *Baltimore &c. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *s. c.* 26 Am. Rep. 384; denying *Baltimore &c. R. Co. v. Cary*, 28 Ohio St. 208, 218. But the contrary was held by the Supreme Court of the United States, and this, of course, disposes of the question. *Railroad Co. v. Koontz*, 104 U. S. 5.

to remove to a Federal tribunal an action brought against it in a State tribunal.¹ When, therefore, an action is commenced against a foreign insurance company by the service of summons upon the person appointed by such company to receive service of process within the State, in pursuance of a statute of the State, as its agent and attorney therein, upon whom all process against the non-resident company may be served, and who is also its managing agent within the State, such agent and attorney can, upon entering appearance for the defendant, file a petition for the removal of the cause, under section 639 of the Revised Statutes of the United States, signing the same by him as such attorney and verifying it by his affidavit, in which he states that he is the defendant's general managing agent; and this will be the act of the defendant and will have the effect of removing the cause and ousting the State court of further jurisdiction.²

§ 7465. This Right of Removal Extends to "Tramp Corporations."—By analogy to the doctrine elsewhere referred

¹ *Rece v. Newport News &c. Co.*, 32 W. Va. 164; *s. c.* 5 Ins. L. J. 515; 3 L. R. A. 572; 5 Rail. & Corp. L. J. 515; 9 S. E. Rep. 212; *post*, § 7466.

² *Shaft v. Phoenix Mut. Ins. Co.*, 67 N. Y. 544; *s. c.* 23 Am. Rep. 138. See, further, *Insurance Company v. Dunn*, 19 Wall. (U. S.) 214; *Farmers' Loan &c. Co. v. Maquillan*, 3 Dill. (U. S.) 379; *Minnett v. Milwaukee &c. R. Co.*, 3 Dill. (U. S.) 460. In *Cooke v. State Nat. Bank*, 52 N. Y. 96; *s. c.* 11 Am. Rep. 667, —the action was brought by a citizen of New York, in a State court in New York, against a national bank located in Boston. It was held: 1. That the court was not ousted of jurisdiction by section 57 of the National Currency Act (13 U. S. Stat. at Large, 99), that statute being permissive, and not mandatory as to the courts in which a national bank may be sued. 2. That the defendant was a citizen of Massachu-

setts, within the meaning of the acts relating to the removal of causes to the Federal courts. 3. That the joinder in the action, as defendants, of the drawers of the check, would not deprive the bank of the right alone to apply for the removal of the cause to the Federal court, the causes of action being distinct and only properly joined by virtue of a State statute. A fourth proposition was ruled by a divided court, which was, that the cause could not be removed by the bank into the Federal court under the Act of Congress of March 2, 1867, on the ground of *local prejudice*, by reason that, being a corporation, it had not the power to make the affidavit prescribed by the statute. But the case has been overruled on this last point, as already stated, by *Mix v. Andes Ins. Co.*, 74 N. Y. 53; *s. c.* 30 Am. Rep. 260.

to, that a corporation is *conclusively presumed*, for the purposes of Federal jurisdiction, to be a "citizen" of the State under whose laws it is created, no matter whether it has an actual domicile in that State or not, and no matter where its actual business domicile may be, and no matter what the citizenship of its members may be,¹—it is the doctrine that, within the meaning of the removal acts, a corporation is a citizen and resident of the State under whose laws it is created, although it may be organized for the purpose of doing business chiefly in other States.² Under this theory, a corporation aggregate, composed, we will say, entirely of citizens of New York, created for the purpose of carrying on business in the State of New York, and nowhere else, under a charter procured by the aid of an attorney in West Virginia, under the laws of that State,³ becomes a citizen of the State of New York; so that whenever an action is brought against it by another citizen of that State, for an amount within the jurisdiction of the Circuit Court of the United States, it is entitled to remove the action into that court, thus defrauding the State court of its rightful jurisdiction over its own citizens.

§ 7466. **Invalidity of Stipulations not to Remove.**—It is a general principle of law that an agreement in advance in which an attempt is made to oust the ordinary jurisdiction of the courts, is illegal and void.⁴ Misapplying this principle, the courts of the United States hold that a statute of a State imposing upon a foreign insurance company, as a condition upon which the State grants to it the right to do business within its limits, that it will file an agreement that it will not

¹ *Ante*, § 7448, *et seq.*; *Louisville &c. R. Co. v. Letson*, 2 How. (U. S.) 497; *Railroad Company v. Harris*, 12 Wall. (U. S.) 65; *Railway Company v. Whitton*, 13 Wall. (U. S.) 270; *Muller v. Dows*, 94 U. S. 444; *Myers v. Murray*, 43 Fed. Rep. 695; *Williams v. Missouri &c. R. Co.*, 3 Dill. (U. S.) 267.

² *Baughman v. National Water*

Works Co., 46 Fed. Rep. 4; *Myers v. Murray*, 43 Fed. Rep. 695.

³ The writer is here referring to actual, and not to imaginary, cases.

⁴ *Nute v. Hamilton &c. Ins. Co.*, 6 Gray (Mass.), 174; *Cobb v. New England Mut. Ins. Co.*, 6 Gray (Mass.), 192; *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 421; *Stephenson v. Piscataqua Ins. Co.*, 54 Me. 55, 70; *Scott v. Avery*, 5 H. L. Cas. 811.

remove suits from the courts of the State into the courts of the United States, is void.¹ The doctrine, as generally formulated, is that a State is powerless to confer upon an artificial being, of its own creation, the faculty of exercising any power in a foreign State; and, conversely, that a State may impose upon a foreign corporation any terms, conditions, and restrictions which it may see fit, upon which, alone, it will be permitted to enter the domestic jurisdiction for the purpose of engaging in business there;² but that a qualification of this principle is that such terms, conditions, and restrictions shall not be repugnant to the constitution and laws of the United States. For this reason an agreement exacted of a corporation, as a condition precedent to its right to engage in business in the State, that it will not remove any suit for trial into the Federal courts, is illegal, and a statutory provision imposing such an agreement is unconstitutional, as being an attempt to oust the Federal courts of their lawful jurisdiction.³ But, on the other hand, the correlative propositions that the laws of one State creating and empowering a corporation can have no force, *ex proprio vigore*, in another State, and consequently that another State may refuse all recognition to such a corporation, and exclude it from its limits, except where it is engaged in interstate commerce, or is an agency of the United States, carry with them the conclusion that when a foreign corporation enters the domestic State under its license, it is there by sufferance, and that the State may at any time revoke the permission and expel it from its limits. Therefore, the contradictory

¹ Insurance Company v. Morse, 20 Wall. (U. S.) 445; reversing *s. c.* 30 Wis. 496; 11 Am. Rep. 580, and overruling New York Life Ins. Co. v. Best, 23 Ohio St. 105; Southern Pac. R. Co. v. Denton, 146 U. S. 202; Barron v. Burnside, 121 U. S. 186. Compare Doyle v. Continental Ins. Co., 94 U. S. 535. This holding was, of course, followed in the inferior Federal courts. Barling v. Bank of British North America, 50 Fed. Rep. 260. And it was, of course, followed by the State

judicatories: Texas Land & Co. v. Worsham, 76 Tex. 556; *s. c.* 13 S. W. Rep. 384; Rece v. Newport News & Co., 32 W. Va. 164; *s. c.* 9 S. E. Rep. 212; 3 L. R. A. 572; 5 Rail. & Corp. L. J. 515.

² Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Lafayette Ins. Co. v. French, 18 How. (U. S.) 484; Ducat v. Chicago, 10 Wall. (U. S.) 410; Paul v. Virginia, 8 Wall. (U. S.) 168.

³ Insurance Company v. Morse, 20 Wall. (U. S.) 445.

conclusion has been arrived at, that, although such an agreement, as above referred to, is void, yet the State may, when the corporation refuses to be bound by it, recall the license granted to it, and expel it from its limits, and the judicial power of the United States does not extend to preventing it from so doing.¹

§ 7467. **Further of This Subject.**—The misapplication of the principle will appear when it is considered that it has always been held by the Supreme Court of the United States that it is competent for the States to *exclude from their limits foreign corporations entirely*, and, *a fortiori*, to impose any conditions which they may see fit as the terms on which they shall be admitted to enter for the purpose of doing business therein. The former proposition necessarily includes the latter. The absolute power of exclusion which is conceded to the States, except in so far as it interferes with interstate commerce, or with the agencies of the Federal government,² necessarily includes the right to impose any conditions of admission which the State may see fit, no matter how absurd, oppressive, or impossible of performance. No condition can be excepted out of the category which the State may impose, without denying its right to exclude the foreign corporation from its limits. When, therefore, the Supreme Court of the United States holds in one breath that a State may exclude altogether from its limits a foreign corporation, such as an insurance company, which is not engaged in interstate commerce,³ and in the next breath that it cannot impose the condition of admission that the corporation shall agree to litigate controversies only in the courts of the State, and not to remove them to the courts of the United States, it is guilty of a *reductio ad absurdum*, and one which illustrates, in a pitiable degree, the extent to which judges are greedy of jurisdiction, and the general incapacity of judges to reason calmly and sensibly on the question of their own jurisdiction. The rea-

¹ Doyle v. Continental Ins. Co., 94 U. S. 535.

² Post, § 7880; Paul v. Virginia, 8 Wall. (U. S.) 168, 177.

³ Post, § 7875, *et seq.*

soning of one Federal judge is to the effect that this doctrine is applicable even in the case of a corporation created under the laws of a foreign country.¹ Unquestionably, it is a sound doctrine that it is not competent for the States in any way to limit or restrain the jurisdiction of the national courts.² But legislation of this kind does not restrain the jurisdiction of the courts of the United States, but merely restrains the sphere of action of foreign corporations. It does not restrain the jurisdiction of the courts of the United States; since the States, by their grant admitting the corporation within their limits, themselves create, and at their mere pleasure, the conditions of jurisdiction if any exist; and if the States may, at their mere pleasure, make or refuse the grant which of itself creates the conditions of jurisdiction, they may make it on the condition that the jurisdiction shall not exist.³ Point is given to this argument by the statement of one of the applications of the jurisdictional doctrine thus laid down by the Supreme Court of the United States. A statute of Wisconsin

¹ Barling v. Bank of British North America, 50 Fed. Rep. 260.

² Orange Nat. Bank v. Traver, 7 Fed. Rep. 146; Phelps v. O'Brien County, 2 Dill. (U. S.) 518; Railway Company v. Whitton, 13 Wall. (U. S.) 270; Barling v. Bank of British North America, 50 Fed. Rep. 260; Suydam v. Broadnax, 14 Pet. (U. S.) 67; Union Bank v. Jolly, 18 How. (U. S.) 506; Hyde v. Stone, 20 How. (U. S.) 170; Payne v. Hook, 7 Wall. (U. S.) 425.

³ There is an analogous absurdity in the decision of the Supreme Court of the United States in Railway Company v. Whitton, 13 Wall. (U. S.) 270, 286. The Legislature of Wisconsin gave a *right of action for damages resulting in death*, such as did not exist at common law, but gave it with the *proviso* that "such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same."

The administrator of one who had been killed through the alleged negligence of a railway company brought an action under this statute, in Wisconsin, in one of the State courts, and afterwards removed it to the Circuit Court of the United States, under the act empowering such removals, on the ground of prejudice or local influence: Act Cong. March 2, 1867; 14 U. S. Stats. at Large, 558. The action having proceeded to judgment in favor of the plaintiff in the Circuit Court of the United States, it was held that the court had jurisdiction, and that, although the statute which created the right of action contained the limitation that the action could take place only in the State courts, yet this was void in so far as it restricted the jurisdiction of the courts of the United States. Thus, the court annexed an extension to the statute, by a plain piece of judicial legislation.

required foreign insurance companies, as a condition precedent to receiving a license to do business in the State, to agree not to remove into the courts of the United States any actions brought against them in the State courts, and enacted that, on a violation of such agreement by the insurance company, it should "be the imperative duty of the Secretary of State to revoke its license." It was held by the Supreme Court of Wisconsin (1) that the statute was constitutional, and (2) that the Secretary of State might be compelled by *mandamus* to revoke the license of such a company, in a proper case under the statute, at the relation of any person interested.¹ This conclusion was denied in the Circuit Court of the United States for the Western District of Wisconsin, by Mr. District Judge Hopkins, who issued an injunction to restrain the Secretary of State from revoking the license;² but his decision in a similar case was afterwards reversed by the Supreme Court of the United States.³

§ 7468. Right of Removal on the Ground of Prejudice or Local Influence. — A statute of the United States, enacted in 1867, provides that "when a suit is brought between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time

¹ State v. Doyle, 40 Wis. 175; *s. o.* 22 Am. Rep. 692.

² Hartford Fire Ins. Co. v. Doyle, 3 Cent. L. J. 41.

³ Doyle v. Continental Ins. Co., 94 U. S. 535 (Bradley, Swayne, and Miller, JJ., dissenting). Compare *Baron v. Burnside*, 121 U. S. 186, where the preceding case is distinguished. It ought not to escape attention, especially in the case of a State of wide territorial limits, like the State of Wisconsin, that the enacting of laws of this kind by no means implies a local or popular distrust of the Federal judicatories in actions between citizens and foreign corporations, —

though unquestionably such a distrust exists, and, in some cases, on good grounds. The real protection to the local citizens intended by such statutes is to prevent them from being dragged long distances from their homes to litigate controversies with foreign corporations, where the action has been originally brought in their own county. By forcing them to submit to a removal of the cause to a Circuit Court of the United States, sitting in a distant city, the expense and burden of the litigation is often increased to such an extent as to amount to a denial of justice to indigent citizens.

before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.”¹ Although this statute extended the right of removal to a “citizen,” provided “he” should make a certain affidavit, yet, by analogy to the other Federal holdings that a corporation aggregate is a “citizen” for the purposes of Federal jurisdiction, it is held that the right of removal here given extends to corporations.² One or two of the State courts hesitated at first upon this question, upon the difficulty that a corporation aggregate *cannot make an affidavit*. But the difficulty that a corporation aggregate can be referred to in a statute as a “citizen,” and that the legislature can call such a body “he,” and that the entity thus described as “he” has no capacity to take an oath, did not cause the Federal tribunals to hesitate; and the settled construction of the statute is, that it applies to corporations as well as to natural persons.³ It next became nec-

¹ Act Cong. March 2, 1867; 14 U. S. Stat. at Large, 558; Rev. Stat. U. S., § 639, cl. 3.

² *Burch v. Davenport & Co. R. Co.*, 46 Iowa, 449; s. c. 26 Am. Rep. 150.

³ *Minnett v. Milwaukee & Co. R. Co.*, 3 Dill. (U. S.) 460; *Farmers' Loan & Co. v. Maquillan*, 3 Dill. (U. S.) 379. In giving the opinion of the court in this case, Mr. Justice Miller says: “My impression in favor of the jurisdiction in this particular class of cases was so strong that I should have overruled the motion at once, but for the circumstance that a decision of the Court of Appeals of New York, and a decision of the Supreme Court of Minnesota, were produced, the former doubtfully, the latter positively, denying the corporations the right to remove cases under the act of March 2, 1867 (14 Stat. at Large, 550). I have con-

sidered the opinions in those cases, and, with great respect for the courts whose judgments they pronounce, I think their views upon the subject are not sound, and that, not unnaturally, perhaps, they incline too much to narrow and cripple the Federal jurisdiction. The history of the State court decisions on the subject of Federal jurisdiction, from the case of *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, shows that, if the State courts could have defined the limits of that jurisdiction, the fabric of Federal jurisprudence, as it exists to-day in this country, would have been shorn of its beauty and symmetry, and the system of its efficacy and usefulness.” *Ibid.* 380. These observations are undoubtedly true. On the other hand it is equally true that if the courts of the United States are allowed, without restraint from Con-

essary to settle how this incorporated "he" can make the affidavit of prejudice or local influence demanded by the statute. Of course, as a corporation can act only through its agents, it was necessary that some one should make the affidavit for it, and in order that the affidavit should be the affidavit of the incorporated "he" named in the statute, it was necessary that the person making it should be duly authorized to make it. There was also a difficulty in getting over the stumbling-block of interpretation found in the words "stating that he has reason to believe and does believe." Who is the incorporated "he" that has reason to believe and does believe? Is it the president, the secretary, the treasurer, the manager, the retained attorney, the agent acting in the par-

gress, to be the exclusive judges of their own jurisdiction, they will gradually absorb all jurisdiction. The seizure of jurisdiction over foreign corporations, under the pretense that a corporation aggregate is a "citizen," deserves to be characterized as a mere piracy of jurisdiction. The Supreme Court of Wisconsin held, in 1870, that the act was unconstitutional, in so far as it gave a *non-resident plaintiff* the right to remove a cause from the State to Federal courts, and an order of removal was reversed. *Whiton v. Chicago &c. R. Co.*, 25 Wis. 424; *s. c.* 3 Am. Rep. 101. Nevertheless, the Circuit Court of the United States retained jurisdiction of the cause, and it proceeded to final judgment in that court, and was afterwards re-examined by the Supreme Court of the United States on writ of error, where the court held that the act was *constitutional* and valid, and affirmed the judgment of the Federal court. *Railway Company v. Whitton*, 13 Wall. (U. S.) 270. The plaintiff was a resident of the State of Illinois. The statute is materially modified by the act of March 3, 1887, as corrected in its enrollment by the

act of August 13, 1888, § 2, paragraphs 4, 5, and 6; 1 Supp. to Rev. Stat. U. S. (2d ed.), p. 612. Clause 4 states the conditions of citizenship as in the original act, and gives the right of removal to "any defendant"; whereas the statute, as originally enacted and embodied in the Revised Statutes of the United States, gave it to the non-resident citizen "whether he be plaintiff or defendant." Clause 5 of the statute of 1888 authorizes the United States court to remand the cause in respect of parties as to whom there is no prejudice or local influence, where no party will be prejudiced by a severance. Clause 6 makes the statute incongruous by providing that, at any time before the trial in the United States court of a cause which has been removed to the court from a State court on the affidavit "*of any party plaintiff*," etc., the court shall, on application of the other party, examine into the truth of the affidavit of removal, and remand the cause, unless it shall appear to the satisfaction of the court that the party will not be able to obtain justice in the State court.

ticular transaction, the board* of directors, or the aggregate body of the stockholders? Still other difficulties arose with reference to it.

§ 7469. **Authority of the Officer to Make the Affidavit.**—It has been ruled that the affidavit prescribed by the statute may be made and signed by some person authorized to represent the corporation, but the *authority* of any person assuming so to represent it *must appear*. No officer of a corporation, unless specially authorized, has power to make such an affidavit for the corporation.¹

§ 7470. **Substance of the Affidavit.**—It has been held that the affidavit need not state the *facts* on which the applicant

¹ When, therefore, the affidavit ran thus,—"I, J. W. H., of Portsmouth, N. H., being duly sworn, depose and say that I am the acting and assistant superintendent of the Manchester and Lawrence Railway corporation; that I have reason to believe and do believe that, from prejudice and local influence, said corporation, defendant in the suit [describing the suit], will not be able to obtain justice in the State court, J. W. H.,"—it was held that the steps prescribed by the act of 1867 to effectuate the removal had not been taken. *Mahone v. Manchester &c. R. Corp.*, 111 Mass. 72; *s. c.* 15 Am. Rep. 9. So, it was held, in Nevada, that an officer of a foreign corporation, sued in a State court, cannot, at least without special authority, make the affidavit required by the statute, for the reason that the statute requires an affidavit of the *defendant's own belief*. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350; *s. c.* 21 Am. Rep. 757. This was a decision by two judges. One of them was of opinion that the person making the affidavit must be specially authorized thereto

by the corporation, *e. g.*, by a *resolution* of the board of directors. The other was of opinion that the corporation was not within the terms of the act of Congress at all, because from the nature of things a corporation cannot make an affidavit. They accordingly concurred that where the affidavit was made by the *vice-president* of a foreign railway corporation, without any special authorization to make it appearing, the suit was not properly removed. In one case Mr. Justice Miller said: "I think the *proper officers* of corporations may make the necessary affidavit to procure the removal." *Farmers' Loan &c. Co. v. Maquillan*, 3 Dill. (U. S.) 379, 381. But he did not indicate who the proper officers were. In another case Mr. District Judge Nelson said that "any proper officer—particularly the *president*, who is the head of the organization,—could make the requisite affidavit." *Minnett v. Milwaukee &c. R. Co.*, 3 Dill. (U. S.) 460, 463. Examine *Fisk v. Union Pac. R. Co.*, 8 Blatchf. (U. S.) 343; *Jones v. Oceanic Steam Nav. Co.*, 11 Blatchf. (U. S.) 406.

for the transfer bases his belief that local prejudice exists. It is sufficient if he states that he has reason to believe and does believe that such local prejudice does exist as will prevent his obtaining justice.¹

§ 7471. **Conclusiveness of the Affidavit.** — It has also been held that the affidavit is *conclusive*, and cannot be traversed in the State court; and this is obviously so, because the language of the statute predicates the right of removal upon the making of the affidavit;² but provision is now made for an investigation, in the United States court, of the truth and grounds of the affidavit of removal, and for a remanding of the cause to the State court “unless it shall appear to the satisfaction of said court [of the United States] that said party will not be able to obtain justice in such State court.”³

§ 7472. **Right of Removal in Cases of a Corporation Created by the Concurrent Legislation of Two or More States.** — We have several times had occasion to examine into the constitution of this species of corporation, with the conclusion that it is a *domestic corporation in each of the States* by whose legislation, in concurrence with that of other States, it has been created.⁴ This being so, when it is sued in a court of any one of such States by a citizen thereof, it is *not entitled to remove* the cause to a court of the United States on the ground of diverse State citizenship.⁵ So, where two railroad corporations, originally created under the laws of two adjoining States, subsequently become *consolidated* through the legis-

¹ Meadow Valley Min. Co. v. Dodds, 7 Nev. 143; s. c. 8 Am. Rep. 709; denying Whiton v. Chicago & C. R. Co., 25 Wis. 424; s. c. 3 Am. Rep. 101.

² Stewart v. Mordecai, 40 Ga. 1; s. c. 2 Am. Rep. 555; Brodhead v. Shoemaker, 44 Fed. Rep. 518; Cooper v. Richmond R. Co., 42 Fed. Rep. 697.

³ Act Cong. March 3, 1887, as corrected in its enrollment by act of August 13, 1888; 25 U. S. Stats., 433;

1 Supp. Rev. Stats. U. S. (2d ed.), p. 612, § 2, cl. 6.

⁴ Ante, §§ 47, 319, 320, 688, 7438, 7452; post, §§ 7490, 7799, 7817, 8012, 8020, 8128.

⁵ Horne v. Boston & C. Railroad, 62 N. H. 454; Paul v. Baltimore & C. R. Co., 44 Fed. Rep. 513; Cohn v. Louisville & C. R. Co., 39 Fed. Rep. 227; s. c. 40 Am. & Eng. Rail. Cas. 338; Memphis & C. R. Co. v. Alabama, 107 U. S. 581.

lative action of both of such States, the united corporation is a domestic corporation in each State, and is not entitled to remove an action brought against it by a citizen of the other State;¹ and this is especially true where the enabling act of the State in which the action is brought, permitting the consolidation, provides that the corporation thus created shall be treated as a corporation created by the laws of such State.² But great difficulty has been met with in determining whether a corporation, originally created by the legislation of one State, has been *re-created*, so to speak, by the legislation of another State, or has merely received a *license* to do business in the latter State.³ In the latter case, it is not a "citizen" of the latter State for the purposes of Federal jurisdiction, and when sued therein by a citizen, it is entitled to remove the cause to a court of the United States.⁴

§ 7473. **Alien Corporations Entitled to Remove.**—An *alien corporation*, that is to say, a corporation created under the laws of a foreign country, is entitled, under the Revised Statutes of the United States,⁵ to remove a cause from a court of the State within which it may be domiciled for the purposes of business, to a court of the United States, upon the ground of its alienage, although it may have acquired a residence within such State such as will give jurisdiction to the courts of the State of actions against it *in personam*.⁶

¹ Paul v. Baltimore &c. R. Co., 44 Fed. Rep. 513. But see *ante*, § 7452.

² Cohn v. Louisville &c. R. Co., 39 Fed. Rep. 227.

³ *Post*, § 7893.

⁴ Upon this principle, it has been held that the Louisville and Nashville Railroad Company, being a corporation of Kentucky, and not of Tennessee, is, when sued in Tennessee by a citizen of that State, entitled to remove the cause to the Circuit Court of the United States. *Goodlett v. Louisville &c. R. Co.*, 122 U. S. 391. So the Baltimore and Ohio Railroad Company is a Maryland corporation,

and has not been re-incorporated in Virginia or West Virginia, but is merely operating its railroad in those States under a license, and is hence entitled to remove a suit brought against it in a court of one of those States, to the United States Circuit Court. *County Court v. Baltimore &c. R. Co.*, 35 Fed. Rep. 161, 164; *Railroad Company v. Harris*, 12 Wall. (U. S.), 65; *Railroad Company v. Koontz*, 104 U. S. 5; *dictum* in *Goodlett v. Louisville &c. R. Co.*, 122 U. S. 391, 402.

⁵ Rev. Stats. U. S., § 639.

⁶ See the statute, and compare the

§ 7474. **Controversy must be Wholly between Different Parties.**—It is a theory of Federal jurisdiction, where it is based exclusively upon diverse citizenship, that, in order to support the jurisdiction, there must be a substantial controversy *wholly between citizens of different States*; so that if the substantial controversy is partly between citizens of different States, and partly between citizens of the same State, the State jurisdiction prevails, and the Federal court has no jurisdiction.¹ In such a case there is, of course, no right of removal from the State court to the Federal court. Nevertheless, the right of a defendant to a transfer of the cause to the Federal court is not defeated by the fact that his co-defendant is a resident of the same State with the plaintiff, provided a *severance* can be had, and the rights of the petitioner for removal determined separately.² Where the action is against a corporation and its directors jointly, to cancel subscriptions to the corporate stock, and to compel the defendants to refund the amounts already paid on the same, the directors are not merely nominal, but are substantial parties; and if one of

reasoning of Judge Deady, in *Purcell v. British Land &c. Co.*, 42 Fed. Rep. 465. And see *ante*, § 7463. Opposed to the doctrine, and also opposed to the weight of authority on the analogous question of the right of removal where it rests upon diverse State citizenship (*ante*, § 7463), is a Federal decision to the effect that a corporation created under the laws of a foreign country, by complying with the laws of one of the States of the American Union permitting it to do business therein, by appointing and empowering a local agent upon whom process against it may be served, becomes a *domestic corporation* in such a sense as precludes its right to remove to a court of the United States an action brought against it by a citizen of such a State. *Scott v. Texas Land &c. Co.*, 41 Fed. Rep. 225; *s. c.* 8 Rail. & Corp. L. J. 16.

¹ *Ante*, § 7447. The act of Congress of 1887, as corrected in its enrollment by the act of 1888, contains this provision: "And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." Supp. to Rev. Stats. U. S. (2d ed.), p. 612. See also *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535; *Sloane v. Anderson*, 117 U. S. 275, 278; *Louisville &c. R. Co. v. Ide*, 114 U. S. 52; *Putnam v. Ingraham*, 114 U. S. 57; *Little v. Giles*, 118 U. S. 596.

² *Stewart v. Mordecai*, 40 Ga. 1; *s. c.* 2 Am. Rep. 555.

them is a citizen of the District of Columbia, or a citizen of the same State as the plaintiff, the cause is not removable under the act of 1887, because there is no controversy wholly between citizens of *different States*.¹ But of course this means a *substantial*, and not merely a *nominal, controversy*; so that, although there may be nominal parties who are citizens of the same State with adverse parties to the record, the cause may nevertheless be removed, if the controversy between the substantial parties is wholly between citizens of different States. Recognizing this principle, it was held² that where two corporations are sued jointly in a State court for a *tort*, one of them cannot remove the cause to a court of the United States, although it *pleads separately*, on the ground that there is a separable controversy between it and the plaintiff, because the other corporation was not in existence at the time of the tort sued upon, without alleging and proving that the two corporations were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court.³

¹ Seddon v. Virginia &c. Co., 36 Fed. Rep. 6; s. c. 1 L. R. A. 108. Under the Constitution of the United States, the jurisdiction of the courts of the United States, in so far as it rests upon diverse citizenship, extends to controversies between citizens of different *States*. Const. U. S., art. 3, § 2, cl. 1. A court that could make the discovery that a corporation aggregate is a "citizen," within the language of this grant of jurisdiction, could not go so far as to hold that either a *Territory* of the United States, or the District of Columbia, is a "State" for the purpose of giving jurisdiction under this clause of the constitution. Hepburn v. Ellzey, 2 Cranch (U. S.), 445; New Orleans v. Winter, 1 Wheat. (U. S.) 91; Barney v. Baltimore, 6 Wall. (U. S.) 280; Pirie v. Tvedt, 115 U. S. 41. For a case that was held rightly remanded because some of the stockholders suing a domestic corporation and a for-

eign corporation, were citizens of the same State with the domestic corporation,—see Central R. Co. v. Mills, 113 U. S. 249.

² Under act Cong. March 3, 1875, ch. 137, § 2.

³ Louisville &c. R. Co. v. Wangelin, 132 U. S. 599. This is in accordance with a number of holdings of the court, to the effect that parties *jointly sued at law*, either *ex contractu* or *ex delicto*, must all be citizens of a different State from that of the plaintiff, in order to warrant a right of removal, and that there can be no severance and no removal on the part of either one of them. Pirie v. Tvedt, 115 U. S. 41; Sloane v. Anderson, 117 U. S. 275; Plymouth &c. Co. v. Amador &c. Co., 118 U. S. 264; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535; Louisville &c. R. Co. v. Ide, 114 U. S. 52; Putnam v. Ingraham, 114 U. S. 57; Starin v. New York, 115 U. S. 48.

§ 7475. **Removal of Actions against Corporations Organized under a Law of the United States.**—The Federal statute on this subject is as follows: “Any suit commenced in any court, other than a Circuit or District Court of the United States, against any corporation, *other than a banking corporation*,¹ organized under a law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section.”² It is obvious that, under this statute, two things must concur in order to create a right of removal: 1. That the defendant is a corporation, or a member of a corporation, organized under a law of the United States, other than a national bank. 2. That such corporation or member has a defense arising under or by virtue of the constitution or some treaty or law of the United States. Where a corporation created by act of Congress has no defense arising under the constitution or law of the United States, there is no right of removal.³

¹ As to *national banks*, see *ante*, § 7436; *post*, § 7899.

² Act Cong. July 27, 1866, ch. 288, § 1; Act Cong. July 27, 1866, ch. 255, § 2; 15 U. S. Stats., p. 227; Rev. Stat. U. S., § 640.

³ *Magee v. Union Pac. R. Co.*, 2 Sawy. (U. S.) 447. It seems that the *affidavit* may be made in the most *general terms*, pursuing the language of the statute, and stating the mere conclusion of law that the defendant has a defense under the constitution and treaty or a law of the United States, without disclosing what that defense is, or making it appear to the court that it has a right of removal

under the statute (*Burton v. Union Pac. R. Co.*, 3 Dill. (U. S.) 336),—the settled habit of some of the Federal courts being to construe everything in favor of their own jurisdiction. The Congress of the United States not being under any prohibition in respect of the passage of *local* or *special laws*, has passed acts of a local or special nature affecting the jurisdiction of the courts of the United States, and some of these acts appear in the charter of corporations granted by act of Congress. Thus, the charter of the *Union Pacific Railroad Company* provides that the corporation by that name “shall have perpetual

§ 7476. **Further of This Subject.**—The language of the charter of the Bank of the United States was that it should have power to “sue and be sued . . . in courts of record, or in any other place whatever.” It was held that this did not enable it to sue and be sued in courts of the United States.¹ But where the act of Congress creating the Bank of the United States provided that it should be “made able and capable in law,” “to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having competent jurisdiction, and in any Circuit Court in the United States,”—then, as to the constitutional power of Congress to create such a jurisdiction, the court, by an indefensible interpretation of the constitution, held that every action brought by a bank chartered by the United States was an action “arising under the laws of the United States,” within the meaning of the constitution.² Extending this doctrine, it has been held, in effect, that every corporation chartered or created under an enabling act of Congress, and having, by its governing statute, the power to sue and be sued, may elect a court of the United States as its forum.³

succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal,” etc. 12 U. S. Stat. at Large, 490, § 1. This is held to confer upon courts of the United States jurisdiction of actions by and against this corporation, without reference to the citizenship of the parties. *Bowman v. Union Pac. R. Co.*, 3 Dill. (U. S.) 367; extending the doctrine of *Smith v. Union Pac. R. Co.*, 2 Dill. (U. S.) 278. It was held that the corporation was suable in the United States court in Nebraska by a citizen of Ohio.

¹ *Bank of United States v. Deveaux*, 5 Cranch (U. S.), 61. See also *Bank of United States v. Martin*, 5 Pet. (U. S.) 479; *Osborn v. Bank of*

United States, 9 Wheat. (U. S.) 738; and compare *Bank of United States v. Northumberland Bank*, 4 Wash. (U. S.) 168.

² *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 817.

³ It was so held with reference to the *Union Pacific Railroad Company*, in *Union Pac. R. Co. v. McComb*, 1 Fed. Rep. 799. It was accordingly held that under the act of Congress of March 3, 1875, 18 U. S. Stat. at Large, 470, providing for the removal from State to Federal Courts of causes “arising under the constitution or laws of the United States,” a suit by a railroad corporation created by an act of Congress was a proper subject for removal. *Union Pac. R. Co. v. McComb*, 1 Fed. Rep. 799. It is perceived that this section contains an exception in the words “*other than*

§ 7477. **Suits Arising under the Laws of the United States.**—Outside of the operation of section 640 of the Revised Statutes of the United States, considered in the preceding section, is the act of Congress of March 3, 1875,¹ giving a right of removal to the defendant or defendants in “any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority,” etc.² The Supreme Court of the United States have held, though without entire unanimity, that corporations created and organized under acts of Congress are entitled, as such, to remove suits brought against them in the courts of the States, to courts of the United States, under the act of 1875, on the ground that such suits are suits “arising under the laws of the United States,” without reference to the nature of the controversy.³ The decision seems to be not merely untenable, but a most unfaithful interpretation of the statute. Under it, the mere fact that corporations have been created by an act of Congress entitles them to remove to courts of the United States all controversies between them and citizens of the State within which they operate their railroads or otherwise carry on their business, although such controversies arise, not under any act of Congress or treaty of the United

a banking corporation organized under a law of the United States.” This was manifestly intended to exclude the right of removal in the cases of *national banks*. It has been held that the receiver of a national bank has not, as such, the privilege of litigating all cases in the courts of the United States, and cannot remove a cause against him from the State court to the United States court; since national banks are excepted by the statute now under consideration, and since such a receiver is not the bank in the sense of the 57th section of the National Currency Act, 13 U. S. Stat. 116, which gives the State courts concurrent jurisdiction with the courts of

the United States, in suits against any association under the act; and since such a receiver has no prerogative in respect of the court in which he shall litigate over other persons. Compare *ante*, §§ 7270, 7320; *post*, § 7899. *Bird v. Cockrem*, 2 Woods (U. S.), 32.

¹ 18 U. S. Stat. 470.

² This section is reproduced in the act of Congress of March 3, 1887, corrected in its enrollment by Act of August 13, 1888, § 2; 1 Supp. to Rev. Stat. U. S. (2d ed), p. 612.

³ *Pacific Railroad Removal Cases*, 115 U. S. 1, 11 (Wait, C. J., and Miller, J., dissenting).

States, but depend wholly upon the municipal law of the particular State.¹ The same court at the subsequent term, dealing with the same question, — the right of removal under the act of 1875, — laid down the correct principle on which the right of removal in such cases depends, in the following language: "If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."² The court accordingly held that the questions whether the city of New York has the exclusive right to establish ferries between Manhattan Island and the north shore of Staten Island on the Kill von Kull, and whether in a given case this right has been interfered with by the setting up of a ferry without license, are not questions arising under the constitution or laws of the United States.³ And so it was held, with obvious propriety, in an earlier case, that a suit cannot be removed, under the act of 1875, simply because, in its progress, a construction of the constitution, or of a law of the United States, may be necessary, unless the suit, in part, at least, arises out of a contro-

¹ It has been held by a State court that, in the case of a corporation created under the laws of another State, and sued in the domestic State to enforce a schedule of rates adopted by the railroad commissioners of the domestic State, there is no right of removal on the part of the defendant, on the ground that Federal questions are involved, although the railroad of the corporation has been built in part through the aid of a congressional grant of land. *State v. Southern Pac. Co.*, 23 Or. 424.

² *Starin v. New York*, 115 U. S. 248, 257. The court cited the following decisions as supporting this proposition: *Cohens v. Virginia*, 6 Wheat.

(U. S.) 264, 379; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 824; *Mayor v. Cooper*, 6 Wall. (U. S.) 247, 252; *Gold Washing & Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Company v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas Pac. R. Co. v. Atchison & C. R. Co.*, 112 U. S. 414, 416; *Provident Sav. Life & C. Soc. v. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11. See also *Dowell v. Griswold*, 5 Sawy. (U. S.) 39, 42.

³ *Starin v. New York*, 115 U. S. 248.

versy in regard to the operation and effect of some provision in that constitution or law *upon the facts involved*.¹

§ 7478. **Removal by Alien Corporations.**—The Revised Statutes of the United States give the right to remove a cause from a State to a Federal court,—“when the suit is against an alien.”² A corporation created under the laws of Great Britain has been held to be an “alien” within the meaning of this provision.³

ARTICLE IV. “INHABITANCY” OF CORPORATIONS FOR THE PURPOSES OF FEDERAL JURISDICTION.

SECTION

7484. “Inhabitancy” for purposes of Federal jurisdiction.

7485. Old doctrine that a corporation can have no inhabitancy outside of the State creating it.

7486. Further of this question.

SECTION

7487. Whether a corporation having an office in another State becomes an “inhabitant etc.”

7488. Doctrine that inhabitancy and citizenship identical.

7489. The present Federal doctrine on this subject.

§ 7484. **“Inhabitancy” for Purposes of Federal Jurisdiction.**—Several statutes of the United States have successively restrained the bringing of civil actions in courts of the United States to cases in which the person impleaded as defendant is

¹ Gold Washing &c. Co. v. Keyes, 96 U. S. 199. It has been held that a judicial contest between a receiver of an insolvent national bank and a depositor, involving merely the question of the right of the depositor to *set off* his deposit against notes due by him to the bank, does not present a *Federal question*, within the meaning of the statute of the United States (Rev. Stat. U. S., § 5242; *ante*, § 7271), avoiding preferences to creditors of such an insolvent bank, so as to authorize a removal under the act of March 3, 1887. *Tehan v. First Nat. Bank*, 39 Fed. Rep. 577, Coxe, J. The learned judge cited *Gold Washing &c. Co. v. Keyes*, 96 U. S. 199. The

holding proceeds on the view that a simple question of set-off is to be determined according to the general principles of the law, to which point the court cite: *Platt v. Bentley*, 11 Am. Law Reg. 171; *Colt v. Brown*, 12 Gray (Mass.), 233; *Tarter's Case*, 54 How. Pr. (N. Y.) 385. See further on the subject as to what are *Federal questions*, so as to give a right of removal, *Illinois Cent. R. Co. v. Chicago &c. R. Co.*, 26 Fed. Rep. 477.

² Rev. Stat. U. S., § 639, cl. 1.

³ *Terry v. Imperial Fire Ins. Co.*, 3 Dill. (U. S.) 408; *Barling v. Bank of British North America*, 50 Fed. Rep. 260.

an "*inhabitant*," of the district in which the action is brought. One of them, enacted in 1875, reads as follows: "No person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court, and no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an *inhabitant*, or in which he shall be *found* at the time of serving such process or commencing such proceeding."¹ The Judiciary Act of 1789 contains substantially the same provision.² The act of 1887, as corrected in 1888, amending the act of 1875, contains a similar provision, but differing essentially from the act which it amends in that it omits the word "*found*." It reads as follows: "But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court, and no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an *inhabitant*; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."³ The question whether a private corporation can become an "*inhabitant*" of a State other than the State of its creation, for the purposes of Federal jurisdiction under these statutes, has perplexed the judges of those courts very much, and more especially as, under the earlier statutes, the question was complicated with the further ques-

¹ 18 U. S. Stat., p. 470, ch. 137.

² 1 U. S. Stat., p. 79, ch. 20. As to when a corporation was "*found*" within a State within the meaning of this word, see *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93, Lowell, J.; *Eaton v. St. Louis Shakspear &c. Co.*, 7 Fed. Rep. 139; *Ex parte Schollenberger*, 96 U. S. 369; *Runkle v. Lamar Ins. Co.*, 2 Fed. Rep. 9; *Williams v. Transportation Company*, 14 Off. Gaz. (U. S.) 523; *Wil-*

son Banking Co. v. Hunter, 7 Reporter, 455. "*Inhabitancy*" in case of a corporation created by the concurrent legislation of two States, see *Culbertson v. Wabash Nav. Co.*, 4 McLean (U. S.), 544. As to such corporations, see *ante*, §§ 47, 319, 320, 688, 7438, 7452, 7472; *post*, §§ 7490, 7799, 7817, 8012, 8020, 8028.

³ 25 U. S. Stat., p. 434, ch. 866; 24 U. S. Stat., p. 552, ch. 373.

tion when such a corporation is to be deemed as "*found*" within a Federal district for the purposes of jurisdiction. This question arose and was decided with reference to a railway company in a notorious case in which a number of adventurers, intending to build, lease, and operate railroads in the State of California, and in other States and Territories, procured themselves to be *incorporated under a special charter granted by the Legislature of Kentucky*, within which State they never had, and never intended to have, any railroad or other property whatever. Their chief object seems to have been to defeat the jurisdiction of the courts of the States in which their railroads were situated, and to place themselves in a position to remove every important action against them to the courts of the United States, under the fictitious doctrine of citizenship relating to corporations, already considered.¹ In an action against this company, and another railroad company, and also a telegraph company, in the Circuit Court of the United States for the Northern District of California, the defendants were not satisfied with the court in which they were impleaded, for some reason best known to themselves, and raised the question whether they were "*inhabitants*" of that district for the purposes of Federal jurisdiction. The question was heard before Mr. Justice Harlan, sitting at circuit under a special commission, and he decided that, under the act of 1887, above quoted, a railroad or telegraph company chartered by a State, or by the United States, is an "*inhabitant*" of any State in which it operates its lines and maintains offices for the transaction of business;² but this salutary doctrine is overruled, as we shall see.³

¹ *Ante*, § 7448, *et seq.*

² *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297. The learned judge also decided that the act of 1887 is not applicable to suits brought against a corporation by the government of the United States; since the statute applies to cases where the Federal jurisdiction is founded up-

on diversity of citizenship, and the United States is present everywhere. The only restriction upon the jurisdiction related to the question whether the defendant was an "*inhabitant*" of the district, within the proper interpretation of the statute. *Ibid.*

³ *Post*, §§ 7488, 7489.

§ 7485. **Old Doctrine that a Corporation can have No Inhabitaney Outside of the State Creating It.**—Recurring now to the doctrine laid down in earlier cases, and especially in the leading case of the *Bank of Augusta v. Earle*,¹ that a corporation *cannot migrate*, but must dwell in the place of its creation, — a doctrine which was founded in pure casuistry, which was supported neither by sense nor experience, and which never had any just application, except to municipal corporations, which are corporations created for civil government within certain defined territories, and which are consequently *fixed* corporations, — we find a large number of cases holding that a corporation created under the laws of one State cannot become an "*inhabitant*" of another State, nor be "*found*" therein, for the purposes of Federal jurisdiction, under the Judiciary Act of 1789, and the amendatory statute of 1875, referred to in the preceding section, although it enters such State by its officers and agents for the purpose of doing business therein.² It was also held that a corporation created under the laws of one State to exploit a patented invention, which did its work in other States through the agencies of *sub-corporations* created in such States, was not "*found*" within such a State, for the purposes of Federal jurisdiction of an action against it, when it appeared that the relation between itself and the sub-corporation was not that of principal and agent, but that of a mere *licensor* and *licensee* or *lessor* and *lessee*.³ Nor did the presence of an officer of a manufacturing corporation in a State other than that of its domicile for the purpose of exhibiting its patented invention and advertising the same, make such a corporation an "*inhabitant*" of the State, or "*found*" therein, for the purposes

¹ 13 Pet. (U. S.) 519; *post*, § 7881.

² *Myers v. Dorr*, 13 Blatchf. (U. S.) 22; *Hume v. Pittsburgh &c. R. Co.*, 8 Biss. (U. S.) 31; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434; *Preston v. Fire Extinguisher Man. Co.*, 36 Fed. Rep. 721; *s. c.* 20 Ohio L. J. 423; *Gormully Man. Co.*

v. Pope Man. Co., 34 Fed. Rep. 818; *Connor v. Vicksburg &c. R. Co.*, 36 Fed. Rep. 273; *s. c.* 1 L. R. A. 331; 2 Interstate Com. Rep. 177.

³ *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17. Compare *post*, § 8034.

of Federal jurisdiction, although it operated a train of its cars within the State for the purpose of exhibition and advertisement. An action for an infringement of a patent could not hence be prosecuted against it in a Federal court in such State.¹

§ 7486. **Further of This Question.**—There are, on the other hand, a number of holdings to the general effect that a foreign corporation is “*found*” within a State, for the purposes of Federal jurisdiction, whenever it is present within the State in such a sense as, under the statutes of the State, will give the *State courts* jurisdiction of actions *in personam* against it.² While it is to be carefully kept in mind that this is not necessarily so, but that the question of Federal jurisdiction depends exclusively upon the meaning of the act of Congress, yet it is a plain and just conclusion that the act of Congress did not intend to exclude the jurisdiction of the courts of the United States from cases where the jurisdiction of the State courts would attach, where the other elements of Federal jurisdiction, generally that of diverse citizenship, are present. In an important case where this question was considered by three Federal judges at circuit, and where the opinion was delivered by Mr. Justice (then Mr. Circuit Judge) Jackson, and is characterized by the care and judgment which distinguish his opinions, it was held that “when the local law, expressly or by comity, permits foreign corporations to do business in the State; when it also provides for suit against them in a reasonable and proper manner, and within the just limits of the State’s power and authority; and when a foreign corporation thereafter enters the State, and transacts its corporate business by means of resident agents, coming within the terms of the local statute,—it may be ‘*found*,’ and is liable to suit there, in either the State or Federal courts, by service of pro-

¹ *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434.

² *St. Louis Wire Mill Co. v. Consolidated Barb-wire Co.*, 32 Fed. Rep.

802; *Van Dresser v. Oregon Rail. & Nav. Co.*, 48 Fed. Rep. 202; *Hat-Sweat Man. Co. v. Davis Sewing-Machine Co.*, 31 Fed. Rep. 294.

cess on such agent."¹ We have already noticed an overruled holding² to the effect that a *railroad* or *telegraph company*, operating a line of railroad or telegraph within a State, is an "*inhabitant*" of that State for the purposes of Federal jurisdiction under the act of 1887.³ On principle, this should be so regarded where the constitution and laws of the State give it the same rights, privileges, and immunities as are given to corporations organized in the State, and require it to subject itself to the jurisdiction of its courts,⁴—though we shall see that the rule is now to the contrary.⁵ But, under the operation of this principle, a foreign corporation is not an "*inhabitant*" of the domestic State, for the purposes of Federal jurisdiction, where it merely enters for the purpose of making *occasional purchases* of raw material for its manufactures, and has no business office nor agent therein.⁶ But a corporation was deemed to be "*found*" within the meaning of the Judiciary Act, and the act of 1875,⁷ within the district where it had an agent who had the direction, management, and control of its business therein, and who superintended its factory therein, and out of whose acts the suit arose, it being an action for penalties under the patent laws of the United States.⁸

§ 7487. **Whether a Corporation having an Office in Another State Becomes an "Inhabitant," etc.**—Pursuing further these irreconcilable holdings, we find a number of decisions which stick in the bark of the old doctrine that a corporation *cannot migrate*,⁹ to the extent of holding that the fact that a corporation organized under the laws of one State *has an office and managing agent* in another State, does not make it an "*inhabitant*" of such other State for the purposes of Federal

¹ United States v. American Bell Telephone Co., 29 Fed. Rep. 17, 35.

² *Ante*, § 7484.

³ United States v. Southern Pac. R. Co., 49 Fed. Rep. 297; Van Dresser v. Oregon Rail. & Nav. Co., 48 Fed. Rep. 202.

⁴ United States v. Southern Pac. R. Co., 49 Fed. Rep. 297.

⁵ *Post*, §§ 7488, 7489.

⁶ St. Louis Wire Mill Co. v. Consolidated Barb-wire Co., 32 Fed. Rep. 802.

⁷ Rev. Stat. U. S., §§ 732, 739.

⁸ Hat-Sweat Man. Co. v. Davis Sewing-Machine Co., 31 Fed. Rep. 294.

⁹ *Post*, § 7881.

jurisdiction of an action against it;¹ and that is now the settled doctrine.² Another court held that a foreign steamship company which had its place of landing in this country at Hoboken, in the State of New Jersey, where it conducted its business operations, was not an "inhabitant" of the State of New York, for the purposes of Federal jurisdiction under the act of 1887, by reason of the fact that it maintained an office in the city of New York, where its financial and monetary operations were conducted by its agents.³ The decision seems to be untenable. The New York office was, beyond doubt, the principal office, and the agents in New Jersey were subordinate to the managers in New York, and received directions from them. It is therefore satisfactory to note the fact that this decision was in effect reversed by a *mandamus*.⁴ With reference to this question, a distinction has been pointed out,⁵ founded upon the *omission* of the word "*found*," from the statute of 1887.⁶ Under the act of 1875, which retains the expression "in which he was *found* at the time of serving the writ," it was held that a corporation might be "*found*," within the meaning of the statute, in another State, where it kept an office and transacted business, although not a citizen or resident of such State, for the purposes of Federal jurisdiction founded upon diverse citizenship.⁷ Upon this ground, a decision of the Supreme Court of the United States ought to be carefully distinguished, as not being authority under the act of 1887,—namely, that where a foreign insurance company has established an agency within the domestic State, and appointed an agent, and, under

¹ Denton v. International Co., 36 Fed. Rep. 1; Bensinger &c. Cash Register Co. v. National Cash Register Co., 42 Fed. Rep. 81; s. c. 8 Rail. & Corp. L. J. 62; Booth v. St. Louis Fire Engine Man. Co., 40 Fed. Rep. 1; s. c. 6 Rail. & Corp. L. J. 484.

² Post, §§ 7488, 7489.

³ Hohorst v. Hamburg-American Packet Co., 38 Fed. Rep. 273.

⁴ Re Hohorst, 150 U. S. 653.

⁵ By Thayer, J., in Bensinger &c. Cash Register Co. v. National Cash Register Co., 42 Fed. Rep. 81, 82.

⁶ Ante, § 7484.

⁷ Good Hope Co. v. Railway Barb Fencing Co., 22 Fed. Rep. 635; St. Louis Wire Mill Co. v. Consolidated Barb-wire Co., 32 Fed. Rep. 802; Hat-Sweat Man. Co. v. Davis Sewing-Machine Co., 31 Fed. Rep. 294.

the State law, stipulated that process in actions against it may be served on such agent, it is deemed to be "found" within the State, for the purposes of Federal jurisdiction, and such jurisdiction attaches in an action against it, provided process be served upon such agent in conformity with the law of the State.¹

§ 7488. **Doctrine that Inhabitaney and Citizenship Identical.**—Several of the Federal circuit judges drifted into the view that *inhabitaney*, under the act of 1887, is substantially identical with *citizenship* under the same act, for the purposes of Federal jurisdiction founded upon *diverse State citizenship*.² But the two things are essentially different. It has long been settled that an allegation that a party is a "*resident*" does not show that he is a "*citizen*" within the meaning of the Judiciary Acts.³ In fact, there is scarcely an analogy between them. Under the Constitution, and the Judiciary Act, and its various amendments, the jurisdiction of the Circuit Courts of the United States extends to controversies, involving a certain amount of value, between "*citizens*" of the different States. By a fictitious and artificial construction of the word "*citizen*," it was held to mean *corporations*, and the court became so swamped in the consequences of its own unfaithful interpretation of the Constitution and Judiciary Act, that it finally found itself bound to hold that a corporation is, for the purposes of Federal jurisdiction founded upon diverse State citizenship, *conclusively presumed to be a citizen of the State under whose laws it is created*, and wholly without reference to the residence of its stockholders; so that, if we take for illustration a case already considered,⁴ the Southern Pacific Company is, for the purposes of Federal jurisdiction founded upon diverse citizenship, *conclusively presumed to be a citizen of Kentucky*,

¹ *Ex parte Schollenberger*, 96 U. S. 369.

² *Booth v. St. Louis Fire Engine Man. Co.*, 40 Fed. Rep. 1; *s. c.* 6 Rail. & Corp. L. J. 484; *Bensinger & c. Cash Register Co. v. National Cash*

Register Co., 42 Fed. Rep. 81; *s. c.* 8 Rail. & Corp. L. J. 62; *Filli v. Delaware & c. R. Co.*, 37 Fed. Rep. 65.

³ *Southern Pac. Co. v. Denton*, 146 U. S. 202, 205, *per Mr. Justice Gray*.

⁴ *Ante*, § 7484.

where none of its members reside, and where it has no property, and not to be a citizen of California, where it has its chief offices, where its managers and most of its stockholders reside, and where its principal property is situated. But it would be next to nonsense to hold that, for this reason, it is not an "inhabitant" of the State of California for the purposes of Federal jurisdiction; and, as we have seen, the contrary was held by Mr. Justice Harlan at circuit.¹ So, the late Federal Judge Deady of Oregon,—a judge whose abilities were of a very high order,—saw plainly through this question, and held that a foreign corporation may be, for the purposes of Federal jurisdiction, an "inhabitant" of a district or country other than that of which it is a *citizen* or *subject*, or where it was organized, within the meaning of the word as used in the act of 1887, as re-enacted in 1888.² Plainly the question whether a corporation is to be deemed an "inhabitant" of a State other than that of its creation, and if so when, is to be answered according to the principles of general jurisprudence; and hence, whenever a foreign corporation acquires a *permanent business residence* or *habitancy* within the domestic State, it should be deemed an "inhabitant" of that State for the purposes of Federal jurisdiction under this statute. A sensible interpretation of the word has been given, by saying that "an inhabitant of a place is one who ordinarily is personally present there; not merely *in itinere*, but as a resident and dweller therein."³ But under this definition a corporation can never be an inhabitant of any place; because, as it can only get life and speak through its agents, it can never be personally present anywhere. Whenever it is present, it is present vicariously in the person of its agents; and hence wherever it permanently dwells and acts and speaks through them, it should be deemed an "inhabitant" for the purposes of Federal jurisdiction. The conclusion inevitably follows

¹ *Ante*, § 7484; *United States v. Southern Pac. Co.*, 49 Fed. Rep. 297.

² *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 345.

³ *Holmes v. Oregon &c. Co.*, 6 Sawy. (U. S.) 262, 277; *s. c.* 5 Fed. Rep. 523.

that wherever a corporation establishes a permanent business office and agency, it becomes an "inhabitant," for the purposes of jurisdiction, under the true interpretation of this statute. Upon this theory, it was held that a Texas railway corporation, whose principal office and place of business were in the eastern district of Texas, was an inhabitant of the western district, because its road extended there, where it had an agent and office for the transaction of its ordinary business;¹ and this ruling was followed in a similar case in another Federal circuit.² Nor will this interpretation of the word "inhabitant" operate to subject corporations to suits in jurisdictions other than that of their residence, provided it is restrained by the intelligent interpretation placed upon it in the opinion of Mr. Circuit Judge Jackson, already alluded to.³

§ 7489. **The Present Federal Doctrine on This Subject.** — This doctrine was finally established by the Supreme Court of the United States (Mr. Justice Harlan dissenting), in a decision holding that, under the act of Congress of 1887,⁴ a corporation, incorporated in one State only, cannot be compelled to answer in a Circuit Court of the United States held in another State, in which it has a usual place of business, to

¹ *Zambrino v. Galveston &c. R. Co.*, 38 Fed. Rep. 449; and compare *Southern Pac. Co. v. Denton*, 146 U. S. 202.

² *Riddle v. New York R. Co.*, 39 Fed. Rep. 290; also see *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 345.

³ *Ante*, § 7486. The reasoning of that opinion is that it cannot be held sufficient to give the Circuit Court jurisdiction *in personam* over a foreign corporation, that it has property rights, however extensive, within the district, or that it has pecuniary interest, however valuable, in business managed or conducted by others. It must itself be carrying on business in its own right, on its own responsibility, and for its own account, and

through or by means of its own agents, officers, or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such State; and that the franchise rights of a patent-holding corporation in no way serve to establish the fact that such corporation is carrying on its business and is to be found wherever its patent is used. *United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17.

⁴ Act Cong. Mar. 3, 1887, § 1, as corrected in its enrollment by the Act of Aug. 13, 1888, ch. 866; 25 U. S. Stat. 434.

a civil suit, at law or in equity, brought by a citizen of a different State.¹ This decision, though learned, and elaborately worked out by Mr. Justice Gray, who delivered the opinion of the court, is open to the criticism that it confounds the two subjects of citizenship and inhabitancy for the purpose of Federal jurisdiction, and makes them identical. It is subject to the further criticism that it proceeds upon the antiquated doctrine that a corporation cannot migrate, but must dwell in the place of its creation;² from which the conclusion of the court logically followed that a corporation could not acquire an "inhabitancy" in a State other than that under whose laws it was created. This, as we have already pointed out, is contrary to the actual fact in many cases. Indeed in many cases corporations have no actual inhabitancy in the State under whose laws they are created, nor have their members any inhabitancy there. This decision was followed by another, in which the opinion of the court was written by the same learned judge, where the question, as it was raised on the record, was whether the Southern Pacific Company, a corporation created under a special charter procured from the Legislature of Kentucky, could be sued in the western Federal district of Texas, while it had its principal office in the eastern district. But the court, following the decision last cited, cut the Gordian knot by holding that it could not be sued in Texas at all, in a Circuit Court of the United States.³ These decisions were applicable to *foreign corporations*. At a later day the same court held that a *domestic corporation*, incorporated under the laws of the State which was divided into two or more Federal districts, is, under the laws of the United States, regulating the bringing of suits and actions in Federal courts, an inhabitant of that Federal district of the State within which the general business of the corporation is done, and where it has its headquarters and general offices.⁴ In

¹ Shaw v. Quincy Min. Co., 145 U. S. 444.

² As to which see *post*, § 7881.

³ Southern Pac. Co. v. Denton, 146 U. S. 202.

⁴ Galveston & c. R. Co. v. Gonzales, 151 U. S. 496 (Jackson and Harlan, JJ., dissenting). Compare Martin v. Baltimore & c. R. Co., 151 U. S. 673, and Mexican Nat. R. Co. v. Davidson,

the case in which the Supreme Court of the United States first took its departure from what had been the general doctrine in the Circuit Courts, the court was careful to distinguish the question from that which might arise in case of an *alien corporation*, in the following language: “This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations.”¹ Soon afterwards the question was presented in the Circuit Court of the United States for the Southern District of New York, in an action by a citizen of the United States for an infringement of a patent, against the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, in the Empire of Germany, in which the service of original process was made upon the financial and business agents of the company, who did its business in the city of New York. The Circuit Court dismissed the suit, on the ground that the foreign corporation was not suable in the city of New York by service upon its financial and business agents there residing, not being an “inhabitant” of that Federal district, within the act of Congress under consideration; but that the action ought to be brought in the State of New Jersey, where its ships landed and where it loaded and unloaded its cargoes.² Subsequently, a *mandamus* was sued out in the Supreme Court of the United States by the plaintiff, to compel the Circuit Court of the United States for the Southern District of New York, to take jurisdiction and proceed in the cause; and the court, in a learned opinion by Mr. Justice Gray, endeavored (but seemingly without success) to make it clear that a distinction exists, in regard of this question of jurisdiction, between the case of an alien corporation and the case of a corporation created under the laws of another State of the Union from that in which it is sued.

157 U. S. 201, where the question related to the right to remove a cause from a State court to a Federal court.

¹ Shaw v. Quincy Min. Co., 145

U. S. 444, 453, opinion by Mr. Justice Gray.

² Hohorst v. Hamburg-American Packet Co., 38 Fed. Rep. 273.

The court accordingly held that service of process, in case of a foreign corporation, is well had upon its financial agents through whom it transacts its business in the United States; and it accordingly awarded a *mandamus* to compel the Circuit Court to take jurisdiction.¹

¹ Re Hohorst, 150 U. S. 653.

CHAPTER CLXXIX.

JURISDICTION AS DEPENDING UPON PROCESS AND ITS SERVICE.

ART. I. WHAT PROCESS USED IN ACTIONS AGAINST CORPORATIONS. §§ 7495-7498.

II. SERVICE OF PROCESS ON CORPORATIONS GENERALLY. §§ 7502-7547.

SUBDIV. I. Upon Whom Service Made. §§ 7502-7530.

SUBDIV. II. Place and Manner of Service and Return. §§ 7538-7547.

ARTICLE I. WHAT PROCESS USED IN ACTIONS AGAINST CORPORATIONS.

SECTION

7495. Writ of summons.

7496. Subpœna in equity.

SECTION

7497. *Capias*: warrant of arrest.

7498. *Distringas* and sequestration.

§ 7495. **Writ of Summons.**—In actions *in personam* against corporations, the defendant is now brought into court in the same manner as is a natural person when so sued, and the usual process is a *writ of summons*.¹ The writ will command the sheriff to *summon the corporation*, and not its president or other officer. If it commands him to summon “the president” of a certain named company, and the president is served, it is a service upon him individually,—the super-added words designating the company being mere *descriptio personæ*; and it is not admissible to strike out the words “the president of,” and make it a service of process against the corporation without authority or consent.² But it is not necessary to describe the defendant as a corporation. For instance,

¹ The original writ in *assumpsit* against a corporation must be in the nature of a summons, and not by *pone* or attachment. *Lynch v.*

Mechanics' Bank, 13 Johns. (N. Y.) 127.

² *Plemmons v. Southern Imp. Co.*, 108 N. C. 614; *s. c.* 13 S. E. Rep. 188.

it has been held sufficient to describe the defendant as "The Burlington and Lamoille Railroad Company, a company organized under the laws of this State." In such a case it will be *presumed* that defendant is a corporation.¹ Pending a motion to quash the writ of summons for an irregularity in an action against a foreign corporation, it is proper to allow the plaintiff to *amend* by making the writ sufficiently formal.²

§ 7496. **Subpoena in Equity.**—If the suit is in equity, the original process is a *subpœna*, except in those jurisdictions where legal and equitable remedies are blended by statute, in which case the same process is issued both in actions at law and in equity, as in the case of a summons at law. A *subpœna* in equity will be *directed to the corporation*, and not to the particular officer upon whom it is to be served. A *subpœna* directed to "John B. Norris, President of the Branch of the Bank of the State of Alabama at Mobile," to answer a bill of complaint exhibited against *him* and others, is not process against the bank in question.³

§ 7497. **Capias: Warrant of Arrest.**—A *capias* was *never issued against corporations*, for the reason that a corporation, being an intangible person, could not be arrested and imprisoned.⁴ Warrants for the *arrest of persons* are, however, issued in aid of actions against corporations. Thus, in New York,

¹ Nye v. Burlington &c. R. Co., 60 Vt. 585; s. c. 11 Atl. Rep. 689.

² Jarbee v. Steamboat, 19 Mo. 141; Stone v. Travellers' Ins. Co., 78 Mo. 655. The principle was thus stated in an earlier case: "If a variance between the declaration and writ can be taken advantage of at all, it is not seen on what principle a party can avail himself of it by a motion to quash. According to our practice, the declaration is filed before the writ issues, and the declaration being the foundation of the writ, and accompanying it, the party would look to it in order to ascertain the nature of the

demand against him, and by whom it was instituted. A variance between it and the summons cannot mislead him." Jones v. Cox, 7 Mo. 173. At the same time, it is said that if an actual amendment of the writ were necessary, the cause would not be sent back with directions to allow the amendment, since the making of the same would be of no importance. Jarbee v. Steamboat, *supra*. In other words, the court would regard the amendment as having been made. Stone v. Travellers' Ins. Co., *supra*.

³ Walker v. Hallett, 1 Ala. 379.

⁴ *Ante*, §§ 6439, 6448.

on an application by a *receiver* of a dissolved corporation for a warrant of arrest against a person for concealing and embezzling corporate property, there must be an affidavit furnishing competent proof that there is good reason to believe that property of the corporation has been concealed and embezzled by such corporation; and under a statute¹ notice of the application for the warrant must be served on the Attorney-General.²

§ 7498. *Distringas and Sequestration.* — Originally, the manner of coercing the members of a corporation, in an action against it, was by distraint of its goods and chattels, and for this purpose a *writ of distraint* was issued. This writ was also issued in aid of an execution against the corporation.³

ARTICLE II. SERVICE OF PROCESS ON CORPORATIONS GENERALLY.

SUBDIVISION I. Upon Whom Service Made.

SECTION	SECTION
7502. State law governs in actions in Federal courts.	7509. Service upon officer after term expires, or after office resigned or abandoned.
7503. Statute must be followed in order to give jurisdiction.	7510. Further of this subject.
7504. Legislature may change modes of service.	7511. Service upon the president.
7505. Rule where there is no governing statute.	7512. Service on managing agent.
7506. Agency of person on whom process served must appear of record.	7513. Who not managing agents to receive such service.
7507. Whether the return conclusive as to the fact of agency.	7514. Service on general agent.
7508. Service upon directors.	7515. Service upon secretary, or secretary and treasurer.
	7516. Service upon any agent or employé.

¹ N. Y. Laws 1883, ch. 378.

² Re Vanamee, 29 N. Y. St. Rep. 198.

³ "After service of writ of *execution* of a decree against a corporation, the next process is a *distringas*, and after that a *sequestration*, which being once awarded, they can never after come and pray to enter their appearance,

as they might have done on the *distringas*, which issues for that very purpose to compel them to appear; but the appearing being past, the process must go, because the appearance being only in favor of liberty, can be of no service to a corporation, which cannot be committed." Bac. Abr., Corporations, E, 2.

6 Thomp. Corp. § 7502.] ACTIONS BY AND AGAINST.

SECTION

7517. Service on station agents of railway companies.

7518. Service upon person having property in charge.

7519. Service on any agent in actions growing out of the business of his agency.

7520. Service upon a railway section foreman.

7521. Service upon stockholders.

7522. Service upon the cashier of a bank.

7523. Service upon receivers.

SECTION

7524. Service upon clerk, book-keeper, etc.

7525. Service upon traveling agent.

7526. What agent can accept service.

7527. Authority to accept service, how shown.

7528. Service upon an officer who is plaintiff in the suit.

7529. Service upon corporate officer temporarily within the jurisdiction.

7530. Substituted service on another officer where proper officer not found.

§ 7502. State Law Governs in Actions in Federal Courts.

Under the Federal act of 1792,¹ it was within the power of the Federal courts, by general rules, to adapt their practice to the exigencies and conditions of the times. But since the passage of the process act of 1872,² the pleadings, forms, and modes of procedure in the Federal courts must conform to the State law and to the practice of the State courts, except where Congress has legislated upon a particular subject and prescribed a rule. When, therefore, a State statute prescribes a particular mode of serving mesne process, that mode must be followed; and this rule is said to be especially exacting in reference to corporations.³ This, it is to be observed, is in conformity with the principle elsewhere stated,⁴ that where a particular mode of serving process is pointed out by statute, that mode must be followed. By this act of Congress, the statute law of the particular State within which the Federal court sits, is made the law governing the practice of the Federal court in reference to its process. The State law becomes the law of the United States by congressional adoption. It is the professed rule of the Federal courts — often departed from — to follow the State courts in the construction of their own statutes; but here, it is conceived, the rule does not in strict-

¹ 1 U. S. Stat. 275.

³ *Amy v. Watertown*, 130 U. S.

² 17 U. S. Stat. 196; Rev. Stat. 301.

U. S. 914.

⁴ *Post*, §§ 7503, 8021.

ness apply; since, by this congressional adoption, the State statute has become, for the purposes of Federal practice, a Federal statute. Nevertheless, courts of the United States, for the sake of carrying out the policy which Congress had in view, of securing within each State a uniform practice in both classes of courts, State and Federal, will defer to the construction put by the highest courts of the particular State upon the construction of its process act, whenever the question arises in actions commenced in a Federal court.¹ In some respects it is not possible to make a literal application of the State process act in the Federal courts, but the Federal court applies it by as close an analogy as its constitution permits. Thus, where the State statute provides for service of process against a railroad company upon one of certain officers, if such officer is *in the county*, otherwise upon another agent, the process of a Federal court must be served upon such officer if within the *Federal district*.² The act of Congress elsewhere considered,³ providing for the *venue* of actions in Federal courts where jurisdiction otherwise attaches under the Constitution and the Judiciary Act, confers, as we have elsewhere seen,⁴ a *personal privilege* upon the defendant, which he may *waive*, and which he does waive by *appearing and contesting the merits* when sued in a Federal district other than that of his habitation. When, therefore, a foreign corporation has, in pursuance of the laws of the domestic State in which it does business, designated a person upon whom process may be served, this designation may be extended to Federal, as well as to State, process. The corporation thereby consents to be sued in the district embracing such State, and waives the exemption granted to it under the act of Congress.⁵

¹ "In the construction of a State statute, in a matter purely domestic, as this is, we always feel strongly disposed to give great weight to the decisions of the highest tribunal of the State." *Amy v. Watertown*, 130 U.

S. 301, 318; citing *Burgess v. Seligman*, 107 U. S. 20.

² *Miller v. Norfolk & W. R. Co.*, 41 Fed. Rep. 431.

³ *Post*, § 7884, *et seq.*

⁴ *Post*, § 7554.

⁵ *Gray v. Quicksilver Min. Co.*, 21 Fed. Rep. 288.

§ 7503. Statute must be Followed in Order to Give Jurisdiction.—Where a particular method of service of process upon corporations is pointed out by statute, that method must be followed; and where the statute designates the officer or agent upon whom process is to be served, it must be served upon that officer or agent, in order to give jurisdiction.¹ Statutes of this kind are not regarded as directory, but as *mandatory and exclusive*; hence where a statute prescribes the method of service, a method not included therein will not be good, although it might have been good at common law. Thus, if the statute designates certain officers or agents upon whom writs may be served, a service upon another agent,² or even upon a person in possession of the property of the corporation sought to be affected by the suit,³ will not give jurisdiction. Where there are *two statutes*, one directing the mode of service generally, and the other, using the word “*may*,” and providing how service may be made in the special case, the special statute, not being in terms exclusive—for here “*may*” is not to be read “*must*”—does not exclude the mode of service

¹ Amy v. Watertown, 130 U. S. 301, 316; Weil v. Greene County, 69 Mo. 281; Chambers v. King &c. Manufactory, 16 Kan. 270; Kennedy v. Hibernia &c. Soc., 38 Cal. 151; Aiken v. Quartz Rock &c. Co., 6 Cal. 186; O'Brien v. Shaw's Flat &c. Co., 10 Cal. 343; Reddington v. Mariposa &c. Co., 19 Hun (N. Y.), 405; Cherry v. North & South R. Co., 59 Ga. 446; Union Pac. R. Co. v. Miller, 87 Ill. 45; Lake Shore &c. R. Co. v. Hunt, 39 Mich. 469; Great West. Min. Co. v. Woodmas &c. Co., 12 Colo. 46; s. c. 13 Am. St. Rep. 204; 20 Pac. Rep. 771; Foster v. Hammond, 37 Wis. 185, 187; Helms v. Chadbourne, 45 Wis. 60; Watertown v. Robinson, 69 Wis. 230; s. c., on former trial, 59 Wis. 513; 17 N. W. Rep. 542; Cosgrove v. Tebo &c. R. Co., 54 Mo. 495; Hebel v. Amazon Ins. Co., 33 Mich. 400; Hart-

ford Fire Ins. Co. v. Owen, 30 Mich. 441; Merrill v. Montgomery, 25 Mich. 73; American Express Co. v. Conant, 45 Mich. 642; Southern Ex. Co. v. Craft, 43 Miss. 508; Kibbe v. Benson, 17 Wall. (U. S.) 624; Alexandria v. Fairfax, 95 U. S. 774; Settlemier v. Sullivan, 97 U. S. 444; Evans v. Dublin &c. R. Co., 14 Mees. & W. 142; Walton v. Universal Salvage Co., 16 Mees. & W. 438; Brydolf v. Wolf, Carpenter &c. Co., 32 Iowa, 509; Hoen v. Atlantic &c. R. Co., 64 Mo. 561; Lehigh Valley Ins. Co. v. Fuller, 81 Pa. St. 398; Congar v. Galena &c. R. Co., 17 Wis. 477, 485.

² Southern Ex. Co. v. Craft, 43 Miss. 508.

³ Aiken v. Quartz Rock &c. Co., 6 Cal. 186; O'Brien v. Shaw's Flat &c. Co., 10 Cal. 343.

pointed out by the general statute.¹ The provision in a particular statute directing the manner in which process is to be served upon the corporation is not superseded by a general law providing a different mode of service upon similar corporations; for *generalia specialibus non derogant*.²

§ 7504. **Legislature may Change Modes of Service.**—The legislature may,³ and the legislatures of the States constantly do,⁴ change the modes of serving process upon corporations; and this is *no violation of the vested rights* of the corporation, and no impairment of the obligation of the contract between it and the State subsisting in its charter, but is a matter relating to the remedy merely.

§ 7505. **Rule where there is No Governing Statute.**—If there is no governing statute, then, under the principles of the common law, as elsewhere explained,⁵ the service must, in order to bind the corporation, be made upon *an officer or agent* sustaining such a relation to it as to be *capable of receiving notice for it* in respect of the matter of the suit.⁶ At common law this officer was the *head officer* of the corporation,—in the case of a municipal corporation, the *mayor*.⁷ But a sound modern view is that where the corporation is one engaged in trade or business, service may be made upon the officer or agent whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation;⁸ and that such an officer may be its *secretary*,⁹ who, as already seen, is its organ of communication with the outside world.¹⁰

¹ State v. Hannibal &c. R. Co., 51 Mo. 532.

² Stabler v. Alexandria, 42 Fed. Rep. 490.

³ New Albany &c. R. Co. v. McNamara, 11 Ind. 543.

⁴ Fee v. Big Sand Iron Co., 13 Ohio St. 563.

⁵ *Ante*, § 5195, *et seq.*

⁶ Sturtevant v. Milwaukee &c. R. Co., 11 Wis. 61. Compare Barrett v.

American Telegraph &c. Co., 56 Hun (N. Y.), 430; s. c. 31 N. Y. St. Rep. 465; 10 N. Y. Supp. 138.

⁷ 1 Tidd Prac. 116; People v. Cairo, 50 Ill. 154.

⁸ Dock v. Elizabethtown &c. Man. Co., 34 N. J. L. 312.

⁹ Heltzell v. Chicago &c. R. Co., 77 Mo. 315, 317.

¹⁰ *Ante*, § 5195.

§ 7506. **Agency of Person on Whom Process Served must Appear of Record.**—That the person on whom the process was served sustains such a relation to the corporation as to affect it with notice, under the principles of the preceding section, must in some way appear of record.¹ In some jurisdictions it is error to render a *judgment by default*, without proof being made to the court that the person upon whom the service was made sustains the relation to the corporation indicated above.² Thus, although the process is returned as having been served upon the *president* of the corporation, it is necessary that proof of his official character should be made to the court, to support a judgment by default, and the sheriff's return alone does not prove that fact.³ So, an acceptance of service by the *secretary* of a corporation is not of itself sufficient evidence that he bears such a relation to the corporation as will make the service effectual to give jurisdiction against the corporation, although the governing statute permits the service to be made upon the secretary of a corporation. "That he was the secretary must be shown."⁴ This is analogous to the general rule that agency cannot be proved by the mere unsworn declarations of the agents.⁵ But where the judgment entry contains the recital that service was proven to the satisfaction of the court, this must be construed, in favor of the judgment, to mean that evidence was introduced tending to show that the person accepting service was the secretary of the company, as he describes himself.⁶

¹ *Sturtevant v. Milwaukee &c. R. Co.*, 11 Wis. 61.

² *Bank v. Walker, Minor* (Ala.), 391; *Lyon v. Lorant*, 3 Ala. 151; *Wetumpka &c. R. Co. v. Cole*, 6 Ala. 655; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

³ *Wetumpka &c. R. Co. v. Cole*, 6 Ala. 655.

⁴ *Talladega Ins. Co. v. Woodward*, 44 Ala. 287. See also *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

⁵ *Ante*, § 4880.

⁶ *Talladega Ins. Co. v. Woodward*, 44 Ala. 287. The same practice obtains in Louisiana, where the corporation defendant can appear specially for the purpose of objecting to the mode of service, absurd as this may seem. See *Collier v. Morgan's R. Co.*, 41 La. An. 37; s. c. 5 South. Rep. 537. In this case a domestic railroad company was allowed to trifle with justice by coming into court for the purpose of showing that the person on whom process against it had

§ 7507. Whether the Return Conclusive as to the Fact of Agency.—This leads us to the inquiry whether the return of the sheriff, or other officer executing the process, is conclusive upon the question whether the person upon whom it was served sustained the relation to the corporation required by the statute, or by the principles of the common law, as stated in a preceding section.¹ It is a general principle of law that the return, by an officer competent to serve and return a writ of summons, of the fact and mode of service, if in due form of law, *is conclusive* upon the parties to the record, in all proceedings, *except in an action against the officer for a false return.*² This is in conformity with the more general rule of common law that the return of the officer upon *any process* in a case is conclusive on the parties to the suit, and can only be impeached in an action against the sheriff for a false return.³

been served was not in fact its *secretary*, as the sheriff had returned. Compare *Jacobs v. Sartorius*, 3 La. An. 9. The true rule ought to be that if a defendant whose residence is within the jurisdiction comes into court to make such an objection, he comes for all purposes; and many courts so hold.

¹ *Ante*, § 5195, *et seq.*

² *Hallowell v. Page*, 24 Mo. 590; *Delinger v. Higgins*, 26 Mo. 180; *McDonald v. Leewright*, 31 Mo. 29; *s. c.* 77 Am. Dec. 631; *Reeves v. Reeves*, 33 Mo. 28; *Stewart v. Stringer*, 41 Mo. 400; *s. c.* 97 Am. Dec. 278; *Jeffries v. Wright*, 51 Mo. 215; *Phillips v. Evans*, 64 Mo. 17; *Anthony v. Bartholow*, 69 Mo. 186; *Madison Co. Bank v. Suman*, 79 Mo. 527; *Heath v. Missouri & C. R. Co.*, 83 Mo. 617, 623.

³ *Ante*, § 3363, p. 2426, note 3; *Dalt.* 189, 191; *Rol. Abr.*, Return, O.; *Watson on Sheriffs*, 72; *Knowles v. Lord*, 4 Whart. (Pa.) 500; *s. c.* 34 Am. Dec. 525; *Diller v. Roberts*, 13 Serg. & R. (Pa.) 60; *s. c.* 15 Am. Dec. 578; *Mentz v. Hamman*, 5 Whart. (Pa.) 150; *s. c.*

34 Am. Dec. 546; *Blythe v. Richards*, 10 Serg. & R. (Pa.) 261; *s. c.* 13 Am. Dec. 672 (*scire facias*); *Denny v. Willard*, 11 Pick. (Mass.) 519; *s. c.* 22 Am. Dec. 389. In like manner, a sheriff's return is *conclusive upon execution creditors*, in a contest between them as to the right of priority. *Flick v. Troxsell*, 7 Watts & S. (Pa.) 65. As to the nature of the evidence afforded by a sheriff's return, see *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179; *s. c.* 29 Am. Dec. 116; *Palmer v. Clarke*, 2 Dev. L. (N. C.) 354; *s. c.* 21 Am. Dec. 340; *Stevens v. Brown*, 3 Vt. 420; *s. c.* 23 Am. Dec. 215; *Ritter v. Scannell*, 11 Cal. 238, 248; *s. c.* 70 Am. Dec. 775; *Rogers v. Cawood*, 1 Swan (Tenn.), 142, 148; *s. c.* 55 Am. Dec. 729; *Lea v. Maxwell*, 1 Head (Tenn.), 365, 369; *Green v. Lanier*, 5 Heisk. (Tenn.) 678; *Whitaker v. Sumner*, 7 Pick. (Mass.) 551; *s. c.* 19 Am. Dec. 298. In a suit in equity to *enjoin a judgment at law*, the plaintiff may show that he had no notice of the action, where to do so does not necessarily contradict the sheriff's return,—as where he shows

This general rule is applicable in the case of service upon corporations, as well as upon natural persons. "In some States a departure from this rule has been recognized in its application to corporations, when the service of process therein is

that he was absent from home at the time the process was served by leaving a copy at his residence. *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *s. c.* 35 Am. Dec. 419. That the sheriff is estopped from contradicting his own return,—see *Boone County v. Lowry*, 9 Mo. 23; *s. c.* 43 Am. Dec. 532; *State v. Rollins*, 13 Mo. 179, 182; *M'Clelland v. Slingluff*, 7 Watts & S. (Pa.) 134; *s. c.* 42 Am. Dec. 224. Compare *Arnold v. Brown*, 24 Pick. (Mass.) 89; *s. c.* 35 Am. Dec. 296,—where it was held that an attaching officer is not estopped from showing that the property seized by him did not belong to the defendants. And it has been held that a sheriff's return cannot be contradicted, even in a proceeding by motion against him and his sureties to compel them to pay the amount of a judgment, with damages, for not levying on certain property, the sheriff having made a return of *nulla bona* on the writ of the moving party, and levied upon and sold the property of the same defendant on other writs. *Egery v. Buchanan*, 5 Cal. 53. In like manner, a sheriff's return of the due execution of a *fiery facias* is conclusive evidence in his favor, on a motion to *amerce* him. *Bank v. Domigan*, 12 Ohio, 220; *s. c.* 40 Am. Dec. 475. It is laid down as undoubted law that such a return is admissible evidence in the officer's favor, as also to affect the rights of third persons. *Gyfford v. Woodgate*, 11 East, 297; *Hathaway v. Goodrich*, 5 Vt. 65; *Stanton v. Hodges*, 6 Vt. 64; *Barrett v. Copeland*, 18 Vt. 67; *s. c.* 44 Am. Dec. 362. But as to the rights of third persons

it is *prima facie* evidence only. So, it has been held that a sheriff's return on an execution is *prima facie* evidence in his favor, in an action to recover the price of the land sold thereunder. *Hand v. Grant*, 5 Smedes & M. (Miss.) 508; *s. c.* 43 Am. Dec. 528. So, his return is evidence in his favor in an action by him against the purchaser at a sale made by him to recover the price bid for the land. *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63; *s. c.* 26 Am. Dec. 254. So, an officer's return on an attachment is *prima facie* evidence in his favor in an action by him to recover the attached property. *Nichols v. Patten*, 18 Me. 231; *s. c.* 36 Am. Dec. 713. But in these and other cases it is ruled that the return of an officer, where he is a party, is only *prima facie* evidence (*Bruce v. Holden*, 21 Pick. (Mass.) 187; *Sias v. Badger*, 6 N. H. 393), and this is obviously the sound view. The general and sound view is that, as between the parties to the suit and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, the return is conclusive; but as to third persons, whose interests, though not connected with the suit, may be affected by the proceedings of the sheriff, and as to collateral facts or matters not necessary to be returned, it is at most *prima facie* evidence. *Chadbourn v. Sumner*, 16 N. H. 129; *s. c.* 41 Am. Dec. 720. See also *Hutchins v. Johnson*, 12 Conn. 376; *s. c.* 30 Am. Dec. 622. On the other hand, there is judicial authority in support of the view that his return is *conclusive on the parties*

permitted by law to be made upon a designated agent of the corporation. It has been held that, however conclusive the return of service should be regarded as to the *time, place, and manner* thereof, it should be treated as *only prima facie evidence of the fact of agency.*"¹

§ 7508. Service upon Directors.—The board of directors, sometimes called the board of trustees, are the *managing body* of every private corporation, except in rare and peculiar schemes

to the record, even when *collaterally* called in question. *Doe v. Ingersoll*, 11 Smedes & M. (Miss.) 249; *s. c.* 49 Am. Dec. 57, *per Sharkey, C. J.* The sheriff's return in an action of ejectment is only *prima facie* evidence of possession by defendant, etc. *Cooper v. Smith*, 9 Serg. & R. (Pa.) 26; *s. c.* 11 Am. Dec. 658. Omissions in a sheriff's return cannot be supplied by extrinsic evidence, but may be cured by an *amendment* under order of the court. *Fairfield v. Paine*, 23 Me. 498; *s. c.* 41 Am. Dec. 357. As to the amendments of the returns upon writs, see *Malone v. Samuel*, 3 A. K. Marsh. (Ky.) 350; *s. c.* 13 Am. Dec. 172; also elaborate note, 13 Am. Dec. 173-181; also *Freeman v. Paul*, 3 Me. 260; *s. c.* 14 Am. Dec. 237; *Crocker v. Mann*, 3 Mo. 472; *s. c.* 26 Am. Dec. 684; *Barnard v. Stevens*, 2 Aik. (Vt.) 429; *s. c.* 16 Am. Dec. 733; *Hefflin v. McMinn*, 2 Stew. (Ala.) 492; *s. c.* 20 Am. Dec. 58; *Dewar v. Spence*, 2 Whart. (Pa.) 211; *s. c.* 30 Am. Dec. 241 (denying amendment which renders subsequent proceeding void); *Berry v. Griffith*, 2 Harr. & G. (Md.) 337; *s. c.* 18 Am. Dec. 309.

¹ *Martin, Com.*, in *Heath v. Missouri &c. R. Co.*, 83 Mo. 617, 624. Compare *State v. O'Neill*, 4 Mo. App. 221, where it is said that the return of the sheriff is *conclusive as to the official character of the person served*;

and see *Willamette Falls &c. Co. v. Williams*, 1 Or. 112. So, *in Illinois*, the return of the officer as to the fact of the agency of the person upon whom he has served the process is not conclusive of his agency, but the question whether he was the agent of the defendant or not may be contested under a *plea in abatement*; though it is *waived* by pleading to the merits. *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *s. c.* 74 Am. Dec. 124. This seems to be in conformity with an exceptional rule in that State that a sheriff's return of original process is only *prima facie* evidence of the truth of the matters therein recited, and may be put in issue by a plea in abatement. *Sibert v. Thorp*, 77 Ill. 45. See also *Brown v. Brown*, 59 Ill. 315, 317. So, *in Alabama*, as already seen (*ante*, § 7506), in order to support a judgment by default against a corporation, it is necessary that it should be proved to the court, otherwise than by the sheriff's return or the clerk's statement, that the person upon whom the summons and complaint were served occupied such a relation to the defendant that service upon him would affect the company with legal notice, and give the court jurisdiction. *Southern Ex. Co. v. Carroll*, 42 Ala. 437; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667.

of incorporation. They wield this power for all purposes connected with its business.¹ In the absence of any statute, they are therefore the primary persons upon whom process against the corporation is to be served. But service upon them will, in strictness, be good only where they, or a *quorum* of them, are assembled and *sitting as a board*; for as already seen, their agency is a *joint agency*, and single directors, unless otherwise acting as agents of the corporation, do not sustain such a relation to it as to affect it with notice.² To obviate the effect of this principle, and to facilitate the service of process upon corporations, statutes have been enacted in some States permitting such service upon *individual directors*.³ Under such statutes the question has sometimes arisen as to whether service could be made upon the directors in case of the *corporation becoming defunct*, or in case of their *resignation or abdication*. In case of a defunct corporation, service upon the last board of directors has been held sufficient under such a statute,⁴ to give the court jurisdiction.⁵

¹ *Ante*, § 3967, *et seq.*

² *Ante*, § 3908. But see *ante*, § 5220, *et seq.* See, for a statement of this principle, *Dock v. Elizabethtown Steam Man. Co.*, 34 N. J. L. 312, 317.

³ Under a statute of this kind (N. C. Rev. Code, ch. 26, § 24), it was held that the director upon whom process should be served must be one of the eleven of the principal directors of a particular bank, and not a director appointed by the authorities of the bank for the management of its *branches or agencies*. *Webb v. Bank of Cape Fear*, 5 Jones L. (N. C.) 288. Under a similar statute in Maryland, service upon *two directors* was enough, although the fact of the service had never been communicated by them to the other officers of the corporation. *Boyd v. Chesapeake &c. Co.*, 17 Md. 195; *s. c.* 79 Am. Dec. 646.

⁴ *Swan & Cr. (Ohio) Stat.* 363.

⁵ *Warner v. Callender*, 20 Ohio St. 190. Under a similar statute (N. Y. Code Civ. Proc., § 431), service could be had upon a director, although the directors had passed a resolution distributing all the property of the corporation to the stockholders, who surrendered their stock, and where, although the directors did not formally resign, the president declared, at the close of the meeting, that there were no longer any directors or stockholders, and that "we have forever dissolved." *Carnaghan v. Exporters' &c. Oil Co.*, 11 N. Y. Supp. 172; *s. c.* 32 N. Y. St. Rep. 1117. In an old case, the court seemingly proceeding under a statute (2 Rev. Stat. N. Y. 458, § 5), permitted a rule to be entered that service of summons on one of the *trustees* of a church should be deemed sufficient. *Tom v. First Society &c.*, 19 Wend. (N. Y.) 25.

§ 7509. **Service upon Officer after Term Expires or after Office Resigned or Abandoned.**—This brings us to the analogous question, under what circumstances the agency or official relation of the person upon whom process is served is deemed to have expired, so that the service will not affect the corporation with notice and give the court jurisdiction. Upon this subject it has been held, by the highest judicial authority, that where the statute prescribes a particular officer of a corporation, upon whom service of process against it is to be made, the service must be made upon that officer, and can be made upon no other;¹ so that, if that *officer resigns or otherwise vacates his office*, a service made thereafter upon him will not be effectual to give jurisdiction, unless there is a statute continuing his functions until his successor is appointed. When, therefore, the governing statute provided for service upon the *mayor* and *city clerk* of a municipal corporation, and, prior to the service, the mayor had duly resigned his office² and his successor had not been elected or appointed, it was held that a service upon him, in an action in a court of the United States, the marshal designating him in his return as “the last mayor of said city,” was not such a service as would support jurisdiction.³ But this principle has no application where the officer, although he may have tendered his resignation, and although it may have been accepted by the proper authority, continues in office, under the governing statute, until his successor is appointed or chosen and qualified. In such a case, where the officer resigned, for the purpose of preventing the performance of the duties of his office, in favor of a creditor of the corporation, it was said that

¹ *Ante*, § 7503; *post*, § 8021.

² The inside history of the litigation against the city of Watertown, Wisconsin, on its municipal bonds, makes it absolutely clear that the resignation was made for the purpose of preventing any lawful service of process being had upon the city in actions to enforce its obligations.

³ *Amy v. Watertown*, 130 U. S. 301. See also *Watertown v. Robinson*, 59 Wis. 513; *s. c.* on subsequent appeal, 69 Wis. 230. Compare *Worts v. Watertown*, 14 Fed. Rep. 534. It should seem that in such a case a service on the person who *acts* as mayor, in the particular case the president of the common council, would be sufficient.

"where a person, being in an office, seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but *de jure*; that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor, will not be helped out by the aid of the courts."¹ Again, it is a principle of the common law where not modified by statute or by the course of decision in particular States, that *civil officers* cannot abandon their offices, by making a resignation at their own mere pleasure, but that they remain in office until their resignations are *accepted* by the proper authority.²

§ 7510. Further of This Subject. — So strong is the tendency of the law against admitting an interregnum, so to speak, in a *public office*, that it has even been held, under a

¹ *Badger v. United States*, 93 U. S. 599, 604.

² This proposition, with the annexed authorities, was thus stated and explained by Mr. Justice Bradley: "As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent

of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. See *1 Kyd Corp.*, ch. 3, § 4; *Willcock Corp.*, pp. 129, 238, 239; *Grant Corp.*, pp. 221, 223, 268; *1 Dillon Mun. Corp.*, § 163; *Rex v. Bower*, 1 Barn. & Cress. 585; *Rex v. Burder*, 4 T. R. 778; *Rex v. Lone*, 2 Strange, 920; *Rex v. Jones*, 2 Strange, 1146; *Hoke v. Henderson*, 4 Dev. L. (N. C.) 1; *s. c.* 25 Am. Dec. 677; *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; *State v. Ferguson*, 31 N. J. L. 107. This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. 'To complete a resignation,' says Mr. Willcock, 'it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant.' *Willcock Corp.* 239." *Edwards v. United States*, 103 U. S. 471, 473.

constitutional provision that township officers shall hold their offices one year from their election, and until their successors are qualified, without saying anything about residence or non-residence, that process against a township may be served upon its treasurer, although he has in a sense vacated his office without resigning it, by *removing into another township*.¹ So, also, where the president of a corporation removed from the county where its place of business was, and, at a meeting of its board of directors, another person was elected president *pro tem.* for that meeting, but the president *de jure* never resigned nor was removed, although he took no subsequent part in the management of the affairs of the corporation, — it was held that service upon him was sufficient to give jurisdiction.² In the same line of judicial policy, it has been held, in substance, that a fraudulent disposition by a private corporation of all its property, a fraudulent transfer by the majority of all their shares, and a fraudulent resignation by the officers with the intention of preventing the bringing of suits against the corporation, are ineffectual, under a statute providing that certain officers shall be chosen annually, and shall hold their offices until others are chosen in their stead; so that process in an action may, nevertheless, be served upon the proper officers of such a corporation, and the service will be effectual to give jurisdiction against it.³

§ 7511. **Service upon the President.** — Under most schemes of incorporation, the president of a business corporation of any kind is its *chief managing and executive officer*,⁴ and, in the

¹ *Salamanca v. Wilson*, 109 U. S. 627.

² *Eel River Navigation Co. v. Struver*, 41 Cal. 616.

³ *Evarts v. Killingworth Man. Co.*, 20 Conn. 447. So, where there has been an *agency*, and an agent upon whom service of process might lawfully be made, the fact that, under the contract between the agent and his principal, he is at liberty to enter

upon any new business for the principal, yet if some of the property of the principal still remains in his hands, and if his agency has not expired for all purposes, service of process upon him will still bind the principal. *Gross v. Nichols*, 72 Iowa, 239; *s. c.* 33 N. W. Rep. 653.

⁴ But note the difference of theory on this question, *ante*, § 4617, *et seq.*

6 Thomp. Corp. § 7512.] ACTIONS BY AND AGAINST.

absence of any statutory direction, service of process upon him, if made in the proper venue, would be a good service upon the corporation. But it may be assumed that nearly all the statutes regulating service of process on business corporations affirm this principle of the common law, and make service on the president sufficient, although they may also authorize service upon inferior officers and agents.¹ Some statutes *require* service to be had on the president,² or require it with a qualification, — as, for instance, a statute in Georgia, requiring corporations to post in a public or conspicuous place the name of their president or chief officer, to the end that service can be perfected upon it through him within the State.³

§ 7512. *Service on Managing Agent.* — Many statutes provide in terms for service of process on the *managing agent* "of the corporation." Under these statutes it becomes, in many cases, a disputed question of interpretation, who is to be deemed such managing agent.⁴ The managing agent of a

¹ *Meriwether v. Bank of Hamburg*, Dudley (S. C.), 36; *Conner v. Southern Ex. Co.*, 37 Ga. 397; *Clark v. Chapman*, 45 Ga. 486; *Steiner v. Central Railroad*, 60 Ga. 552; *Southern Ex. Co. v. Skipper*, 85 Ga. 565; *s. c.* 11 S. E. Rep. 871.

² Thus, under statutes in Georgia, service of garnishment can be had only on the president, because this process operates immediately, and renders it unlawful for the corporation to pay out the money attached after the service, which creates an exigency rendering it unjust for the corporation to suffer the danger of the delay which might supervene between the service on some inferior officer or agent, and his giving notice of the fact to the principal executive officer. *Steiner v. Central Railroad*, 60 Ga. 552; *Clark v. Chapman*, 45 Ga. 486. So, an early statute of Illinois (Scates' Comp. 243), provided that

service could be had on the president of the corporation if he resided within the county in which the suit was brought. See *Illinois & C. R. Co. v. Kennedy*, 24 Ill. 319. That service upon the *president of a bank* is the proper mode of service in Missouri, and that the sheriff's return is conclusive as to the official character of the person served, — see *State v. O'Neill*, 4 Mo. App. 221.

³ See *Conner v. Southern Ex. Co.*, 37 Ga. 397; *Southern Ex. Co. v. Skipper*, 85 Ga. 565; *s. c.* 11 S. E. Rep. 871. Service where the president is *plaintiff* in the suit: *Post*, § 7528; and see *post*, § 8047.

⁴ See, for cases of this character, *Doty v. Michigan Cent. R. Co.*, 8 Abb. Pr. (N. Y.) 427; *Carr v. Commercial Bank of Racine*, 19 Wis. 272; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422; *Bain v. Globe Ins. Co.*, 9 How. Pr. (N. Y.) 448; *Donadi v. New York*

corporation, within the meaning of such a statute, has been held to be the agent who is invested with the general conduct and control of its business at a particular place,¹—such as the agent of a foreign railroad corporation attending to its business at its office in Omaha, although he resided across the Missouri River, at Council Bluffs in Iowa.² The term “managing agent” has been held to include a *division superintendent* of that division of a railroad which includes the place where the cause of action arose;³ the general *superintendent* of a telegraph and telephone company having charge of one of the departments of the business of the company;⁴ the *person in charge* of the factory of the defendant,—although running the factory on shares with the corporation;⁵ the *local agent* of an express company, who maintains an office for it and does all its business of receiving and forwarding at the particular place;⁶ and the agent of a banking corporation in liquidation who has *general charge of the winding up* of its affairs, notwithstanding he makes affidavit that he is not its managing agent.⁷

§ 7513. Who not Managing Agents to Receive Such Service.—On the other hand, under a statute⁸ providing that service in attachment on a corporation shall be made upon the “president or other head of the same, or the secretary, cashier, or other managing agent thereof,”—a service of process on the *teller of a bank* is not sufficient.⁹ So, a *local agent of a foreign corporation*, appointed merely to receive what was sent to

&c. Ins. Co., 2 E. D. Smith (N. Y.), 519; Flynn v. Hudson River R. Co., 6 How. Pr. (N. Y.) 308; Bank of Commerce v. Rutland &c. R. Co., 10 How. Pr. (N. Y.) 1; American Express Co. v. Johnson, 17 Ohio St. 641.

¹ Porter v. Chicago &c. R. Co., 1 Neb. 14.

² *Ibid.*

³ Rochester &c. R. Co. v. New York &c. R. Co., 48 Hun (N. Y.), 190; s. c. 15 N. Y. St. Rep. 686.

⁴ Barrett v. American Telegraph &c. Co., 56 Hun (N. Y.), 430; s. c. 31

N. Y. St. Rep. 465; 10 N. Y. Supp. 138.

⁵ Hat-Sweat Man. Co. v. Davis Sewing-Machine Co., 31 Fed. Rep. 294.

⁶ American Express Co. v. Johnson, 17 Ohio St. 641.

⁷ Carr v. Commercial Bank, 19 Wis. 272.

⁸ Cal. Prac. Act, § 125, subd. 4; Cal. Code Civ. Proc., § 542, subd. 4.

⁹ Kennedy v. Hibernia &c. Soc., 38 Cal. 151.

him, and to remit the proceeds, has been held not to be a managing agent on whom process against the corporation could be served.¹ And so, a *single director* of a railroad company has been held not "a head or managing agent thereof," within the meaning of a similar statute.² So, an *assistant treasurer* of a corporation, who has no part in the management of its business, is not a managing agent within the meaning of a New York statute, and process cannot be served upon him.³ For stronger reasons, a service upon a mere *clerk* is not sufficient.⁴

§ 7514. *Service on General Agent.*—Under a statute authorizing service of process upon a *general agent* of a corporation, it has been held that where the principal office of a railroad corporation is in the State, a summons may be served upon its *local freight agent* within the State.⁵ But a service upon a mere *foreman of a mine*, who merely oversees the laborers, keeps their time, sees that the work is done in mining fashion, performs the duties of shift-boss, and, in the absence of the general agent, sells ore and buys supplies for the men and pays their wages, reporting his acts to the gen-

¹ Gibbin v. Kanawha &c. Coal Co., 2 Cin. (Ohio) 75.

² Alabama &c. R. Co. v. Burns, 43 Ala. 169; Ala. Rev. Code, § 2568. That a judgment by default against a corporation will be reversed, when the summons has not been served upon the president or other head of the corporation, secretary, cashier, or managing agent thereof,—see *Willamette &c. Co. v. Williams*, 1 Or. 112.

³ Winslow v. Staten Island &c. R. Co., 51 Hun (N. Y.), 298; s. c. 21 N. Y. St. Rep. 87; 4 N. Y. Supp. 169; under N. Y. Code Civ. Proc., § 431.

⁴ *Ruland v. Canfield Pub. Co.* (City Ct. N. Y.), 10 N. Y. Supp. 913. In California, service on a corporation of

a notice of appeal from a justice's decision may be made on its manager. He is its "managing agent," within the statute providing for service of *summons* (Cal. Code Civ. Proc., § 411); and this provision for service affords, by analogy, the rule for service of notice of appeal. *Pacific Coast R. Co. v. Superior Court of San Luis Obispo*, 79 Cal. 103; s. c. 21 Pac. Rep. 609. That the delivery of a true copy of the summons and petition to the general manager of a railway company is a sufficient service on the company, under Missouri Revised Statutes, § 2858,—see *Damhorst v. Missouri &c. R. Co.*, 32 Mo. App. 350.

⁵ *Toledo &c. R. Co. v. Owen*, 43 Ind. 405.

eral agent,—is not a good service under such a statute; for he is not a general agent within its meaning.¹

§ 7515. **Service upon Secretary, or Secretary and Treasurer.**—In the absence of a statute prescribing the officer upon whom service can be made, a service upon the *secretary*, when it cannot be had upon the chief managing officer or agent, will be deemed a good service, under the principles of the common law already stated.² A person holding at the same time the office of *secretary and treasurer*, will be regarded, in the absence of evidence to the contrary, as a proper person on whom service of process in an action against the company may be had.³ It is, of course, sufficient that the secretary be such *de facto*. The fact that he may not be such *de jure*, by reason of some disqualification, as by reason of his permanent residence in another State, does not invalidate a service of process upon him, in an action against the corporation, where there is a statute authorizing service upon its secretary.⁴

§ 7516. **Service upon Any Agent or Employé.**—Some statutes have gone so far as to authorize the service of process against corporations upon any one of their agents or employés,—but generally with the qualification that the

¹ Great Western Min. Co. v. Woodmas &c. Co., 12 Colo. 46; s. c. 13 Am. St. Rep. 204; 20 Pac. Rep. 771. A statute of Iowa provides that in suits against corporations, service may be made on any agent employed in the general management of its business. Code of Iowa, § 2612. A so-called *recording agent of an insurance company*, who has nothing to do with the business of the company except to write its policies, and to give attention to such policies as he has issued, and to look after the interests of the company in connection with the property insured by him, is not an agent in the general management of its business, within the

meaning of this statute. This was so held in State Ins. Co. v. Granger, 62 Iowa, 272,—where it was decided that there was no service to give the court jurisdiction. A service was also had on a “recording agent”; but it was not claimed that he was a general managing agent, within the meaning of the statute.

² Ante, §§ 4696, 5195; Heltzell v. Chicago &c. R. Co., 77 Mo. 315, 317. As to service on secretary under Alabama statute,—see Talladega Ins. Co. v. Woodward, 44 Ala. 287.

³ State v. Felton, 52 N. J. L. 161; s. c. 19 Atl. Rep. 123.

⁴ McCall v. Byram Man. Co., 6 Conn. 428; ante, § 3893, et seq.

principal officer shall be served if he reside within the jurisdiction. Thus, a statute of Illinois provided that when any suit should be brought against any incorporated company, process should be served upon the president of such company, if he reside in the county within which such suit is brought, and if he be absent from the county or shall not reside in the county, then the summons shall be served by the proper officer, by leaving a copy thereof with the clerk, cashier, secretary, engineer, conductor, or any agent of such company, found in the county, at least five days before the trial, if before a justice of the peace, and at least ten days, where the suit is brought in the Circuit Court. In the face of this statute, it was held no objection that service of a summons had not been made upon the agent of a corporation; since, under the statute, service upon any of its agents was sufficient, and if the agent failed to notify the company, it was a misfortune occasioned by the neglect of its own employé for which the plaintiff was not accountable.¹ Under a statute similar to the foregoing, prescribing service upon the chief officers if they reside within the county, and if not, on certain subordinate officers or agents, it is necessary, to make a service on a special officer or agent good, for the return to show that *none of the chief officers named in the statute could be found.*²

§ 7517. **Service on Station Agents of Railway Companies.**—In many States service may be had upon the *station agents* of railway companies.³ If two railway companies have

¹ Chicago &c. R. Co. v. Fell, 22 Ill. 333.

² Fee v. Big Sand Iron Co., 13 Ohio St. 563. Under a statute of Virginia (Va. Acts 1883-4, p. 701), declaring that if the case be against some other corporation than a city, town, or bank of circulation, incorporated in that State, or elsewhere, transacting business in that State, service may be made on any agent or any person declared by the laws of that State to

be an agent of such corporation, — service on the *vice-president and general superintendent of a railroad company*, in the absence of the president, is sufficient. Norfolk &c. R. Co. v. Cottrell, 83 Va. 512; s. c. 31 Am. & Eng. Rail. Cas. 235; 3 S. E. Rep. 123; 2 Rail. & Corp. L. J. 329.

³ State v. Hannibal &c. R. Co., 51 Mo. 532; Central &c. R. Co. v. Morris, 68 Tex. 49; s. c. 3 S. W. Rep. 457.

the same local agent, and a suit is brought against both companies, and service is had upon the agent, *two copies* of the citation should, in Texas, be left with the agent, one for each defendant.¹ If the defendant railway company has *leased its line* to another company, service may be perfected, in Georgia, by sending a letter containing the process to the president of the lessor company, and by serving the process upon the station agent of the lessee company.² If the road is in the hands of a Federal court *receiver*, in Missouri, a station agent will be deemed an agent of the receiver, so that service of process on him will be good, where the receiver is a non-resident, such service being good under the statute law in actions against railroad companies. But to remove any doubt, the court, whose officer the receiver is, will make a rule that such service shall be considered good.³ Where there is a statute allowing service upon the station agents of railway companies in ordinary cases, and there is also a special statute giving an action for a penalty against such companies before justices of the peace, which special statute provides that the suit *may* be commenced by serving the summons on *any director*, it is held that the mode of service, made *permissive* in the special statute, is not to be deemed *exclusive*, and that the word "may" is not to be read as meaning "shall"; so that a service on a station agent is good.⁴

§ 7518. Service upon Person having Property in Charge.

Where the statute⁵ provides that a defendant corporation may be summoned by service upon its acknowledged agent within the Territory, or upon any person in its employ or who has any of its property in charge, where no such agent is found, service upon its *attorney*, who also has some of its property in charge, is valid.⁶

¹ Central &c. R. Co. v. Morris, 68 Tex. 49; s. c. 3 S. W. Rep. 457.

² Atlanta &c. R. Co. v. Harrison, 76 Ga. 757.

³ Central Trust Co. v. St. Louis &c. R. Co., 40 Fed. Rep. 426.

⁴ State v. Hannibal &c. R. Co., 51 Mo. 532.

⁵ Utah Comp. Laws, 1888, § 3208.

⁶ Saunders v. Sioux City Nursery & S. Co., 6 Utah, 431; s. c. 24 Pac. Rep. 532.

§ 7519. Service on Any Agent in Actions Growing out of the Business of his Agency.— Statutes are found, like the following, in Iowa: “Where a corporation, company, or individual, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.”¹ “The statutory thought is that, if service on the principal is dispensed with, it should be made upon some one connected with the business out of which it grew. And this is reasonable. Such a person would be much more likely to inform his principal of the pendency of the action than one who knew nothing about the business and was not interested therein.” This statute does not warrant the service of notice upon one agent, in an action growing out of the business of another and former agent who conducted a different office in the same town; and a notice so served will not give the court jurisdiction. The court reasoned that if an agent is removed, or ceases to act, and his agency is for a time closed, and afterwards another agent is appointed, and thereafter there is such an office or agency, the person employed in the latter cannot be legally served with notice in an action growing out of the business done by the former agent.²

§ 7520. Service upon a Railway Section Foreman.— Under a statute requiring a railway company to designate in each county some officer of the company or person upon whom

¹ Code of Iowa, § 2613.

² State Ins. Co. v. Granger, 62 Iowa, 272. As to what is an “action growing out of or connected with the business of that office or agency,” within the meaning of the statute, it has been held that where the agent is sued by his own creditor, who recovers a judgment against him, and causes an execution to be issued thereon, and who seeks to seize, by

garnishment, any money due him by the corporation whose agent he is, a service of the notice of garnishment upon him, as the agent of the corporation, will not be a good service under the statute; because the debt due from the agent to his judgment creditor was the agent’s private debt, and was in no manner connected with the business of his agency. Upton Man. Co. v. Stewart, 61 Iowa, 209.

process against it may be served, and providing that, in the absence of such designation, process may be served upon certain named officers and agents, among them a "*local superintendent of repairs*,"¹—a service upon a *section foreman*, under the above designation, will be good where the company has not designated the person as required by the statute.²

§ 7521. **Service upon Stockholders.**—As a stockholder is not, as such, an agent of the corporation,³ he is not a proper person on whom process may be served. Even where the *proprietors of common land* had been incorporated, under a system prevalent in the earlier days in New England, service of summons on an individual member of such a corporation was not sufficient, and the member might appear and plead want of notice to the corporation.⁴ Statutes have been enacted in some States,⁵ authorizing service of process upon foreign corporations by delivering the writ to any stockholder, when the corporation has no officer or agent within the State. A stockholder remains such, for the purpose of process against the company being served upon him, although he has made a *sham transfer of his shares* to defeat the jurisdiction thus sought to be acquired,—as where he has gratuitously transferred his shares to trustees whose names he does not know, for some unknown and undefined purpose, and at the same time has contributed fifty dollars to cover the expense of the transfer on the books of the corporation.⁶

§ 7522. **Service upon the Cashier of a Bank.**—The cashier of a bank sustains a relation to the corporation of such importance that the courts in many cases take judicial notice of the existence of his agency, and of his powers and duties.⁷ Beyond

¹ Kan. Civ. Code, § 68 a.

² St. Louis &c. R. Co. v. DeFord, 38 Kan. 299; s. c. 16 Pac. Rep. 442.

³ *Ante*, §§ 1075, 3975, 5234.

⁴ Rand v. Proprietors, 3 Day (Conn.), 441.

⁵ Such as Colo. Code Civ. Proc., § 40.

⁶ Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499; s. c. 22 Am. St. Rep. 433; 25 Pac. Rep. 325; 9 Rail. & Corp. L. J. 113; 32 Am. & Eng. Corp. Cas. 201. Compare *ante*, § 3255, *et seq.*

⁷ *Ante*, §§ 4741, 4789.

all question, he is an officer or agent of the corporation upon whom process may be served for the purpose of affecting it with notice and giving the court jurisdiction of an action *in personam* against it, under the principles of the common law already stated.¹ Cashiers are commonly designated in statutes as the corporate officer or agent upon whom process may be served.²

§ 7523. **Service upon Receivers.**—Service of process, in an action in a State court, upon the *receiver* of a railroad property appointed by a Federal court, is properly made upon the officer upon whom it would be made if the railroad had remained in the hands of the company owning it, and if the action had been against the company.³ But it seems competent, in a case of doubt, for the court appointing the receiver to make an order that the service in a particular case shall be deemed sufficient.⁴

§ 7524. **Service upon Clerk, Book-keeper, etc.**—A mere clerk or book-keeper is not a “*managing agent*” of a corporation upon whom process can be served under a statute;⁵ nor is he such an agent as satisfies the principles of the common law,⁶ where no mode of service is pointed out by statute.⁷ He is not an officer or agent within a statute⁸ relating to proceedings against corporations by *garnishment*; nor is he the proper party to *make the disclosure* required by the statute.⁹

¹ *Ante*, § 4740, *et seq.*; § 5229. That a service upon the cashier of a bank of process of *garnishment*, in the name, although not the full name, of the bank, upon which the bank appeared by its full name and answered, constitutes a sufficient service,—see *Reynolds v. Smith* (D. C.), 17 Wash. L. Rep. 117. And see *post*, § 8080.

² Under a statute of Virginia (Va. Code 1873, ch. 166, § 7), service of process on a *director* of a corporation, and also upon its *cashier*, is sufficient, although both disclaim, in their answers, the right to answer

officially. *Lewis v. Glenn*, 84 Va. 947; s. c. 6 S. E. Rep. 866.

³ *Central &c. Co. v. St. Louis &c. R. Co.*, 40 Fed. Rep. 426.

⁴ *Ibid.* Illinois statutes relating to the service of process upon receivers of corporations: Ill. Laws 1887, p. 142; amended by Laws Ill. 1889, p. 138.

⁵ *Ante*, § 7513.

⁶ *Ante*, §§ 5195, 5233.

⁷ *Dock v. Elizabethtown &c. Man. Co.*, 34 N. J. L. 312.

⁸ Laws Mich. No. 85, No. 175.

⁹ *Pettit v. Muskegon Booming Co.*, 74 Mich. 214; s. c. 41 N. W. Rep.

§ 7525. *Service upon Traveling Agent.* — It has been held that the service of summons made “on an agent authorized to effect insurance only,” by which words the court understood a traveling agent for procuring applications of insurance to be transmitted to the regular office of the company for its action thereon, was not a good service of process on a domestic corporation, under a statute allowing such corporations to be sued in any county where they might “have an agency or transact any business.”¹

§ 7526. *What Agent can Accept Service.* — Any one upon whom service of process may be executed is competent to acknowledge in writing in behalf of the corporation that he has been served.²

§ 7527. *Authority to Accept Service, how Shown.* — By analogy to the principle that an agency is not proved by the mere declarations of a person that he is the agent of another, so the authority of a person assuming to accept service for a corporation is not shown by the relation in which he describes himself in his written indorsement of acceptance, but his authority must otherwise appear.³ There is authority for the proposition that an officer or agent of a corporation can-

900; *post*, § 7810. Service upon town clerk, county clerk, etc., under local statutes: *Weil v. Greene County*, 69 Mo. 281; *Knox Co. v. Harshman*, 133 U. S. 152; *Mariner v. Waterloo*, 75 Wis. 438; *s. c.* 44 N. W. Rep. 512. *Mandamus* to board properly directed to clerk: *Commissioners v. Sellev*, 99 U. S. 624. No difference that clerk failed to communicate notice to board: *Knox Co. v. Harshman*, 133 U. S. 152.

¹ *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

² *Talladega Ins. Co. v. Woodward*, 44 Ala. 287. Compare *Dillard v. Central Va. Iron Co.*, 82 Va. 734. Where the only service of a bill in equity

upon the defendant, a corporation, was by the acceptance of service by an attorney, who was requested by the president of the corporation to make such acceptance as attorney for the corporation, but the corporation had not authorized the president to accept service of legal process, or to appoint attorneys, and the corporation was accustomed to appoint its attorneys only by vote of the directors, — it was held that the service was not a legal one. *Bridgeport &c. Bank v. Eldredge*, 28 Conn. 556; *s. c.* 73 Am. Dec. 688. Compare *ante*, §§ 4657, 5228.

³ *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

not accept service *outside of the jurisdiction* within which the process of the court in which the action is brought, can run.¹ But this is somewhat doubtful, at least in relation to general actions; for, as elsewhere seen,² the privilege of being sued within a particular venue is generally deemed a *personal privilege*, which even a corporation can *waive*. But as a proceeding by *garnishment* is a *special statutory proceeding*, which must be strictly pursued in order that jurisdiction shall attach,³ it has been held that an acceptance, by an officer of the corporation, of service of a writ of *garnishment* outside of the county within which alone the writ can run and be served, is a nullity, and gives no jurisdiction to condemn the debt.⁴

§ 7528. Service upon an Officer Who is Plaintiff in the Suit.—Where an action is brought against a corporation by one of its own officers, process cannot be served upon him, although he is an officer upon whom process might be served under the applicatory statute, if he were not the plaintiff in the case.⁵ Such a service cannot support a judgment by default, and it is the duty of the court, upon the manner of service being made known to it, to refuse to enter such judgment.⁶ The reason has already been adverted to in dealing with the subject of notice to corporations.⁷ The relation of the officer to the corporation, in respect of the litigation, is such that he is interested in withholding the notice which it would otherwise be his duty to give to those officers of the corporation whose duty it would be to take the proper adversary action in its behalf. But such a service would be cured

¹ Hebel v. Amazon Ins. Co., 33 Mich. 400.

² Post, § 7552, et seq.

³ Ford v. Detroit Dry Dock Co., 50 Mich. 358.

⁴ Hebel v. Amazon Ins. Co., 33 Mich. 400. This is analogous to the proposition, decided by the same court, that the lawful owner of a claim may be estopped by garnish-

ment proceedings, only when the garnishee has been put by regular course of law into a position to bind the owner. Hirth v. Pfeifle, 42 Mich. 31, 33.

⁵ Post, § 8047.

⁶ Buck v. Ashuelot & Co., 4 Allen (Mass.), 357.

⁷ Ante, § 5195, et seq.

by also serving the writ upon another officer, competent to receive such service.¹

§ 7529. Service upon Corporate Officer Temporarily within the Jurisdiction.—It is a sound conclusion, supported by numerous adjudications, that service, such as will support a judgment *in personam*, cannot be made upon an officer of a foreign corporation who, at the time, is accidentally within the jurisdiction of the forum, and that a law ascribing a greater effect to such a service would be void; since the character of such a person as a corporate officer does not, under such circumstances, accompany him to another jurisdiction;² though there are cases supporting the view that such a service may well take the place of a constructive notice by publication, such as will support a judgment *in rem* against any property of the foreign corporation which may be seized within the jurisdiction.³

§ 7530. Substituted Service on Another Officer where Proper Officer not Found.—Many statutes provide that service shall be had upon the chief officer of the corporation, or upon certain principal officers or agents; but with the further *proviso* that if such officer or agent cannot be found within the jurisdiction, service may then be had upon certain named

¹ Where the president of a corporation is plaintiff in an action brought against the corporation, it has been held that a service of process upon the president of the corporation and also upon its secretary, is a sufficient service to support a judgment against the corporation by default; and that, in the absence of fraud in obtaining such a judgment, it will support a motion for an execution against a stockholder under the statute giving such an execution. *Schaeffer v. Phoenix Brewery Co.*, 4 Mo. App. 115.

² *M'Queen v. Middletown Man. Co.*, 16 Johns. (N. Y.) 6; *Moulin v. Trenton Mut. L. &c. Ins. Co.*, 24

N. J. L. 234; *Newell v. Great Western R. Co.*, 19 Mich. 336, 345; *Peckham v. North Parish*, 16 Pick. (Mass.) 274, 286; *Latimer v. Union Pac. R. Co.*, 43 Mo. 105; *s. c.* 97 Am. Dec. 378; *State v. Ramsey Co.*, 26 Minn. 233; *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301; *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. (N. Y.) 275. See, as to this subject in its relation to foreign corporations, *post*, § 8030, *et seq.*

³ *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. (N. Y.) 275; *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. (N. Y.) 183; *Bates v. New Orleans &c. R. Co.*, 13 How. Pr. (N. Y.) 516.

subordinate officers, agents, employés, etc. Service upon officers or agents of the latter class is sometimes called "*substituted service*." The general rule is that, in order to make a substituted service valid, *the statute must be strictly complied with*.¹ If, for instance, the statute requires service to be had on the president, or other head officer, or permits service to be had on other officers or agents in case the president does not reside in the county or is absent therefrom, then if service is made on another officer or agent, the return must show that the president did not reside in the county, or was absent therefrom.² Again, if the statute provides for such substituted service in case the principal officer "cannot be found," this means cannot be found in the county or bailiwick, and the statute is not satisfied where the sheriff merely returns that he is absent from the place of business of the corporation.³

SUBDIVISION II. *Place and Manner of Service and Return.*

SECTION

- 7538. Service where made.
- 7539. Further of this subject.
- 7540. Statutory mode of service must be followed.
- 7541. Following the analogy of statutes.
- 7542. Manner of service, delivering copy, etc.

SECTION

- 7543. Service by officer who is a member of the corporation.
- 7544. Service by publication.
- 7545. Form and sufficiency of the return.
- 7546. Objection to service and return, how made.
- 7547. Service of notice of appeal.

¹ *Merrill v. Montgomery*, 25 Mich. 73; *Hoen v. Atlantic &c. R. Co.*, 64 Mo. 561; *People v. Saginaw Circuit Court*, 23 Mich. 492; *St. Louis &c. R. Co. v. Dorsey*, 47 Ill. 288.

² *St. Louis &c. R. Co. v. Dorsey*, 47 Ill. 288.

³ *Hoen v. Atlantic &c. R. Co.*, 64 Mo. 561. Where the statute provided that service might be made on certain officers therein named, "or if there be no such officers, or none can be found, such service may be made on such other officer or member of such corporation, or in such manner as the court in which the suit is brought

may direct" (*Comp. Laws Mich.*, § 4835), it was held that the substituted service could only be made *in the county where the corporation had its principal office*. *People v. Saginaw Circuit Court*, 23 Mich. 492. Compare *Haywood v. Johnson*, 41 Mich. 598, where the previous case is cited. See also *Hebel v. Amazon Ins. Co.*, 33 Mich. 400. It may be added that this statute of Michigan does not apply to *foreign corporations*. *People v. Wayne Circuit Court*, 24 Mich. 38. This statute was amended by Mich. Laws 1887, p. 112.

§ 7538. **Service where Made.** — Service must, of course, be made *within the jurisdiction of the court*, unless there is a statute providing for service out of the jurisdiction; and then questions will arise as to the sufficiency and effect of a judgment rendered upon such service. It is believed that the question of venue, as determined by the question whether the action is *local* or *transitory*, is the same where the action is against a corporation as where it is against a natural person. The principle is that actions brought for the purpose of directly *affecting property*, real or personal, must be brought within the jurisdiction where the property is situated; but that actions for the *collection of debts* or the *enforcement of contracts* are transitory, and must follow the person of the defendant, and are to be brought within the jurisdiction where the defendant is found. The uniformity of this second rule is not admitted in all jurisdictions, but the subject is too large a one to be considered here. For the purposes of the present discussion, we may start out with the general principle that a transitory action against a corporation must be brought in the place where the corporation is found. From this, one step conducts us to the proposition that, as a general rule, and in the absence of statutory changes, a corporation is found only in the place where it has its domicile, that is to say, its real place of business. But, as a corporation is the creature of the legislature, it is competent for a State which has created a corporation, to prescribe the manner in which process may be served in actions against it.¹ Under earlier conceptions that a corporation must be named of a particular place,² that it must dwell in a particular place,³ that it cannot migrate, but must dwell in the place of its creation,⁴ the venue, for the purpose of an ordinary action against a corporation, was in the county *where the corporation resided*, that is, where it had its *chief place of business*, unless the statute law otherwise provided.⁵

¹ *Railroad Company v. Hecht*, 95 U. S. 168; *Holgate v. Oregon Pac. R. Co.*, 16 Or. 123.

² *Ante*, § 687.

³ *Ante*, § 6888.

⁴ *Post*, § 7881.

⁵ *Brobst v. Bank of Pennsylvania*, 5 Watts & S. (Pa.) 379. That this is the statutory rule in Colorado, subject to statutory exceptions, see West-

§ 7539. **Further of This Subject.**—As a corporation can only be sued within the county or local jurisdiction within which it is found, which means either *where it has its princi-*

ern Union Tel. Co. v. Conant, 11 Colo. 111. See *ante*, § 7423. But it has been held that, in the absence of a statute containing this requirement, the return need not show that such was the fact. *Tabor v. Goss & Co. Man. Co.*, 11 Colo. 419, 426. Compare *Little Bobtail Gold Min. Co. v. Lightbourne*, 10 Colo. 429; *s. c.* 15 Pac. Rep. 785. Where this was the rule, it was necessary, in an action against a corporation, to serve the summons at the place where the corporation was located. *Brobst v. Bank of Pennsylvania*, 5 Watts & S. (Pa.) 379. Therefore, in an action against the Bank of Pennsylvania, which was located in Philadelphia, summons could not be served upon the cashier of a branch bank located in another county, within which it was attempted to bring the action. *Ibid.* By force of statute in Virginia (Va. Code 1873, ch. 166, § 7), service of process upon corporations must be made *in the State*, upon an officer or agent resident within the State; otherwise the judgment will be *void*, and may be assailed collaterally. *Dillard v. Central Virginia Iron Co.*, 82 Va. 734; *s. c.* 1 S. E. Rep. 124. Under a later statute of Virginia (Va. Acts 1883-4, p. 701), service may be had upon any agent of a corporation, other than a banking corporation, doing business in the State, whether foreign or domestic, in the county or municipal corporation in which such agent resides, or in which the principal office of the corporation is located, whatever may be the grade of employment of such agent. *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512; *s. c.* 3 S. E. Rep. 123. Under statutes

of West Virginia, service of summons, in an action commenced before a justice of the peace against a domestic railroad corporation, on the president or other chief officer of the corporation, must be made within the county in which *he* resides; otherwise there is no jurisdiction, in the absence of an appearance, and the judgment is void. *Taylor v. Ohio River R. Co.*, 35 W. Va. 328; *s. c.* 13 S. E. Rep. 1009. So, where the service is made upon an attorney appointed and empowered to receive service of process under another statutory provision, it must be made in the county where *he* resides, or, in the absence of an appearance, the judgment will be void. *Railway Company v. Ryan*, 31 W. Va. 364; *s. c.* 13 Am. St. Rep. 865. The inconvenience of driving suitors to the county of the principal office or place of business of the corporation, has resulted, in Michigan, in an amendment of the statute relating to service of process on corporations (How. Stat. Mich., § 8137), by allowing a plaintiff, residing in a county other than that where the principal office of the corporation is situated, to commence suit against it *by attachment*. Pub. Acts Mich. 1887, No. 242, p. 303. In the same State, process from a *justice's court* in civil cases is not allowed to run into another county than that of the justice, or to be served beyond his constable's bailiwick. The general statute of that State (Comp. Laws Mich. 1871, § 1683), concerning the service of process upon foreign insurance companies doing business within the State, is not applicable to justice's courts, but only to courts of

pal place of business, or where it has a local agency, branch office, or subordinate place of business,— an easy way by which corporations might elude the bringing of actions against them would be to keep their principal officers away from such places of business and outside of the venue; for, as we have already seen, under the principles of the common law, service of process can only be had upon the principal officers of a corporation.¹ Statutes have been enacted in many of the States to prevent them from doing this,—among which is the following statute, enacted in Illinois in 1853: “That in all cases where suit has been, or may hereafter be brought, against any incorporated company, process shall be served on the president of such company, if he reside in the county in which suit is brought, and if such president be absent from the county, or does not reside in the county, then the summons shall be served by the proper officer, by leaving a copy

record, and justices have no jurisdiction of actions against such companies. *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441, anno 1874. In the same State, service of *garnishee process* from justice’s courts, cannot, under the statute (Comp. Laws Mich. 1871, § 6463), be made beyond the county, and an acceptance of service by an attorney of the corporation, which shows that it was made outside the county, thereby shows that it was made where the process had no legal force, and consequently no jurisdiction can attach by virtue of such acceptance. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400. Under the statute of Michigan of 1875 (Pub. Acts Mich. 1875, art. 167, § 31), which was a substitute for the provisions of earlier statutes, service of process on a *manufacturing* corporation could only be had within the county where its business office was established. *Dewey v. Central Car & Co.*, 42 Mich. 399. But, since the passage of the act of 1887 (Mich. Laws 1887, Act No. 242,

§ 3), service of process, in actions against corporations in that State, may be made upon the proper officers of the corporation in the county where the plaintiff resides, although its business office is located in another county. *Potter v. Hutchinson Man. Co.*, 79 Mich. 207; s. c. 44 N. W. Rep. 595. Under a statute of North Carolina, providing that process, in a suit against a corporation, might be served upon an officer of the company, in the county where he usually resides, it was held that the service might be made in the county of the officer’s domicile, or in that in which he had his official residence and carried on the corporate business (*North Carolina v. Raleigh & C. R. Co.*, 3 Ired. Eq. (N. C.) 471), and the service could not be treated as a nullity, if the sheriff returned on whom he had served the process, though it was served upon an officer outside the county of his residence. *Ibid.*

¹ *Ante*, § 7505.

thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of such company, found in the county.”¹ Under this statute, as of course under every other statute of the kind, there must be what is sometimes called a *venue*, that is to say, the corporation must have such a domicile within the territorial limits of the jurisdiction of the court in which the action is brought as will give the court jurisdiction over it in case it is served with process within those limits. If the corporation has such a domicile, jurisdiction over it will attach, provided process is served, within the jurisdiction, upon any agent designated by statute.²

¹ Scates' Comp. 243.

² Thus, under the above statute, where an insurance company, whose principal agent was in Peoria County, in Illinois, had a branch office and agency in Chicago, in Cook County, an action brought against it in the latter county, and process served upon its agent there, was well brought. *Peoria Ins. Co. v. Warner*, 28 Ill. 429; quoted with approval in *Stephenson Ins. Co. v. Dunn*, 45 Ill. 211, 213. But, under the same statute, jurisdiction could not be acquired by serving process on the president or other officer of the corporation outside of the jurisdiction of the court, that is to say, outside of the county within which the suit was brought. If the president of the corporation did not reside within the county, then the process should be served upon some other officer or agent named in the statute. *Stephenson Ins. Co. v. Dunn*, 45 Ill. 211; *Winneshiek Ins. Co. v. Holzgrafe*, 46 Ill. 422. Compare *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *s. c.* 74 Am. Dec. 124; *Chicago & c. R. Co. v. Fell*, 22 Ill. 333. And it would necessarily follow that if none of the officers or agents named in the statute could be found within the county, then the

plaintiff would have to bring his action in some county where the corporation had a business domicile, and where some one of them could be found. Under section 267 of the General Statutes of Colorado, of 1887, for the purpose of serving a summons, a defendant corporation is deemed to be found only in the county where the principal office of the corporation is kept, or its principal business carried on, subject to certain exceptions named in the section. The object of this statute was to prevent abuses which had sprung up under a previous statute, like that of Illinois above quoted, authorizing service upon irresponsible subordinates, who would neglect to communicate notice to their principal, and to secure service upon some of the principal officers of the corporation charged with the management of its affairs. *Western Union Tel. Co. v. Conant*, 11 Colo. 111; *s. c.* 17 Pac. Rep. 107. Compare *Peoria Ins. Co. v. Warner*, 28 Ill. 429, 433. A statute of Oregon, referring to transitory actions, provides that “in all other cases, the action shall be commenced and tried in the county in which the defendants, or either of them, reside, or may be found at the commencement of the

§ 7540. Statutory Mode of Service must be Followed.—

Recurring now to the principle that where the mode of service is pointed out by statute, that method is exclusive, it may

action; or if none of the parties reside in this State, the same may be tried in any county which the plaintiff may designate in his complaint" (Civ. Code Or., § 44); and also provides that "the summons shall be served by the sheriff of the county where the defendant is found"; and also provides that the summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: "1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent; or, in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county; or, if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." *Ibid.*, § 55. This statute authorizes the commencement of an action against a corporation in any county in which the cause of action arose, provided the corporation can be there found and served in compliance with its terms. It was intended to settle a controversy which existed prior to its passage, as to whether a corporation could, no matter where the cause of action arose, be sued in any other county than that of its chief office and place of business. But it is still necessary, in the commencement of an action against a corporation under it, in order to acquire jurisdiction over the person,

that the return of service of summons should show that a duly authenticated copy thereof, and a copy of the complaint, were delivered to one of the officers thereof, designated in the part of the statute last quoted, either in the county where its principal office was situated, or in the county where the cause of action arose; or in case none of such officers should reside or have their offices in the county where the cause of action arose, then to any clerk or agent of such corporation who might reside or be found in the county where the cause of action arose; or if no such officer be found, then by leaving such copies at the residence or usual place of abode of such clerk or agent. The action may be commenced in the county where the corporation has its principal office, whether the cause of action arose there or not, because that is its place of residence. In that case, however, the service must be made upon the president, or other head officer of the corporation, secretary, cashier, or managing agent thereof; but if commenced in a county where the cause of action arose, service may be made upon a clerk or agent, under the circumstances and in the manner above mentioned. When, therefore, an action was commenced against a domestic corporation within the county where it had its principal office, but the summons was delivered to the sheriff of another county, and there served upon its second vice-president, it was held that the court acquired no jurisdiction. *Holgate v. Oregon Pac. R. Co.*, 16 Or. 123; *s. c.* 20 Am. & Eng. Corp. Cas. 527; 17 Pac. Rep.

be added that the law does not demand a literal and exacting compliance with the statute, but is generally satisfied with a *substantial compliance*.¹ This does not mean that, where the statute imposes certain conditions, the sheriff can substitute other conditions not equivalent to those of the statute. Thus, if the statute demands service upon the chief officer, but provides for service upon a subordinate officer or agent in case the "chief officer cannot be found," this means in case the chief officer cannot be found in the county or bailiwick of the officer serving the writ.² It refers to something more than a temporary absence from the usual place of business of such officer: it means an absence from the county.³ Hence if, under such a statute, the sheriff returns that he has served the summons upon a person in charge of the business office of the defendant, "in the absence of the president or chief officer," this will not be a good service, and will not give jurisdiction; because *non constat* but that it may be his mere temporary absence.⁴

§ 7541. **Following the Analogy of Statutes.**—Where there is a general statute, directing the *manner* in which *summons* shall be served, but there is no statute specially directing the manner in which another species of notice is to be served,—as for instance a *notice of appeal*,—then, there is authority for the position that the court will follow the analogy of the statute prescribing the mode of serving a summons.⁵

§ 7542. **Manner of Service, Delivering Copy, etc.**—This subject is probably *governed by statutes in all cases*; and there-

859. It is perceived that this is in accordance with the construction placed upon the statute of Illinois, as above shown; and the meaning is that the corporation must be served *within the venue*, upon such agent, there found, as the statute permits; and that the summons cannot be sent out of the venue to be served on some other agent, unless the statute permits. *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

¹ *Cosgrove v. Tebo & Co.*, 54 Mo. 495.

² *Hoen v. Atlantic & Co.*, 64 Mo. 561.

³ *Dixon v. Hannibal & Co.*, 31 Mo. 409; *Hoen v. Atlantic & Co.*, 64 Mo. 561.

⁴ *Hoen v. Atlantic & Co.*, 64 Mo. 561.

⁵ *Pacific Coast R. Co. v. Superior Court*, 79 Cal. 103; *s. c.* 21 Pac. Rep. 609.

fore it will not be useful here to go further than to state the results at which the courts have arrived in the interpretation of such statutes. It has been held sufficient, in Nevada, to deliver a copy of the summons to the secretary of the corporation;¹ in Maine, in the case of a corporation summoned as trustee (garnishee), to leave a copy at the place of the last and usual abode of the treasurer, or other proper officer;² in Georgia, to leave a copy of the writ at the most notorious place of abode of the president of the corporation;³ in Connecticut, in an action by a citizen against the Bank of the United States domiciled in Pennsylvania, by attaching a table, the property of the defendants, and leaving notice of the writ with the president and cashier of the branch bank.⁴

§ 7543. Service by Officer Who is a Member of the Corporation.— We have already seen that where the plaintiff is an officer of the corporation, a valid service of process in his suit against the corporation cannot be had against him, because it will be to his interest to conceal instead of communicating the notice to the corporation.⁵ It is held, in an old case, that a writ in favor of a manufacturing corporation will be abated if served by a constable who is a *member* of the corporation.⁶ But there does not appear to be any reason in this, especially in view of the fact that a stockholder in a

¹ Gillig v. Independent &c. Min. Co., 1 Nev. 247.

² Harris v. Somerset &c. R. Co., 47 Me. 298.

³ Water Lot Co. v. Bank of Brunswick, 30 Ga. 685.

⁴ Sill v. Bank of United States, 5 Conn. 102. „But where a corporation had its place of business in the same room in which a banking business was conducted, but separated from the banking concern by a screen, a service on the corporation by leaving the papers in the portion of the room occupied by the banking concern, was not a valid service, although the officers of the corporation may at the

time have been engaged in the banking room. Harrell v. Mexico Cattle Co., 73 Tex. 612; s. c. 11 S. W. Rep. 863. Where it appeared that the sheriff handed the citation to one who was the *private secretary* of the president of the corporation, and that this person told the sheriff that he was without authority to receive the citation, it was held that the service was bad, and that there was no jurisdiction. Collier v. Morgan's La. &c. R. Co., 41 La. An. 37; s. c. 5 South. Rep. 537.

⁵ *Ante*, § 5205.

⁶ Dunmore Man. Co. v. Rockwell, Brayt. (Vt.) 18.

business corporation is not the defendant in an action against the corporation, but may sue the corporation or be sued by it both at law and in equity.¹ Under statutes prohibiting the service of the writ by one who is a party to the action, it is therefore a sound view that the proper officer to serve the writ is not disqualified by being a member of the corporation;² and this would necessarily be so in the case of a *municipal corporation*; otherwise no one might, in some cases, be found who could serve the writ.

§ 7544. Service by Publication.—Statutes are found which authorize service of process against domestic corporations by publication, where no officer or agent can be found within the State, upon whom service may be had.³ The effect of a judgment rendered upon such a notice would, at most, be to authorize execution against property of the corporation *within the State*.⁴ The principle already adverted to,⁵ that statutory modes of service must be strictly pursued, applies with peculiar force to notice by publication.⁶

§ 7545. Form and Sufficiency of the Return.—The form and substance of the return of the officer who serves the writ is a matter of extreme importance, because it is in the nature

¹ *Post*, § 7579.

² *Adams v. Wiscasset Bank*, 1 Me. 361; *s. c.* 10 Am. Dec. 88; *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405.

³ See for instance, N. C. Laws 1889, ch. 108, p. 102.

⁴ Where a corporation had been dissolved as bankrupt under the late Federal bankruptcy law, it was held that, as the debtor could not be found, service must be made by publication. *Re Washington Marine Ins. Co.*, 2 Nat. Bank. Reg. 648.

⁵ *Ante*, §§ 7503, 7509; *post*, § 8021.

⁶ For instance, where the statute requires publication for six days, this means six juridical days, and if one of the days is Sunday, jurisdiction does

not attach. *Scammon v. Chicago*, 40 Ill. 146. So, where the statute requires publication to be made in a newspaper selected by a municipal corporation for the publication of its legal notices, if the corporation has selected a daily paper, a publication of the notice in a Sunday edition will not be a compliance with the statute, for the further reason that the Sunday edition is not delivered to its subscribers as a part of its regular daily issue, but sold only to news-dealers and newsboys, and is hence regarded as a different and distinct paper from the paper selected by the corporation. *Ibid.*

of a record, and cannot be averred against, except in a direct action against the officer to recover the damages which have resulted to a party to the suit in case of its being a false return. To this statement of the verity of a sheriff's return there are no doubt statutory and other exceptions.¹ As the mode of serving process is, in nearly all American jurisdictions, carefully prescribed by statute, the test of a good return is that it exhibits a literal *compliance with the statute*.² Another is, that it should state those facts in *direct*, and not in *inferential*, language. For instance, if the governing statute permits the process to be served upon the president of the defendant corporation, the sheriff should state the name of the person upon whom he serves it, and should also state that such person *is* the president of the defendant corporation. A return that he served the writ on "A. B., *as* president," etc., is bad,³ because it does not show that the sheriff has complied with the statute. And this is so on principle, although the recital in the return as to the official character of the person on whom the officer made the service may not be sufficient to support a judgment by default, additional evidence being required.⁴ It is true that, in the jumble of judicial holdings upon this question, decisions can be found which will excuse such a return as that last cited;⁵ but they are clearly opposed to the governing principle already stated,⁶

¹ *Ante*, § 7507, note.

² For a return showing a literal compliance with the governing statute, see *State v. O'Neill*, 4 Mo. App. 221. That the return, under a Tennessee statute, need not show that the person upon whom the process is served is the president, or other head officer, cashier, treasurer, secretary, director, or chief agent of the corporation in the county,—see *Wartrace v. Wartrace & Co.*, 2 Coldw. (Tenn.) 515. Example of a sufficient return of summons in an action against a foreign corporation in Pennsylvania:

⁶ *Ante*, §§ 7503, 7509; *post*, § 8021.

Wintemute v. New Jersey Cent. R. Co., 5 Pa. County Ct. 648.

³ *Illinois & C. R. Co. v. Kennedy*, 24 Ill. 319.

⁴ *Ante*, § 7507.

⁵ Thus, the return of the sheriff that a summons, in an action to which a county was a party, was served on A. & B., "*said to be commissioners*," was held equivalent to a return of service on "A. and B., commissioners," since the words "*said to be*" might be struck out as surplusage: *Kleckner v. County of Lehigh*, 6 Whart. (Pa.) 66.

that the statutory mode of acquiring jurisdiction in such cases is exclusive. In describing the agent upon whom he served the process, the sheriff, in his return, must describe an agent, either within the *language*, or at least within the *meaning*, of the governing statute, where general words of description are employed therein.¹ Where the statute provides for an *alternative* or *substituted* mode of service,²—upon the president or other chief officer, if he can be found within the jurisdiction, and if not, upon some inferior officer or agent named, then, in order to give the court jurisdiction in case of service upon an inferior officer or agent, the return must *show the condition named in the statute*, as that the president did not reside in the county or was absent therefrom.³ But it does not follow from this that the return must pursue the exact language of the statute, though it is safer where a proper grammatical construction will allow it to be done.⁴

¹ When, therefore, he returned that he had served process against a railroad company upon its "commencement agent," and the statute provided for service upon "any station agent," the return did not show such service as gave the court jurisdiction. *Detroit v. Wabash & C. R. Co.*, 63 Mich. 712; s. c. 30 N. W. Rep. 321. So, where the statute authorized service of a notice of garnishment by delivering it to "the nearest station agent or freight agent," of the railroad company (Rev. Stat. Mo., 1879, § 2521), a return which showed service "by delivering a copy of the notice to D. W. Steal, nearest agent," etc., did not give jurisdiction to proceed. *Hayley v. Hannibal & C. R. Co.*, 80 Mo. 112. So, where the statute governing the service of process against railroad companies in actions before justices of the peace for killing or injuring animals, required service to be had on the "station agent," a return of service upon a person described merely

as "agent," was not sufficient, because it was neither a literal nor a substantial equivalent of the statute; and the court acquired no jurisdiction. *Heath v. Missouri & C. R. Co.*, 83 Mo. 617, 624–626.

² *Ante*, § 7530.

³ *St. Louis & C. R. Co. v. Dorsey*, 47 Ill. 288.

⁴ *Heath v. Missouri & C. R. Co.*, 83 Mo. 617, 624. Thus, where the governing statute authorized service to be made "by leaving a copy thereof at any business office of said company, with the person in charge thereof" (Rev. Stat. Mo. 1879, § 748), and the sheriff returned that he left a copy with "D., the book-keeper and agent of the within-named defendant, at and in the only office of the company in the county of I., said D. being in charge of defendant's said office," etc., it was held that this sufficiently showed a compliance with the statute. *Hill v. St. Louis Ore. & C. Co.*, 90 Mo. 103; s. c. 2 S. W. Rep. 289, 686.

§ 7546. **Objection to Service and Return, how Made.**—

Under some systems of procedure, corporations are allowed to appear for the special purpose of making objection to the manner in which process has been served upon them, or rather to object that process has not been served upon them, but has been served upon some one not their agent.¹ Objections of this kind come with an ill grace from domestic corporations suable within the venue, and the courts look upon them with disfavor.² The writer is of the opinion that such an appearance ought to be regarded as an appearance for all purposes. Where such a motion is grounded upon a misdescription of the corporation in the sheriff's return, then it must state the other name, on the principle applicable to pleas in abatement that the defendant must give the plaintiff a better writ.³ Where the objection does not relate to the manner of serving the process, or acquiring jurisdiction over the defendant, but is grounded on the proposition that the *situs of the contract* sued on was such that the court was without jurisdiction of the cause of action named in the declaration, it cannot, it has been held, be taken by motion to quash, but ought to be taken by plea so as to allow a review by writ of error based on the record of exceptions.⁴ In other words,

¹ Collier v. Morgan's La. &c. R. Co., 41 La. An. 37.

² Nye v. Burlington &c. R. Co., 60 Vt. 585.

³ *Ibid.* Where the defendant was described in the writ as the "Burlington and Lamoille Railroad Company, a company organized under the laws of this State," it was held consistent with the conclusion that the defendant was a corporation upon which service of process might legally be had, under the governing statute, by delivering a copy to its clerk. A motion to dismiss on the ground that the service was illegal, which neither alleged nor denied the corporate existence of the defendant, and which did not point out the respect in which

the service was defective, nor in what manner it could be corrected, was properly overruled. *Ibid.*

⁴ Maxwell v. Speed, 60 Mich. 36; s. c. 26 N. W. Rep. 824. *Where the service is good, and the plea in abatement filed by the corporation consequently bad, it will not be an error for which the judgment will be reversed, that the plaintiff proceeded to take a judgment by default against the corporation in disregard of the plea, without first moving to have it stricken from the files.* But it was said that "if the defendant corporation had filed an affidavit of merits, and asked that the default might be opened or the judgment vacated in the court below, there might have been good

such an objection is one which goes to the merits, and should be made as objections to the merits are made.

§ 7547. **Service of Notice of Appeal.**—The law on the subject of the necessity of giving notice of appeal, varies from the greatest technicality to the greatest liberality. For instance, in Missouri, in the case of appeals from justices of the peace to the Circuit Court for the purpose of a trial *de novo*, the greatest strictness is demanded in following the statutes in regard to giving notice of the appeal, as will be seen by the cases cited in the note.¹ Coming to the other end of the oscillation of the pendulum, we find decisions to the effect that, in proceedings originating in the probate court and removed to a higher court for trial *de novo*, a statutory provision for giving notice of an appeal is regarded as directory merely; so that, where notice has not been given as prescribed, the appellate court may make an order for some suitable service of it.² It should seem that this is the correct view where the cause is merely removed to a higher court for a trial *de novo*; since such an appeal is in no case, like a writ of error at common law, the commencement of a new action, but the object of giving the notice is merely to afford the opposite party time to prepare for a new trial in another

ground, in the discretion of that court, for granting such an application. But it has contented itself with attacking the jurisdiction of the court on writ of error; and the defect, if any, in the proceedings to judgment after the filing of the plea is one of irregularity in practice, and not one operating in any way upon the jurisdiction." *Shickle & Co. v. Wiley Construction Co.*, 61 Mich. 226; *s. c.* 1 Am. St. Rep. 571. As to the practice of striking out pleas, answers, or defenses, see *People v. McCumber*, 18 N. Y. 315; *s. c.* 72 Am. Dec. 515; also an extended note in 72 Am. Dec. 521, *et seq.*; also *Hayward v. Grant*, 13 Minn. 165; *s. c.* 97 Am. Dec. 228.

¹ *Rowley v. Hinds*, 50 Mo. 403; *Purcell v. Hannibal & C. R. Co.*, 50 Mo. 504; *Nay v. Hannibal & C. R. Co.*, 51 Mo. 575; *Page v. Atlantic & C. R. Co.*, 61 Mo. 78; *Thurston v. Kansas Pac. R. Co.*, 1 Mo. App. 400; *McGinness v. Taylor*, 22 Mo. App. 513; *Fink v. Berberich*, 7 Mo. App. 577; *Jordan v. Bowman*, 28 Mo. App. 608; *Horton v. Kansas City & C. R. Co.*, 26 Mo. App. 349.

² *Woodward v. Spear*, 10 Vt. 420; *Donovan's Appeal*, 40 Conn. 154. The Supreme Court of Michigan incline to the same view: *Simpson v. Mansfield & C. R. Co.*, 38 Mich. 626, 629.

court.¹ Of course, if the proceeding in the appellate court is in the nature of a new action, as in case of a writ of error at common law or a bill of review in chancery, it must be commenced by new process, without which the appellate court will acquire no jurisdiction. Under a statute of Michigan,² in the case of an appeal from the probate court in a proceeding by a corporation against the estate of a deceased person, if the executors appeal, the probate judge can direct how service of the notice of appeal shall be served on the corporation, and may name the officer, agent, etc., on whom it shall be made.³ It is, therefore, not necessary that the more general statute which prescribes how process, pleadings, etc., shall or may be served on corporations, or on the particular class of corporations, shall be complied with, where there is such a special statute.⁴ On the contrary, if there is no special statute directing how notice of an appeal shall be served on a corporation, the court will cause it to be served in the same manner as is provided by the general statute for the service of original process on corporations in actions against them.⁵

¹ So stated by Mr. Justice Cooley in *Simpson v. Mansfield &c. R. Co.*, 38 Mich. 626, 629.

² Comp. Laws Mich., § 4442.

³ *Simpson v. Mansfield &c. R. Co.*, 38 Mich. 626.

⁴ *Ibid.*

⁵ *Pacific Coast R. Co. v. Superior Court*, 79 Cal. 103; *s. c.* 21 Pac. Rep. 609.

CHAPTER CLXXX.

JURISDICTION AS DEPENDENT UPON VOLUNTARY APPEARANCE.

SECTION	SECTION
7552. Appearance cures defects in service of process and waives jurisdiction over the person.	7556. What appearance not deemed such a waiver.
7553. In case of foreign corporations, waives exemption from being sued.	7557. Admits that it is sued by the right name.
7554. Application of this principle to Federal jurisdiction.	7558. What is a voluntary appearance for the purposes of the action.
7555. Waives exemption from being sued in the particular Federal district.	7559. What is not an appearance.
	7560. What is an authorized appearance by a corporation.
	7561. Waiving service and confessing judgment.

§ 7552. **Appearance Cures Defects in Service of Process, and Waives Jurisdiction over the Person.** — It is a general principle in the law of procedure that a voluntary appearance by the defendant, for the purpose of contesting the merits of the action brought against him, waives any right of objection for want of process, sufficiency of process, want of service of process, or sufficiency of service of process, by which it was attempted to bring him into court.¹ This principle is equally

¹ Cartwright v. Chabert, 3 Tex. 261; s. c. 49 Am. Dec. 742; Pixley v. Winchell, 7 Cow. (N. Y.) 366; s. c. 17 Am. Dec. 525; Barber v. Hubbard, 3 Code Rep. (N. Y.) 171; Petrie v. Fitzgerald, 1 Daly (N. Y.), 405; Webb v. Mott, 6 How. Pr. (N. Y.) 439, 441; Hubbell v. Dana, 9 How. Pr. (N. Y.) 424; Coppernoll v. Ketcham, 56 Barb. (N. Y.) 113; Ballouhey v. Cadot, 3 Abb. Pr. (N. S.) (N. Y.) 123; Hanna v. McKenzie, 5 B. Mon. (Ky.) 314; Knox v. Summers, 3 Cranch (U. S.), 496; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; Tuberville v. Long, 3 Hen. & M. (Va.) 309. There is a view, not based upon any sound conception, that this principle applies only to mere *irregularities* in the process or in its service, and not to defects of a radical nature: Beall v. Blake, 13 Ga. 217; s. c. 58 Am. Dec. 513; Little v. Ingram, 16 Ga. 194, 198; Little v. Little, 5 Mo. 227; s. c. 32 Am. Dec. 317. Compare Wynn v. Booker, 22 Ga. 359, 362. As where

applicable in actions against corporations. Although the service of the summons may be defective so as not to give jurisdiction over the corporation, yet if the corporation appears and pleads to the merits, it thereby *waives* the defect and submits itself to the jurisdiction of the court. Thereafter it cannot raise the question whether the person upon whom the process was served was its agent or not.¹ But a voluntary appearance does not waive jurisdiction *over the subject-matter of the action*; because it is a principle that the powers of courts over the subject-matter of actions cannot be enlarged by the consent of parties litigant.

§ 7553. In Case of Foreign Corporations, Waives Exemption from being Sued. — So, if the relation of a foreign corporation to the domestic State is such that, under the statutes of such State, or otherwise, it enjoys an immunity from being sued therein, — if it is so sued, and appears in the suit, by attorney or otherwise, for the purpose of contesting the merits, it waives its privilege and voluntarily submits to the jurisdic-

no process had been attached to the original declaration (*Beall v. Blake, supra*), or where the process did not run in the name of the State: *Little v. Little, supra*. But this last decision, although reprinted in the American Decisions as though it was still authority, was a mere judicial aberration, and was overruled in *Davis v. Wood*, 7 Mo. 162, where it was held that the provision of the constitution of Missouri requiring all writs to run in the name of the State was directory merely, and that a writ defective in this particular was cured where the defendant appeared and answered to the merits, or confessed the defendant's demand. See also *Doan v. Boley*, 38 Mo. 449; *Jump v. McClurg*, 35 Mo. 196. Aside from this, there is no sense whatever in the conception that there may be such radical defects in the process by which a defendant is

brought into court as cannot be waived by his voluntary appearance, which in itself is a submission to the jurisdiction of the court. The only object of the process is to bring him into court and to enable the plaintiff to recover a judgment against him in case he refuses to come in. If he comes in for any other purpose than to object to the mode by which it is attempted to bring him in, he accomplishes, by his voluntary action, the purpose of the process; and it is the sheerest nonsense to allow him, in some future proceeding, to question the validity of the method by which he has been brought in.

¹ *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *s. c.* 74 Am. Dec. 124; *Union Nat. Bank v. First Nat. Bank*, 90 Ill. 56, 58, — where it is held that the fact of defective service can only be put in issue by a plea in abatement.

tion of the court, and the judgment will have the same effect as though it had been rightfully served within the venue.¹ Under this principle, where the foreign corporation is not engaged in business in the State, but its president is inveigled into the State, and process is there served on him, while this will not give jurisdiction to proceed to judgment against it,²—yet where the corporation appears and pleads to the merits by a duly authorized attorney, it cannot afterwards have the action dismissed on the ground of the invalidity of the service.³

§ 7554. Application of This Principle to Federal Jurisdiction.—This principle is applicable to *Federal*, as well as to State, jurisdiction. Thus, as elsewhere seen,⁴ although, prior to the enactment of the Federal Process Act of 1872, an *attachment* could not issue out of a court of the United States *except in aid* of a suit where, on grounds of diverse citizenship or

¹ *Hady v. Insurance Co.*, 37 Ohio St. 366; *Murry v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Reynolds v. La Crosse &c. Packet Co.*, 10 Minn. 178; *McCormick v. Pennsylvania &c. R. Co.*, 49 N. Y. 303; *Hann v. Barnegatt &c. Co.*, 7 Civ. Proc. Rep. (N. Y.) 222; *Brooks v. New York &c. R. Co.*, 30 Hun (N. Y.), 47; *Virginia &c. Steamboat Nav. Co. v. United States, Taney (U. S.)*, 418; *Fitzgerald &c. Construction Co. v. Fitzgerald*, 137 U. S. 98; *De Bemer v. Drew*, 39 How. Pr. (N. Y.) 466; *Carpentier v. Minturn*, 65 Barb. (N. Y.) 293; *Paulding v. Hudson Man. Co.*, 2 E. D. Smith (N. Y.), 38. There is a holding to the effect that, after a corporation which has been summoned as a *trustee*,—a local name for *garnishee*,—has appeared, submitted to the jurisdiction of the court, made the disclosure required by the statute, and judgment has been entered against it, it is too late for it to object that the service of the process of garnishment

was insufficient. *Harris v. Somerset &c. R. Co.*, 47 Me. 298. But this is very doubtful. Elsewhere it is pointed out that a proceeding by *garnishment* is a proceeding *in rem* to attach a debt due by one person to another; that it being a strict proceeding, in derogation of the principles of common law, jurisdictional steps must be strictly taken; and that the service of the garnishment is a part of the mode pointed out by the statute for making the levy. If, therefore, the garnishee is not served in conformity with the statute, there is no levy; the debt owing by him to the principal defendant is not impounded; and it is difficult to see upon what principle he can waive this defect of jurisdiction for his creditor, the principal debtor in the attachment suit. See *post*, §§ 7804, 8069.

² *Ante*, § 7529; *post*, § 8030.

³ *Fitzgerald &c. Construction Co. v. Fitzgerald*, 137 U. S. 98.

⁴ *Ante*, § 7502.

otherwise, the court had acquired jurisdiction *in personam*, yet of an attachment did issue where the court had not acquired jurisdiction *in personam*, the defect of jurisdiction was *waived* by the fact of the defendant appearing and answering to the merits. So, the privilege of a defendant, whether a person or a corporation, of not being compelled to answer in a Federal jurisdiction other than that of his or its domicile, is regarded by the Supreme Court of the United States as a privilege which may be waived.¹ This principle has been extended so far as to hold that it is applicable to a case where an action is brought in a court of the United States against a railway company whose domicile is in another State, and which is hence not an "inhabitant of the State in which the action is brought," within the Judiciary Act of 1887, as amended in 1888.² And so the fact that neither the plaintiff nor the defendant resides either in the district or in the State in which the suit is brought, does not prevent the defendant from waiving the defect of jurisdiction.³ And when a defendant corporation voluntarily submits itself to the jurisdiction, in such a case, its action cannot be overturned at the instance of stockholders and creditors, not parties to the suit as originally brought, but who are permitted to become parties by an intervening petition, although they show by their intervening petition that the jurisdiction has attached as the consequence of "misrepresentation, fraud, and collusion" between the plaintiff and the defendant.⁴

§ 7555. Waives Exemption from being Sued in the Particular Federal District.—So, although the corporation is, by its governing statute or otherwise, privileged from being sued in the particular county or judicial district, or other venue, yet if it voluntarily appears and defends the action on

¹ Central Trust Co. v. McGeorge, 151 U. S. 129; Ex parte Schollenberger, 96 U. S. 369, 378; First Nat. Bank v. Morgan, 132 U. S. 141; St. Louis &c. R. Co. v. McBride, 141 U. S. 127, 131. in Southern Pac. Co. v. Denton, 146 U. S. 202.

² St. Louis &c. R. Co. v. McBride, 141 U. S. 127, 131.

³ Central Trust Co. v. McGeorge, 151 U. S. 129. Doctrine recognized

⁴ *Ibid.*

its merits, it waives its privilege,¹—as, for instance, where a *national bank* is sued in a county other than that in which it is located.²

§ 7556. What Appearance not Deemed Such a Waiver. —

A corporation sued in a personal action in a court of a State, within which it is neither incorporated nor does business, nor has any agent or property, does not, by appearing specially in that court, for the sole purpose of presenting a *petition for the removal* of the action into the Circuit Court of the United States, and by obtaining a removal accordingly, waive the right to object to the jurisdiction of the court for want of a sufficient service of the summons.³ So, an appearance for the special purpose of raising an objection that the defendant corporation is *sued in the wrong Federal district* is not a waiver of the right to object to the jurisdiction over its person.⁴ Another court goes to the extreme length of holding that where a *non-resident* person,⁵ or corporation,⁶ is sued in the domestic forum, by citation served outside the State, an appearance by the non-resident, although expressly declared to be for the sole purpose

¹ *Ante*, § 2574.

² *First Nat. Bank v. Morgan*, 132 U. S. 141; *Ex parte Schollenberger*, 96 U. S. 378; *Central Trust Co. v. McGeorge*, 151 U. S. 129.

³ *Goldey v. Morning News*, 156 U. S. 518; affirming *s. c.* 42 Fed. Rep. 112. That the insufficiency of the service of summons upon the defendant corporation is *not waived by filing a petition for removal*, has been the general doctrine of the Circuit Courts of the United States,—see the following cases, cited in the preceding case: *Parrott v. Alabama Ins. Co.*, 5 Fed. Rep. 391; *Blair v. Turtle*, 1 McCrary (U. S.), 372; *Atchison v. Morris*, 11 Biss. (U. S.) 191; *Small v. Montgomery*, 5 McCrary (U. S.), 440; explaining *Sweeney v. Coffin*, 1 Dill. (U. S.) 73, 76; *Hendrickson v. Chicago &c. R. Co.*, 22 Fed. Rep.

569; *Elgin Canning Co. v. Atchison &c. R. Co.*, 24 Fed. Rep. 866; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miner v. Markham*, 28 Fed. Rep. 387; *Perkins v. Hendryx*, 40 Fed. Rep. 657; *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31; *Bentliff v. London & Colonial &c. Corp.*, 44 Fed. Rep. 667; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. Rep. 433; *Forrest v. Union Pac. R. Co.*, 47 Fed. Rep. 1; *O'Donnell v. Atchison &c. R. Co.*, 49 Fed. Rep. 689; *Alhauser v. Butler*, 50 Fed. Rep. 705; *M'Gillivray v. Olafin*, 52 Fed. Rep. 657.

⁴ *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Mexican Central Railway v. Pinkney*, 149 U. S. 194; *Galveston &c. R. Co. v. Gonzales*, 151 U. S. 497.

⁵ *York v. State*, 73 Tex. 651.

⁶ *St. Louis &c. R. Co. v. Whitley*, 77 Tex. 123.

of pleading to the jurisdiction over its person, is a waiver of this immunity from suit within the jurisdiction, and perfects the service of process against it.

§ 7557. **Admits that It is Sued by the Right Name.** — So, where an action is commenced against a corporation by a *wrong name*, if the corporation appears and pleads to the merits, without pleading the misnomer in *abatement*, this will be a waiver of its right of objection on that ground, and will give the court jurisdiction to proceed to judgment against it in the name by which it has been impleaded.¹

§ 7558. **What is a Voluntary Appearance for the Purposes of the Action.** — Upon the question what will be deemed a voluntary appearance by a foreign corporation for the purpose of giving jurisdiction of an action against it, there is more difficulty. The true principle seems to be that a voluntary appearance *for the mere purpose of objecting to jurisdiction over the person* of the defendant will not be deemed a submission to the jurisdiction of the court such as will give it the power to proceed. But an appearance for the purpose of contesting the merits will be.² And it is a conclusion equally sound that an appearance for the mere purpose of *objecting to the jurisdiction of the court over the subject-matter of the action* is a waiver of any defect in the process or its execution whereby the court acquired jurisdiction *over the person* of the defendant.³

¹ *Virginia &c. Steam Nav. Co. v. United States*, Taney (U. S.), 418; *Stone v. Congregational Soc.*, 14 Vt. 86; *School Dist. v. Griner*, 8 Kan. 224. After the corporation has appeared and the cause has been referred, this objection cannot be raised before the referee: *Stone v. Congregational Soc.*, 14 Vt. 86.

² *McCormick v. Pennsylvania R. Co.*, 49 N. Y. 303; *Brooks v. New York &c. R. Co.*, 30 Hun (N. Y.), 47.

Judicial authority on this proposition is unanimous, and therefore it will be unnecessary to cite cases.

³ *Handy v. Insurance Co.*, 37 Ohio St. 366. There are, however, *decisions which seem to proceed in disregard of these principles*. Thus, in one case the foreign corporation appeared and filed a special demurrer to the complaint upon the sole ground that the court had no jurisdiction over its person, it being a foreign corporation;

§ 7559. What is not an Appearance. — If defendants are sued as a *foreign corporation*, and thereafter in court the papers are amended by making them *partners*, the amendment has the effect of commencing a *new action* against different parties, and is not merely an amendment of the original action. If the suit is by *attachment*, there must consequently be a *new affidavit*, in order to confer jurisdiction, unless the making of the same is waived by an appearance. In such a case, an appearance and pleading to the action where the suit is a case against a corporation, is not an appearance to the new action which has been created by the amendment.¹ Under most systems of procedure a party may *appear specially*, for the purpose of making objections to the manner in which jurisdiction is attempted to be obtained over him, without subjecting himself to the consequence of a general appearance.²

§ 7560. What is an Authorized Appearance by a Corporation. — Such being the importance of the consequences which follow an appearance by a corporation, it is next proper to inquire what act of a corporation will constitute an appearance such as will operate as a waiver on its part of the objections already named. We must recall, at the outset, that a

and this was held an appearance for all the purposes of the action. *Reynolds v. La Crosse &c. Packet Co.*, 10 Minn. 178.

¹ *Inman v. Allport*, 65 Ill. 540. Where the action was against the corporation, a statement in the record that "the defendants were, severally, duly called, but came not, nor either of them," sufficiently showed that such defendants were not present by attorney or otherwise. *Union Pac. R. Co. v. Horney*, 5 Kan. 340.

² *Lincoln v. Hilbus*, 36 Mo. 149; *Smith v. Rollins*, 25 Mo. 408, 410; *Mulhearn v. Press Pub. Co.*, 53 N. J.

L. 150; *s. c.* 20 Atl. Rep. 760. In an action against a corporation, where counsel for defendant obtained a rule to show cause why the service of process should not be set aside, he got an order extending his time to file a plea. It appearing that the order was taken to prevent judgment being entered by default before the determination of the rule to show cause, and for the purpose of forfeiting the defendant's position under the rule, the court refused to regard it as a general appearance which waived the irregular service. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150.

corporation, being an intangible person, *can appear only by attorney*.¹ We may next advert to the old doctrine that authority to appear for a corporation in a suit against it could only be communicated *by its corporate seal*.² As already seen,³ this doctrine is exploded, and the law now is that a corporation may appoint an attorney, or any other agent, *without the use of its corporate seal*. Upon the question what will be *evidence of the authority of the attorney to appear* for the corporation, there is, then, no difference between the case of an appearance by an attorney in behalf of a corporation, and an appearance by an attorney in behalf of an individual. The rule in every case is that an appearance in behalf of the defendant, by a duly authorized, licensed, and qualified attorney of the court, will carry with it a presumption of his authority to appear, until such authority is challenged and overthrown.⁴

§ 7561. **Waiving Service and Confessing Judgment.** — The right of a corporation to *confess a judgment* is unquestionably an incident of its capacity of being sued as an artificial person.⁵ Indeed, it might be regarded as an incident of its power to pay its debts. A limitation on the power may exist where it is exercised for the purpose of *preferring particular creditors*,⁶ the corporation being insolvent. Another limitation may concern the *power of a particular officer* to bind the corporation by confessing a judgment for it; and most cases concerning confessions of judgment by corporations take for granted that the corporation possesses the power, and merely

¹ Osborn v. Bank of United States, 9 Wheat. (U. S.) 738.

² Cape Sable Co.'s Case, 3 Bland (Md.), 606.

³ Ante, § 5061.

⁴ Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 829; State Bank v. Bell, 5 Blackf. (Ind.) 127. That in an action by a corporation in a justice's court, a formal appearance by an attorney for the corporation, in

the presence of its manager, will be deemed an authorized appearance for the purpose of upholding the judgment, although the attorney did not make oath to his authority, — see Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

⁵ Shute v. Keyser (Ariz.), 29 Pac. Rep. 386.

⁶ Ante, §§ 6492, 6512, 6537.

6 Thomp. Corp. § 7561.] ACTIONS BY AND AGAINST.

challenge the power of the officer.¹ A corporation may execute a power of attorney to confess judgment, *waiving service*, although its charter provides for a particular form of service.²

¹ See, for example, *Miller v. Bank*, 237; *Thew v. Porcelain Man. Co.*, 5 Or. 291; *McMurray v. St. Louis &c. S. C.* 415; *White v. Crow*, 17 Fed. Man. Co., 33 Mo. 377; *Joliet &c. Co. Rep.* 98.
v. Ingall, 23 Ill. App. 45; *Stokes v.*
New Jersey Pottery Co., 46 N. J. L.

² *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

CHAPTER CLXXXI.

PARTIES TO SUCH ACTIONS.

SECTION

7566. Corporation when a necessary plaintiff.

7567. Corporations as joint plaintiffs.

7568. When corporation a defendant in actions at law.

7569. Joinder of several corporations as defendants.

7570. When corporation is a necessary party defendant in equity.

7571. Is a necessary party when holder of legal title.

7572. Corporation when not a necessary party defendant.

7573. Directors parties to actions affecting the trust reposed in them.

7574. President when a necessary party and when not.

SECTION

7575. Directors, trustees, officers, agents, etc., when not necessary or proper parties.

7576. When receivers entitled to be made parties.

7577. When stockholders may be parties defendant.

7578. Further of this subject.

7579. Stockholders for the corporation.

7580. Statutory exceptions permitting stockholders to be summoned.

7581. Other views as to the joinder of stockholders as defendants.

7582. Stockholders when not necessary parties defendant.

7583. What objections may be raised by one having no right to plead.

§ 7566. **Corporation when a Necessary Plaintiff.** — The corporation is a necessary plaintiff in an action to vindicate its rights in respect of its property, where it has made a conveyance thereof to secure a debt; because it remains the substantial owner, although the legal title and right of possession is in the trustee to whom conveyance has been made.¹

§ 7567. **Corporations as Joint Plaintiffs.** — Two corporations claiming lands as tenants in common cannot *join* in a *writ of entry*,² for the reason that corporations cannot hold

¹ Samuel v. Holladay, 1 Woolw. (U. S.) 400.

² Rehoboth v. Hunt, 1 Pick. (Mass.) 224, 228.

land as tenants in common, which is contrary to the general theory;¹ but if one of them has a right to maintain an action, the court may grant leave to strike out the name of the other.² It is said that each of them may sue for its undivided right.³ But two corporations may unite in an action of *assumpsit* to recover money deposited in a bank in their joint names.⁴

§ 7568. When Corporation a Defendant in Actions at Law. — In actions *ex contractu*, at law, the corporation is the party to be sued where the obligation which is the subject of the suit is its obligation, and not that of the directors, trustees, or agents, by the hand or agency of whom it has been executed,⁵ — a subject considered at length in a former title.⁶

§ 7569. Joinder of Several Corporations as Defendants. — There is nothing in the nature of corporations which prevents several corporations from being joined as defendants in an action, either at law or in equity. Consequently, an action may be maintained jointly against two *railroad companies*, for injuries received in a *collision* caused by the *concurrent negligence* of both defendants, although there may be no concert of action or common purpose between them.⁷ So, if two insurance companies are severally liable on the same policy, they may be joined as defendants in an action to recover thereon.⁸ But where a complaint in an action alleged that several newspaper corporations together constituted the American Newspaper Union, which was a corporation, and the cause of action was a breach of contract by the general agent of the union for advertising in the newspapers represented by him, it was held that, as incorporators, the several corporations composing the

¹ *Ante*, § 5793.

² *Ibid.*

³ *Ibid.*

⁴ *New York & Sharon Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412. Compare *Gathwright v. Callaway County*, 10 Mo. 663.

⁵ *Herod v. Rodman*, 16 Ind. 241.

⁶ *Ante*, § 5074, *et seq.*; § 5127, *et seq.*; § 5164, *et seq.*

⁷ *Flaherty v. Minneapolis & C. R. Co.*, 39 Minn. 328; *s. c.* 12 Am. St. Rep. 654; 40 N. W. Rep. 160; 1 L. R. A. 680.

⁸ *Blasingame v. Home Ins. Co.*, 75 Cal. 633; *s. c.* 17 Pac. Rep. 925.

union ought not to be joined as defendants.¹ So, in a suit in equity by bondholders of one railroad company, whose road has been leased to another, through the influence of a third, which has obtained control of the property, to obtain an *accounting* of earnings, an injunction, and a rescission of the lease, all three companies are properly joined as parties defendant.²

§ 7570. When Corporation is a Necessary Party Defendant in Equity.—On the contrary, in every action in equity directly affecting the property or rights of the corporation, it is a necessary party defendant, except where it proceeds as plaintiff, although all its stockholders may join with it; and this for the reason, already stated,³ that the stockholders are not the joint owners of the property of the corporation, but that the title rests in the corporate entity as a person distinct from its aggregate members. Therefore, a proceeding in equity, to *appoint a receiver* of the property of a *de facto* corporation, cannot be sustained against all its members, unless the corporation is joined.⁴ The corporation is a necessary party to a suit by creditors against stockholders for collecting moneys due on unpaid assessments of their stock, or for capital once paid in, but afterwards improperly divided.⁵ It is upon this ground, as we have seen, that courts of equity have frequently refused to entertain jurisdiction of proceedings by creditors against the stockholders of *foreign corporations*, resident within the local jurisdiction. Here, the inability to make the corporation a party defendant is frequently regarded as an insuperable obstacle in the way of doing complete justice.⁶ But other courts have regarded this difficulty as not insuperable. The courts, in some of the cases previously cited, have found another objection in the supposition that

¹ Clegg v. Aikens, 5 Abb. N. Cas. (N. Y.) 95.

² Port Royal &c. R. Co. v. Branch, 78 Ga. 113.

³ Ante, § 1071.

⁴ Ante, § 6874; and see Baker v. Backus, 32 Ill. 79.

⁵ Bank v. Adams, 1 Pars. Sel. Cas.

(Pa.) 534; First Nat. Bank v. Smith, 6 Fed. Rep. 215; Dormitzer v. Illinois &c. Bridge Co., 6 Fed. Rep. 217; Walsh v. Memphis &c. R. Co., 6 Fed. Rep. 797; United States v. Globe Works, 7 Fed. Rep. 530.

⁶ Bank v. Adams, 1 Pars. Sel. Cas. (Pa.) 534, 549.

the decree would not conclude the corporation or its receiver, from compelling its stockholders to account a second time for the same assets.¹ Upon the same ground, the corporation is a necessary party defendant to a suit brought by a policyholder of a *mutual fire insurance company*, to compel the officers of the company to pay over a fund which they have collected by assessments on account of a loss of the plaintiff; because the debt is primarily due from the corporation, and not from the officers.² The corporation is also a necessary party to a bill filed by its stockholders against a municipal corporation and its officers, to restrain them from collecting a tax alleged to be illegal, levied by the municipality for general revenue purposes, on the property of the company within its limits; for the reason, as stated by Mr. Justice Davis, that "it would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter."³ In the limited class of cases where, if at all, a bill may be filed *by creditors* of a corporation *against its directors*, grounded on fraudulent breaches of their official trust, the corporation is a necessary party.⁴

§ 7571. Is a Necessary Party when Holder of Legal Title.

In an action at law affecting property, the *holder of the legal title* is generally the party to sue or be sued, though in some cases an action may be prosecuted by or against one who has a qualified title and right of possession,—for instance, against a sheriff who has levied upon goods; though in such cases it is customary to substitute as defendant the real owner, upon a suggestion made for that purpose. In suits in equity, the holder of the legal title is generally a necessary party to any actions affecting the title or possession of property, or establishing a lien thereon; etc. Keeping in mind these principles, we find

¹ See also *Wood v. Dummer*, 3 (U. S.) 626. See also *Dodge v. Woolsey*, 18 How. (U. S.) 331.
Mason (U. S.), 308, 316; *Mann v. Pentz*, 3 N. Y. 415, 423.

² *Lyman v. Bonney*, 101 Mass. 562. (N. Y.), 607; *Deerfield v. Nims*, 110 Mass. 115; *Lyman v. Bonney*, 101 Mass. 562.

³ *Davenport v. Dows*, 18 Wall.

that where an action is brought against a corporation by one of its promoters to obtain shares alleged to have been wrongfully issued to other parties who manipulated the company to the plaintiff's injury, such other parties should be joined as defendants.¹ For the same reason, in an action against the stockholders of a corporation, seeking to make them secondarily liable, by reason of having in their possession assets of the corporation, the corporation itself is a necessary party.² So, where an action was brought to enforce a mechanic's lien against certain *partners*, under the firm name of *The A. B. Co.*, and *The A. B. Co., a corporation*, answered, setting up its incorporation and alleging title to the property, it was held error to render judgment for the plaintiff because the corporation had not been made a party.³ So, a court refused, in an action by the State, the object of which was to prohibit the assignees of an authorized lottery from further exercising their franchise and to cancel the assignment,—to adjudge that the grant of the franchise had been exceeded and grant the relief prayed for, without having before it the trustees who were the holders of the legal title, as well as the *cestuis que trust*.⁴ If, on the other hand, the owner of the legal title is not made a party, his title is in no way affected by the result of the litigation.⁵

§ 7572. **Corporation when not a Necessary Party Defendant.**—It has been held that a corporation is not a necessary party to an action against its officers to compel them to transfer to the plaintiff shares of its stock on its books;⁶ but this is doubtful.⁷ So, it seems that a corporation is not a necessary party to an action to compel a stockholder to make a

¹ *Summerlin v. Fronteriza* Silver Min. Co., 41 Fed. Rep. 249; *s. c.* 7 Rail. & Corp. L. J. 451.

² *Swan Land & Co. v. Frank*, 39 Fed. Rep. 456.

³ *Rousseau v. Hall*, 55 Cal. 164.

⁴ *Com. v. Frankfort*, 13 Bush (Ky.), 185.

⁵ *Railroad Co. v. O'Harra*, 48 Ohio

St. 343; *s. c.* 26 Ohio L. J. 25; 28 N. E. Rep. 175.

⁶ *Gould v. Head*, 41 Fed. Rep. 240; *s. c.* 7 Rail. & Corp. L. J. 402; *ante*, § 2441.

⁷ A glance at the foot notes, *ante*, §§ 2425 to 2441, will show that in most cases the corporation was a party.

transfer of shares which he has agreed to sell to the plaintiff, though it has been said that it is not improper to implead the corporation as defendant.¹ Where one corporation has been *consolidated* with another, under a scheme by which it is *dissolved*, and shares in the new corporation are issued to its shareholders, neither the old corporation nor its officers are proper parties defendant to an action by one of its shareholders to enforce *specific performance* of the agreement of the new corporation to issue the shares.² A railroad company which has paid into court an award in condemnation proceedings, to which award there are adverse claimants, is not a proper party to a proceeding by a claimant to have the money paid to him.³ A railroad corporation is not a necessary or proper party to a proceeding for partition in consequence merely of having laid out and constructed its road over lands owned by tenants in common.⁴ Where a gravel road company possesses the power, under its governing statute, of laying an assessment upon adjacent land-owners to raise funds wherewith to build its road, and moneys are advanced to it on the pledge of the assessments, and afterwards the assessments are collected by its president,—it is not a necessary party to an action against the latter, or his assignee, for a conversion of the fund; because they belong to the creditors advancing the money on the security of them.⁵ To the principle stated in a preceding section,⁶ that in proceedings in equity affecting the property of a *foreign corporation*, it is a necessary party, an exception was admitted in New Jersey, to the extent of holding that the Court of Chancery of that State would extend its aid to a receiver of a foreign corporation seeking to obtain

¹ Sayward v. Houghton, 82 Cal. 628; s. c. 23 Pac. Rep. 120. Yet, as the corporation was not the party in interest, its presence on the record, as defendant, was not sufficient to prevent the defendant stockholder from demanding a change of venue to the county of his residence. *Ibid.*

² Babcock v. Schuylkill & C. R. Co.,

31 N. Y. St. Rep. 643; s. c. 9 N. Y. Supp. 845.

³ Northern Pac. R. Co. v. Jackman, 6 Dak. 236.

⁴ Weston v. Foster, 7 Met. (Mass.) 297.

⁵ Pugh v. Miller, 126 Ind. 189; s. c. 25 N. E. Rep. 1040.

⁶ *Ante*, § 7570. And see *ante*, §§ 6874, 7351.

possession of its property situated in New Jersey, as against its own officers, who were endeavoring by fraud and subterfuge to withhold it,—the court holding, as it was obliged to in order to assert its jurisdiction, that the foreign corporation was not a necessary party.¹

§ 7573. Directors Parties to Actions Affecting the Trust Reposed in Them. — It may perhaps be stated, as a general rule, that the directors or trustees of a corporation are necessary parties to all actions directly affecting the trust reposed in them,—whether to enforce the performance of their trust,² or to restrain fraudulent breaches of it.³

§ 7574. President when a Necessary Party, and when not. — When the object of the action is to enjoin unlawful action by the corporation, and the president holds a majority of its stock and is responsible for the unlawful acts complained of, he and his agents are proper parties defendant.⁴ On the other hand, although the president may have been primarily guilty of the fraud or breach of trust which has resulted in loss to the corporation and its stockholders, yet where the action proceeds against two other directors on the ground of their negligence in permitting such acts of the president, he is not a necessary party, because no relief is sought against him.⁵

¹ *Bidlack v. Mason*, 26 N. J. Eq. 230. That a party cannot introduce a corporation into a controversy in which no decree can be obtained against it, and compel it to litigate one issue, in which it has no interest, between him and his own corporation, and another between it and a third company, in which neither he nor his own corporation has any interest,—see *Mayer v. Denver &c. R. Co.*, 38 Fed. Rep. 197; *s. c.* 6 Rail. & Corp. L. J. 49.

² *Karnes v. Rochester &c. R. Co.*,

4 Abb. Pr. (N. S.) (N. Y.) 107; *People v. Law*, 34 Barb. (N. Y.) 494.

³ Thus, in a suit to dissolve a corporation because of a fraudulent sale of property to it by one of its directors, the latter has been held to be a necessary party. *Tutweiler v. Tuscaloosa &c. Coal Co.*, 89 Ala. 391; *s. c.* 7 South. Rep. 398.

⁴ *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297; *s. c.* 48 N. W. Rep. 371.

⁵ *Smith v. Rathbun*, 22 Hun (N. Y.), 150.

§ 7575. **Directors, Trustees, Officers, Agents, etc., when not Necessary or Proper Parties.**—Where no relief of any kind, not even discovery, is sought against the directors or trustees of a corporation, they are neither necessary nor proper parties defendant, in suits in equity against the corporation.¹ They cannot, for instance, be joined as defendants with the corporation in a suit, the mere purpose of which is to enforce an equitable *lien* against *property* of the corporation.² Where two or more railroad corporations are consolidated, and the new corporation thus formed assumes the debts and obligations of the original companies, the directors or other officers of the new organization are not necessary or proper parties to an action brought by a holder of preferred and *guaranteed stock* of one of the old companies, to enforce an alleged contract made by it to pay specified *dividends* upon such stock.³

§ 7576. **When Receivers Entitled to be Made Parties.**—This subject has been more particularly considered when dealing with the subject of receivers of corporations;⁴ but a decision may be noted to the effect that where a receiver of a railroad property has, under an order of the court appointing him, issued *receiver's certificates*, the validity of which has been challenged by *intervening parties*, the receiver is a necessary party defendant to such intervention.⁵ Where certain stockholders of an insolvent corporation, which had passed into the hands of a receiver, brought suit, in behalf of themselves and others of their class, to recover in behalf of the corporation losses of its assets which had taken place by the unauthorized acts of the defendants as its officers in rendering it liable as indorser,—it was held that the receiver was an indispensable party, and that if he could not be made a party, a demurrer for want of parties must be sustained. In

¹ Allen v. New Jersey Southern R. Co., 49 How. Pr. (N. Y.) 14; State v. Jacksonville &c. R. Co., 15 Fla. 201.

² Norwood v. Memphis &c. R. Co., 72 Ala. 563.

³ Chase v. Vanderbilt, 62 N. Y. 307.

⁴ *Ante*, § 6982, *et seq.*

⁵ Central Trust Co. v. Sheffield &c. R. Co., 44 Fed. Rep. 526.

such a case it was not enough to show the failure or refusal of the receiver to bring the action to recover the wasted assets, but he must be made a party defendant as the representative of the corporation, in order that it might be bound; since the receiver would have, as a representative of the corporation, the right to maintain the action.¹ So, it has been held that the receiver of a corporation is entitled to be made a party plaintiff in an action instituted by the treasurer of the corporation, which action was pending when the receiver was appointed.²

§ 7577. When Stockholders may be Parties Defendant. —

It has been held that a stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage, alleged to have been executed by the corporation in its lifetime; and so has one who has acquired an independent title to a part of the lands embraced in the mortgage.³ It has also been held that stockholders may properly be made parties defendant, in a suit against the corporation to enforce a lien upon its property, where they are jointly and severally liable with the corporation, for the purpose of preventing a multiplicity of suits.⁴ And, generally, it seems that where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, they have a right to come in as parties to a suit against the company, and ask that their property shall be relieved from the effect of such fraud.⁵ There are also local rules of procedure where, under statutes, it is necessary to join the stockholders with the corporation, in order to charge them with *individual liability*, — as in Michigan for *debts due to laborers*.⁶ But, outside of these and other like exceptions, the gen-

¹ Porter v. Sabin, 36 Fed. Rep. 475.

² Houston v. Redwine, 85 Ga. 130; s. c. 11 S. E. Rep. 662. As to the substitution of receivers in pending actions, see *ante*, § 6986.

³ Chouteau v. Allen, 70 Mo. 290, 342.

⁴ Manufacturing Company v. Bradley, 105 U. S. 175.

⁵ Bayliss v. Lafayette & c. R. Co., 8 Biss. (U. S.) 193.

⁶ Thompson v. Jewell, 43 Mich. 240. See also Milroy v. Spurr Mountain & c. Co., 43 Mich. 231; *ante*, § 3141, *et seq.*

eral rule is, that the stockholders cannot be joined as parties defendant in actions against the corporation, but, on the contrary, that they are bound by the judgments rendered against the corporation *by representation* through it.¹

§ 7578. **Further of This Subject.** — Without entering into details or reasoning, the corporation has been held to be a necessary party defendant in proceedings on behalf of the people to restrain the usurpation of corporate franchises;² in actions against stockholders, in which the claims sought to be enforced are claims sounding in damages by reason of an alleged breach by the corporation of its covenants, and misrepresentations in regard to the value and profits of property sold by it;³ in actions against the stockholders, where it is sought to make them secondarily liable, as having in their possession assets of the corporation;⁴ in actions by stockholders to recover personal judgments against the directors, grounded on their mismanagement or neglect;⁵ in an action to restrain the building of a railroad under a grant from a city of a franchise for that purpose, where it is claimed that the city has disposed of the right for an insufficient consideration and in violation of its charter, — the municipal corporation being a necessary party;⁶ in an action by a policyholder of a mutual insurance company against the directors, proceeding on the ground that they have misapplied money collected for the specific purpose of paying his demand;⁷ in a bill by a stockholder to set aside a mortgage made by the corporation, where there has been a foreclosure and sale;⁸ in suits in equity by creditors of the corporation against its officers and stockholders;⁹ in an action to restrain a county treasurer from collecting a tax to aid in the construction of a

¹ *Ante*, §§ 3499, 4471, *et seq.*

² *People v. Flint*, 64 Cal. 49.

³ *Swan Land & Cattle Co. v. Frank*, 39 Fed. Rep. 456.

⁴ *Ibid.*

⁵ *Camp v. Taylor* (N. J.), 19 Atl. Rep. 968.

⁶ *People v. Law*, 34 Barb. (N. Y.) 494.

⁷ *Brown v. Orr*, 112 Pa. St. 233.

⁸ *Coxe v. Hart*, 53 Mich. 557.

⁹ *Deerfield v. Nims*, 110 Mass. 115.

See also *ante*, § 3509, *et seq.*

turnpike, on the ground that the turnpike company has been organized as a corporation pursuant to the statute,—the pretended corporation being made a party defendant by its assumed corporate name;¹ in a bill in equity filed by one of the stockholders against one of its officers, constituted its trustee by resolution for the winding-up and distribution of its assets, the object being for an accounting and settlement of the plaintiff's interest.² It has been held that, in a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party, plaintiff or defendant. If the corporation refuses to bring such suit upon request, its bondholder or creditor may do so, and make the corporation a party defendant.³ It should be added that where the corporation is, owing to the nature of the action, a necessary party defendant, the fact that it has no officer or agent on whom process can be served shows no valid reason for not making it a party; since if the plaintiff cannot find it within the jurisdiction where he brings his action, he must go to the place where it can be found.⁴

§ 7579. Stockholders for the Corporation.—It is a settled principle of law that stockholders have no such interest in the property of the corporation as enables them to sue or defend for it.⁵ They consequently have no right to *notice*, individually, in a suit against the corporation, or in a proceeding affecting its property.⁶ Nor does the fact that the stockholder may ultimately become personally liable for the debts of the corporation, of itself, give him the right to appear and defend in actions brought against it.⁷ “A corporation,” said Shaw,

¹ Knight *v.* Flatrock &c. Co., 45 Ind. 134.

² Young *v.* Moses, 53 Ga. 628.

³ Newby *v.* Oregon &c. R. Co., Deady (U. S.), 609.

⁴ Swan Land & Cattle Co. *v.* Frank, 39 Fed. Rep. 456.

⁵ *Ante*, §§ 4471, 4476, *et seq.*; Habicht *v.* Pemberton, 4 Sandf. (N. Y.) 657; Hamilton *v.* Glenn, 85 Va. 901; *s. c.* 13 Va. L. J. 242; 9 S. E. Rep. 129;

Blackman *v.* Central R. &c. Co., 58 Ga. 189; Lane *v.* Weymouth, 10 Met. (Mass.) 462; Byers *v.* Franklin Coal Co., 14 Allen (Mass.), 470; Farnum *v.* Ballard Vale Machine Shop, 12 Cush. (Mass.) 507.

⁶ Peirce *v.* Somersworth, 10 N. H. 369.

⁷ Byers *v.* Franklin Coal Co., 14 Allen (Mass.), 470.

C. J., "is a body politic, a person in law, distinct from that of all its members, and may deal with them, sue them, or be sued by them, as by other parties. If one member or set of members might appear and represent the corporation, any others may do the same. They may make different and inconsistent defenses, bind the corporation by their acts and admissions, against the will of the majority legally expressed, and thus lead to confusion and a conflict of rights."¹ An exception to the rule is admitted in equity where the governing body of the corporation will not use its name for the purpose of bringing the necessary action to enforce its rights, — in which case, after exhausting reasonable efforts to induce it to do so, the shareholders are allowed to sue for the corporation.² Under similar circumstances, where the governing body, in breach of their trust, refuse to defend actions brought against the corporation, shareholders have been allowed to be made parties, for the purpose of making defense in its behalf.³

§ 7580. Statutory Exceptions Permitting Stockholders to be Summoned.—Stockholders are sometimes summoned in the action at the same time with the corporation. When this is done, it is in accordance with the terms of a positive statute. Thus, a statute of Massachusetts provided that "the person or property of any stockholder in a manufacturing corporation shall not be hereafter taken upon any execution issued against the corporation, unless a summons in the action was left with said stockholder"⁴; and further "that any stockholder with whom such summons has been left shall be admitted to defend in any such action; and if it shall appear that he is not liable therein, judgment for him shall be entered upon the issue joined, and for his costs; and judgment may be entered

¹ *Farnum v. Ballard Vale Machine Shop*, 12 Cush. (Mass.) 507.

² *Ante*, § 4479, *et seq.*

³ *Morrill v. Little Falls Man. Co.*, 46 Minn. 260; *s. c.* 48 N. W. Rep. 1124. In this case the plaintiff was the president of the corporation; he brought

an action against the corporation to recover land, and had the summons served upon himself, as its president, and upon another person as its secretary.

⁴ *Laws Mass.* 1851, ch. 315, § 1.

in the same action against the said corporation for damages and costs as upon a default.”¹ Under this statute the persons summoned as stockholders were never permitted to answer to the merits of the action. The action was left, as before, to be defended by the corporation itself. The other persons summoned could allege only such defenses as bore upon the question of their membership in the defendant corporation. In no proper sense, therefore, were they parties to the action.²

§ 7581. **Other Views as to the Joinder of Stockholders as Defendants.**—It has been held that a stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage, alleged to have been executed by the corporation in its lifetime;³ but the grounds of the decision are not given, and the conclusion may be doubted. It was said by the Supreme Judicial Court of Maine, in one case, that, in a suit against a corporation, a stockholder had no right to appear and make a defense to it; nor could he bring a writ of error to reverse the judgment.⁴ Upon this last point, however, a contrary conclusion was definitely reached in later cases.⁵ These decisions proceed upon the rule of the common law that *privies in law*,—that is to say, those having an interest in the judgment or in the property affected by it, are entitled to prosecute a writ of error to reverse the judgment, although not parties to the record.⁶ The contract of subscription to the capital stock of a corporation has always been regarded as a several contract between

¹ Laws Mass. 1851, ch. 315, § 2.

² *Holyoke Bank v. Woodman Paper Man. Co.*, 9 Cush. (Mass.) 576; *Farnum v. Ballard Vale Machine Shop*, 12 Cush. (Mass.) 507; *Robbins v. Suffolk Co.*, 12 Gray (Mass.), 225; *Byers v. Franklin Coal Co.*, 14 Allen (Mass.), 470.

³ *Chouteau v. Allen*, 70 Mo. 290, 342.

⁴ *Whitman v. Cox*, 26 Me. 335.

⁵ *Merrill v. Suffolk Bank*, 31 Me. 57; *s. c.* 50 Am. Dec. 649; *Rankin v. Sherwood*, 33 Me. 509.

⁶ *Porter v. Rummery*, 10 Mass. 64, 68; *Shirley v. Lunenburg*, 11 Mass. 379, 384; *Marr v. Hanna*, 7 J. J. Marsh. (Ky.) 642; *s. c.* 23 Am. Dec. 449. Thus, it is said in *Viner's Abridgment* that “the writ of error shall be brought by him who would have the thing for which the judgment is erroneously given, if the judgment had not been given.” *Vin. Abr.*, tit. *Error*, K, pl. 1. See also 2 *Saund.* 46 a, note 6; *Ibid.* 101 e, note 1.

each subscriber and the corporation; and upon a suit in equity brought by a subscriber to rescind the contract, or to recover his money, it has never been held necessary to join the other subscribers or shareholders as defendants.¹ But where there is an averment of insolvency and a prayer for the settlement of the affairs of the institution, under an order of the proper court, all the stockholders may be made parties, so as to adjust the whole affairs of the institution, and determine their respective rights, liabilities, and cross-equities.² Under other theories of practice, the stockholders need not be joined, especially when numerous and scattered, but all are *bound by representation* through the corporation where it is made defendant.³ Of course, if the interest or liability of the stockholder is direct, and not incidental or collateral, then he must be joined as a party defendant if he is not a party plaintiff. Thus, a decree cannot properly be entered in a proceeding to which only a corporation and its officers are made parties, if an adjustment of the rights of a new stockholder be involved.⁴ So, in a suit against the corporation, if a party who claims to be the owner of shares of its stock, standing in the name of another person, which he alleges the corporation has wrongfully transferred to such other person on its books, demand the recovery of the stock itself, the stockholder in whose name it stands is a necessary party to the action.⁵

§ 7582. Stockholders when not Necessary Parties Defendant. — The *stockholders* of a corporation being persons distinct from the corporation, it is not necessary to join them, in any actions affecting the corporation or its management, in the absence of special circumstances.⁶ They need not, for instance, be joined in an action to reduce or annul assessments

¹ *Chio v. Beard*, 11 Mo. App. 21, 26.

² *Herron v. Vance*, 17 Ind. 595.

³ *Ante*, § 3499.

⁴ *St. Louis Paint Man. Co. v. Mepham*, 30 Mo. App. 15.

⁵ *Reid v. Commercial Ins. Co.*, 32 La. An. 546. Circumstances under

which the real owner of shares obtained by fraud from the trustees by a nominal owner is a proper party plaintiff,—see *Hazard v. Dillon*, 34 Fed. Rep. 485.

⁶ *Ante*, §§ 4471, 4476, *et seq.*

of public taxes laid upon the shares of the capital stock of the corporation, under a statute constituting the corporation their agent for the purpose of assessment and collection;¹ nor in an action by a trustee, in a deed of trust for the creditors, of an insolvent corporation, to have the court, by its decree, direct an assessment to be made upon its stockholders for the liquidation of its debts,—the stockholders being represented by the corporation and bound through it;² in a bill in equity to secure the appointment of a receiver of the assets of the corporation;³ in an action by one of the stockholders to prevent a misappropriation of corporate funds by the directors;⁴ and in an action against the corporation, founded upon the fraudulent practices of its officers.⁵ Under a statute,⁶ providing that when two or more persons associate in any business and transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, and when they are so sued the members of the association need not be joined.⁷

§ 7583. What Objections may be Raised by One having No Right to Plead.—Neither the stockholders nor the officers of a corporation unless parties to the record can be regarded as parties to the suit,⁸ and, of course, strictly speak-

¹ *Planters' Crescent Oil Co. v. Jefferson Assessor*, 41 La. An. 1137; *s. c.* 6 South. Rep. 809.

² *Vanderwerken v. Glenn*, 85 Va. 9; *s. c.* 13 Va. L. J. 91; 6 S. E. Rep. 806; 17 Wash. L. Rep. 86; *Hamilton v. Glenn*, 85 Va. 901; *s. c.* 9 S. E. Rep. 129. That this is not the universal rule, see *ante*, § 3493.

³ *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *s. c.* 14 N. E. Rep. 214; reversing *s. c.* 23 Ill. App. 72; *ante*, § 6874.

⁴ *Wickersham v. Crittenden*, 93 Cal. 17; *s. c.* 28 Pac. Rep. 788. Compare *ante*, § 4564, *et seq.*

⁵ *Silver Valley Min. Co. v. Balti-*

more Gold &c. Smelting Co., 99 N. C. 445.

⁶ Cal. Code Civ. Proc., § 388.

⁷ *Hewitt v. Storey*, 39 Fed. Rep. 719. That an action cannot be maintained by two directors against the corporation, joining a preferred stockholder and another director, to restrain the preferred stockholder from suing the corporation for an accounting and for dividends, for the reason, among others, that the defendants are improperly joined as having no common interest,—see *Gould v. Thompson*, 39 How. Pr. (N. Y.) 5.

⁸ *Bronson v. La Crosse &c. R. Co.*, 2 Wall. (U. S.) 283; *French v. First*

6 Thomp. Corp. § 7583.] ACTIONS BY AND AGAINST.

ing, parties only can plead. Notwithstanding, it has been held that one having no right to plead may, upon a motion that the defendant corporation be defaulted, show that the corporation was never served with process in the action.¹ And, on the principle stated in a preceding section, it has been held that, in case a judgment is rendered against a corporation after its dissolution, a stockholder may prosecute a *writ of error* and reverse it on that ground.²

Nat. Bank, 7 Ben. (U. S.) 488; *s. c.* 11 Nat. Bank. Reg. 189; Apperson *v.* Mutual Benefit &c. Ins. Co., 38 N. J. L. 272, 273; Blackman *v.* Central R. & B. Co., 58 Ga. 189; Whitman *v.* Cox, 26 Me. 335.

¹ Buck *v.* Ashuelot Man. Co., 4

Allen (Mass.), 357; Rand *v.* Proprietors of Upper Locks & Canals, 3 Day (Conn.), 441.

² Merrill *v.* Suffolk Bank, 31 Me. 57; *s. c.* 50 Am. Dec. 649; Rankin *v.* Sherwood, 33 Me. 509; *ante*, § 7581.

CHAPTER CLXXXII.

NAME IN WHICH ACTIONS BROUGHT BY CORPORATIONS.

SECTION	SECTION
7589. Actions to assert corporate rights or to redress corporate injuries brought in corporate name.	7596. When successors in office may sue.
7590. Corporation may sue in its own name on promise made to its officers for its benefit.	7597. Corporation party to contract in wrong name, suable by it in right name.
7591. Distinction between cases where the agency is disclosed and where it is concealed.	7598. If payable to the officer by description, the corporation may sue.
7592. Bank may sue on commercial paper made payable to its cashier.	7599. Effect of change of name of corporation.
7593. In such cases corporate officer may sue in his own name.	7600. Member cannot sue for the corporation.
7594. Doctrine that action may be brought either in the name of corporation or agent.	7601. Corporation not affected by judgment in actions against its officers.
7595. Promise made to trustees of unincorporated concern suable by trustees.	7602. Suing or being sued in the name of an officer.
	7603. Action in whose name after dissolution.

§ 7589. **Actions to Assert Corporate Rights or to Redress Corporate Injuries Brought in Corporate Name.**—As corporations have, by implication of law, the general power to sue in their artificial names,¹ and as this power is, in almost every instance, conferred in express language by the charter or other governing statute,—the *general rule* is that every action brought for the purpose of asserting a right accruing to, or of redressing a wrong done to, a corporation, whether at law or in equity, should be brought in the artificial name of the corporation, and not in the name of its individual trustees, officers, or members.² It will often happen, under this rule, that

¹ *Ante*, § 7360.

² *Wilson v. Trustees*, 8 Ohio, 174; *North St. Louis Christian Church v. McGowan*, 62 Mo. 279; *Porter v.*

the action will be brought in the name of the trustees, especially in the case of religious and educational corporations; because, in such a case, the trustees may be the body which is incorporated.¹

§ 7590. Corporation may Sue in its Own Name on Promise Made to its Officers for its Benefit.—It is a general rule of procedure, both at common law and under the codes, that a corporation may maintain, in its artificial name, an action

Nekervis, 4 Rand. (Va.) 359; Bradley v. Richardson, 2 Blatchf. (U. S.) 343; Illinois Hospital v. Higgins, 15 Ill. 185; Campbell v. Brunk, 25 Ill. 225; Hay v. McCoy, 6 Blackf. (Ind.) 69; Lexington v. M'Connell, 3 A. K. Marsh. (Ky.) 224; Mauney v. Motz, 4 Ired. Eq. (N. C.) 195; Allen v. New Jersey Southern R. Co., 49 How. Pr. (N. Y.) 14; Legrand v. Hampden Sidney College, 5 Munf. (Va.) 324. It is believed that all the decisions in this, and the succeeding sections in this article, may be reconciled upon the double proposition that an agent who contracts in his own name *may* sue on the contract, but that where he contracts in the name of his principal, the latter *must* sue. Sharp v. Jones, 18 Ind. 314; s. c. 81 Am. Dec. 359. A *religious corporation* may, for instance, maintain an action in its corporate name to establish a devise made in its favor (First Baptist Church v. Robberson, 71 Mo. 326); though in this last case the suit is usually brought by the executor or trustee under the will, by a bill in the nature of a bill of *interpleader*, and this for his own protection. *Ibid.*, p. 333; citing Stevens v. Warren, 101 Mass. 564; Bailey v. Briggs, 56 N. Y. 407; Com. Dig. Chan., 3, G, 6; 1 Redf. Wills, 492. So, a corporation, formed of the members of a partnership, can sue in equity in its corporate name

for a debt due the partnership. Griffin v. Macaulay, 7 Gratt. (Va.) 476. A banking association, organized under the general banking laws of New York, might formerly sue in its corporate name, or in the name of its president: Leonardsville Bank v. Willard, 25 N. Y. 574. But it was necessary to state that the contract had been made with the bank using its business name: Delafield v. Kinney, 24 Wend. (N. Y.) 345. Circumstances under which a corporation might maintain an action in its own name, against a third person for the value of certain shares, for the benefit of its own treasurer: Edgeworth Co. v. Wetherbee, 6 Gray (Mass.), 166.

¹ *Ante*, § 16. Thus, where, by a statute, "the selectmen, town clerk, and treasurer of a town for the time being," were "constituted and declared to be a body corporate and 'Trustees of the Ministerial and School fund,' in such town forever, with power to prosecute and defend suits at law," it was held that a suit by them was rightly brought in the name of the "Trustees of the Ministerial and School fund in the town of L.," and that it was not necessary that the names and official characters of such trustees should be particularly set forth in the writ. Ministerial &c. Fund v. Parks, 10 Me. 441.

upon any species of promise made to its trustees, directors, or other officers, in its behalf; and this is so whether the name of the corporation is disclosed by the contract or not, and whether the fact of the agency of the promisee is disclosed or not.¹ If, in such a case, the promise is made to the agent without disclosing the name of his principal or the fact of his agency, then the corporation, being the principal, and the real party in interest, may maintain the action in its own name, upon a proper averment and proof that the promise was made to it by the name of the promisee who acted as its agent.²

¹ *Ante*, §§ 5038, 5113.

² For instance, under the rules of pleading at common law, a banking corporation may maintain an action in its own name upon a note given to its cashier, upon an averment and proof that it was made to the corporation by that name. *Smith v. Branch Bank*, 5 Ala. 26. And, under the same system of pleading, where a bond is given to a committee, etc., of a corporation, to be paid to the corporation itself, the bond may be sued on in the name of the corporation; and the declaration may allege that the bond was made to the corporation under the description of the committee, etc. *New York African Soc. v. Varick*, 13 Johns. (N. Y.) 38. It has been so held, in the case of a bond given to the directors of a corporation, and to be paid to them, their successors and assigns. *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234, 242. See also *Curran v. Fanning*, 13 Hun (N. Y.), 466; *s. c. sub nom. Curran v. Sears*, 2 Redf. (N. Y.) 532 (devise to the trustees of a college); *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.), 476; *s. c.* 41 Am. Dec. 759. And so in the case of a bond made to the plaintiffs by the name and description of the "directors of the

Onondaga County Mutual Insurance Co." *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill (N. Y.), 476; *s. c.* 41 Am. Dec. 759. So, on a note payable to the "treasurer of the Board of Trustees of Carthage College," the college may sue. *Friedline v. Carthage College Trustees*, 23 Ill. App. 494. So, a note made payable to "G. W., treasurer of the Ministerial and School fund in Levant, or his successor in office," was suable in the name of the corporation whose treasurer he was. *Ministerial &c. Fund v. Parks*, 10 Me. 441. So, where a note was made payable to "J. R., agent of the Southern Life and Trust Company, or order," it was held to be suable in the name of the corporation. *Southern Life &c. Co. v. Gray*, 3 Fla. 262. So, where a note was indorsed to the president of a corporation by name, with an addition indicating the name of the corporation, it was held to be suable by the corporation in its corporate name. *Dupont v. Mount Pleasant Ferry Co.*, 9 Rich. L. (S. C.) 255. So, where one subscribed for shares in a turnpike company, and agreed to pay, on demand, to J. G. or order, all assessments, it was held that an action of *assumpsit* could be maintained against him *by the corpo-*

§ 7591. **Distinction between Cases where the Agency is Disclosed and where It is Concealed.**—In short, an undertaking to the *trustees of a corporation* should be enforced in the name of the corporation,¹ because the corporation is the beneficiary named in the contract, according to its true interpretation. When, in cases like the preceding, the instrument itself discloses the agency, and gives the name of the beneficiary, there is no difficulty, and no need of resorting to parol evidence, but it is a mere question of interpretation. But where the instrument does not disclose the agency, or the

ration to recover such assessments. *Taunton &c. Turnp. Co. v. Whiting*, 10 Mass. 327, 335; *s. c.* 6 Am. Dec. 124. So, where, under a scheme for the organization of a corporation such as already considered (*ante*, § 44), commissioners were appointed to conduct the organization and a subscriber to the shares gave his note payable to the commissioners,—it was held that the corporation might maintain *assumpsit* thereon. *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30. In the particular case the note was “a promise to pay the Commissioners of the Vermont Central Railroad,” and the court held that, upon the face of the instrument, the corporation was the beneficial payee. Or where the promise was “to pay Luther Stone, Town Treasurer, or his successor in office”: *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431; *s. c.* 11 Am. Dec. 704; or where a bill was indorsed, “pay to M. Clark, Esq., Cashier”: *Bank of Manchester v. Slason*, 13 Vt. 334. See further *ante*, § 4578; *Bank of United States v. Lyman*, 20 Vt. 666, 669; 1 Am. Lead. Cas. 461. And note the analogy between these holdings and the principle that a deed made to the trustees of a corporation is a deed to the corporation: *ante*, § 5113. So, in case of a written order to deliver

shares of stock to “D. A. N., President of the Eastern Railroad Co.,” the words “president of the Eastern Railroad Co.,” are not to be rejected as *descriptio personæ*, but are to be treated as *disclosing an agency* and as indicating enough to authorize an action in behalf of the principal, upon actual proof that the bargain was made on its account. *Eastern R. Co. v. Benedict*, 5 Gray (Mass.), 561; *s. c.* 66 Am. Dec. 384; 10 Gray (Mass.), 212; 15 Gray (Mass.), 289. So, where a note is made payable to a *public agent* or *public trustee*, the prevailing view is that it is suable only by the municipal corporation, or other public principal: *Irish v. Webster*, 5 Me. 171. To the same effect are *State v. Boies*, 11 Me. 474; *Trustees v. Parks*, 10 Me. 441; *Hunter v. Field*, 20 Ohio, 340; *Dugan v. United States*, 3 Wheat. (U. S.) 172; *United States v. Boice*, 2 McLean (U. S.), 352; *Supervisors v. Hall*, 42 Wis. 59; *Dan. Neg. Inst.*, § 1188. Compare *Fisher v. Ellis*, 3 Pick. (Mass.) 322, elsewhere cited, where, on a note payable to the treasurer of a parish or his successors in office, it was held that either the treasurer or the parish might sue.

¹ *Barnes v. Perine*, 9 Barb. (N. Y.) 202, 207.

name of the principal or beneficiary, the rule is the same, by analogy to the principle in the law of agency, that a promise made to an agent without disclosing his principal is a promise made to the principal, on which he may maintain an action in his own name.¹ Where the instrument is made payable to a person named, *for the use of the corporation*, then the question is free of all difficulty; because, on the face of the instrument, the corporation is the beneficiary payee. An action on a note made payable to the treasurer of a corporation, or his successor in office, for the use of the corporation, is properly brought in the name of the corporation.² Under the foregoing principle, a corporation can maintain an action upon a written contract, where it is mentioned throughout the body of the instrument as one of the contracting parties, although the contract is signed by its agents using their own names only, and without words to designate that they signed as agents, — the plaintiff declaring that the defendant, under the name of —, here giving the name signed to the contract, — “made a contract, a copy whereof is hereto annexed.”³

¹ Thus, where an agent purchases goods *without disclosing his principal*, or where the bill of sale is made to the agent himself, the property, immediately upon the execution of the contract, vests in the principal, and the right of action upon an *implied warranty* or on fraudulent representations made to the agent, is in the principal. *Cushing v. Rice*, 46 Me. 303; *s. c.* 71 Am. Dec. 579. In *Nave v. Hadley*, 74 Ind. 155, 157, it is said that an action may be maintained by an undisclosed principal upon a *promissory note* payable to the agent; but the general rule is otherwise in case of negotiable instruments. Except in those cases, it may be shown that contracting parties were the agents of other persons, so as to give the benefit of the contract to, or to charge its liabilities upon, an unnamed principal. An *undisclosed principal* may

be shown to be the real party in a transaction in which the agent is the only ostensible person: *Putnam v. White*, 76 Me. 551, 554; *Cushing v. Rice*, *supra*. See 1 Am. Lead. Cas. 643, where many authorities are collected.

² *Warren Academy v. Starrett*, 15 Me. 443. See also *Garland v. Reynolds*, 20 Me. 45.

³ *Lamson & Co. Man. Co. v. Russell*, 112 Mass. 387. The principle has been carried so far that, where a *public license* had been granted to the *directors* of a bridge corporation, to keep a *ferry* near where the bridge of the corporation had been carried away by a freshet, the income of which ferry was to be appropriated toward rebuilding the bridge, and afterwards the successors of such directors made a *parol lease* of the ferry and ferry-boat to another per-

§ 7592. **Bank may Sue on Commercial Paper made Payable to its Cashier.** — Contrary to the early doctrine, there is now a great preponderance of authority in favor of the proposition that where a note is drawn payable to a person named, with the addition of "cashier," the bank of which such person was cashier at the time when the note was drawn may maintain an action thereon, and that parol evidence may be introduced to show what bank was meant. Both of these questions were decided in the affirmative in a leading case in the Supreme Court of the United States, where an exhaustive opinion was delivered by Mr. Justice Clifford.¹ This would be especially true under the modern codes of procedure which require actions to be brought in the name of the *real party in interest*; but even where this new system of pleading has not been introduced, there are many holdings to the effect that a banking corporation may maintain an action upon a note payable to its cashier, it appearing that it was given for its benefit and that the promise was actually made to it.² Some of

son, the corporation could maintain an action for the rent in its own name. *Ticonic Bridge v. Moor*, 13 Me. 240.

¹ *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234. See also *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. (U. S.) 326; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Watervliet Bank v. White*, 1 Denio (N. Y.), 608; *Pratt v. Topeka Bank*, 12 Kan. 570; *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *Wright v. Boyd*, 3 Barb. (N. Y.) 523; *First Nat. Bank v. Hall*, 44 N. Y. 395; *s. c.* 4 Am. Rep. 698; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *Bank of Manchester v. Slason*, 13 Vt. 334; *Rutland &c. R. Co. v. Cole*, 24 Vt. 33; *ante*, §§ 4758, 5038, 5113.

² *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280; approved in *Charitable Association v. Baldwin*, 1 Met. (Mass.) 359, 365; *Lowell v. Morse*, 1 Met. (Mass.) 473, 475; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *First Nat. Bank v. Hall*, 44 N. Y. 395; *s. c.* 4 Am. Rep. 698; *Garton v. Union City Bank*, 34 Mich. 279; *Pratt v. Topeka Bank*, 12 Kan. 570. See also *Southern Life &c. Co. v. Gray*, 3 Fla. 262; *Alston v. Heartman*, 2 Ala. 699; *New York African Soc. v. Varick*, 13 Johns. (N. Y.) 38; *Hartford Bank v. Barry*, 17 Mass. 94; *Long v. Colburn*, 11 Mass. 97; *s. c.* 6 Am. Dec. 160; *Folger v. Chase*, 18 Pick. (Mass.) 63; *Ministerial &c. Fund v. Parks*, 12 Me. 441; *Rutland &c. R. Co. v. Cole*, 24 Vt. 33; *Barlow v. Congregational Soc.*, 8 Allen (Mass.), 460, 462; *Eastern R. Co. v. Benedict*, 5 Gray (Mass.), 561,

these decisions proceed upon the view that the contract, according to its true interpretation, is a promise made to the bank, and not to the cashier.¹ And in reference to the true meaning of the contract, the courts, it seems, will *judicially notice* what is a *general custom of trade*, that the accounts of banks with each other are usually kept in form with their cashiers, and that their paper is regularly drawn and indorsed in form by their cashiers, *eo nomine*.²

§ 7593. In Such Cases Corporate Officer may Sue in his Own Name.—It is not to be inferred, from the cases considered in the three preceding sections, that where a promise is made in terms to a corporate officer, or agent, or to a board of corporate officers, in their individual names, they have not the right to maintain an action thereupon, although words may be added to their names descriptive of their offices; and although the corporation might also, by the proper averments, maintain an appropriate action thereon.³ The reason seems

563; *s. c.* 66 Am. Dec. 384; Colburn *v.* Phillips, 13 Gray (Mass.), 64, 67; Smith *v.* Branch Bank, 5 Ala. 26.

¹ In a case where this was held it was said by Morton, J.: "If it be in truth a promise to the individual who was cashier when it was made, and not to the corporation, it is very clear that the plaintiffs cannot maintain this action; for he alone to whom a promise is made, or in whom its legal interest is vested, can enforce its performance or complain of its breach." Commercial Bank *v.* French, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280, 282; citing Allen *v.* Ayres, 3 Pick. (Mass.) 298.

² See *Sussex v. Sidney College v. Davenport*, 1 Wils. 184. Proceeding upon this view, where a promissory note was made payable "to the cashier of the Commercial Bank," it was held that the bank was the promisee and could maintain an action thereon, it appearing that the consideration

proceeded from it. Commercial Bank *v.* French, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280.

³ *Gilmore v. Pope*, 5 Mass. 491. Accordingly, it has been held that where the owner of a note, indorsed in blank, obtains the consent of a third person that the action thereon may be brought in the name of such third person, and thereupon fills the blank indorsement with his name, and causes suit to be instituted in the name of such indorsee,—no objection can be taken to the right of the plaintiff to bring the action. *Burnap v. Cook*, 32 Ill. 168, 171. See also *Bryant v. Dana*, 3 Gilm. (Ill.) 343, 349. But in an action by a trustee upon a promissory note, any defense going to the consideration may be made that might have been urged against the beneficial owner. *Merrill v. Randall*, 22 Ill. 227, 233; *Belohradsky v. Kuhn*, 69 Ill. 547, 551. Accordingly, it is no defense to an action on a

to be threefold: 1. They are the holders of the *legal title*. 2. The defendant, by making the promise to them, estops himself from alleging and proving that he made it to some one else. 3. A *trustee* having the *legal title* may sue in his own name *in a court of law*, and such a court has no concern with the trust upon which he holds the title, or with his application of the trust fund. If this is the correct principle, it is only the real beneficiary that can intervene, and show that the promise was in fact made to him, under the principles of the preceding sections. Upon this principle, where the promise is made to the *treasurer* of a corporation, he may maintain an action thereon in his own name, although the corporation is really the beneficiary.¹ So, where a promise is to pay to the *trustees* of an *incorporated* company or their successors, it has been held that an action thereon may be prosecuted *in the name of the trustees*, although other persons may have succeeded them.² Upon the same principle it has been held

promissory note to show that the beneficial ownership is in some one other than the plaintiff, unless the defendant can likewise show that he has a valid defense on the note in the hands of such other person. *Newton v. Turner*, 5 La. 46; *s. c.* 25 Am. Dec. 173. It may be added here that a recovery upon a note payable to a named person, with the addition of "cashier or order," cannot be defeated by the fact of the expiration of the charter of the bank at which the note was negotiable and payable. *Horah v. Long*, 4 Dev. & Bat. L. (N. C.) 274; *s. c.* 34 Am. Dec. 378.

¹ Thus, where a note was made payable to the treasurer of a parish, it was held that it would support a suit in the name of the treasurer, though it was given for funds of the parish. *Fisher v. Ellis*, 3 Pick. (Mass.) 322. Compare *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280, 283, — where this case is commented on. So, where a promis-

sory note was made payable to "A. B., agent" of a corporation named, it was held that A. B. could maintain an action thereon in his own name, the added words being merely *descriptio personæ*. *Buffum v. Chadwick*, 8 Mass. 103. Similarly, where the common-law system of pleading prevailed, a note made payable to A. B., executor, etc., was a note payable to A. B. personally, the added words being merely *descriptio personæ*; so that, upon the death of A. B., suit upon the note should have been brought in the name of *his* executor for the use of the administrator *de bonis non*, who succeeded him in the administration of the estate of his testator. *Cravens v. Logan*, 7 Ark. 103.

² *Binney v. Plumley*, 5 Vt. 500; *s. c.* 26 Am. Dec. 313; *Davis v. Garr*, 6 N. Y. 124; *s. c.* 55 Am. Dec. 387. See also *Bush v. Peckard*, 3 Harr. (Del.) 385. In *Colburn v. Phillips*, 13 Gray (Mass.), 64, 67, it was held (distinguishing the case of *Eastern*

that the *cashier* of an incorporated bank may maintain an action in his own name against the *acceptor of a bill of exchange*, drawn payable to the plaintiff as cashier, the promise being in form made to the cashier as an individual, and the addition being simply descriptive of the person,—as on a bill of exchange payable to the order of “M. Johnson, Cashier,” as such bills are often drawn when payable to banks.¹ In like manner, it is held that the cashier of an incorporated bank may recover upon the *common counts* for money had and received, the amount of a bill of exchange, drawn to him as cashier and accepted for value, although he holds the same in trust for the bank.² The rule of law which we are considering vests the legal title in the cashier personally, rejects the word “cashier” as *descriptio personæ*, and vests the right of action in him in virtue of his legal title, without regard to the equitable right of the bank.³

R. Co. v. Benedict, 5 Gray (Mass.), 561; s. c. 66 Am. Dec. 384, that an agent may also sue on a written agreement made by him in his own name in behalf of his principal. In Elkins v. Boston &c. R. Co., 19 N. H. 337; s. c. 51 Am. Dec. 184,—it was held that the agent of an undisclosed principal may maintain an action in his own name against a carrier for damages for loss of property he has agreed to carry. In Pearce v. Austin, 4 Whart. (Pa.) 489; s. c. 34 Am. Dec. 523,—it is held that an agent may sue in his own name upon a negotiable note indorsed in blank. This is in pursuance of a general rule that the holder of negotiable paper can maintain an action on it in his own name without showing title to it, and that the court will not inquire into his right to the paper, or his right to maintain a suit upon it, unless circumstances appear showing that his possession is *mala fide*. *Ibid.*; Dean v. Hewit, 5 Wend. (N.Y.) 257; Talman v. Gibson, 1 Hall (N.Y.), 308; Livingston v. Clinton, cited in 3

Johns. Cas. (N. Y.) 263. In Ogilby v. Wallace, 2 Hall (N. Y.), 553, the right to sue, even by a *fictitious person*, when the name of the real party was disclosed, unless some question arose as to the *bona fides* of the plaintiff's possession, was asserted.

¹ Johnson v. Catlin, 27 Vt. 87; s. c. 62 Am. Dec. 622; Van Ness v. Forrest, 8 Cranch (U. S.), 30. Compare Arlington v. Hinds, 1 D. Chip. (Vt.) 431; s. c. 12 Am. Dec. 704, where the note was given to “Luther Stone, Town Treasurer.” So, it has been held that a note indorsed to “S. S. Fairfield, Cashier,” will sustain an action in the name of Fairfield. Fairfield v. Adams, 16 Pick. (Mass.) 381. See also Little v. Obrien, 9 Mass. 423; Brigham v. Marean, 7 Pick. (Mass.) 40.

² Johnson v. Catlin, *supra*.

³ Rose v. Laffan, 2 Speers L. (S. C.) 424; s. c. 42 Am. Dec. 376; Campbell v. Humphries, 2 Scam. (Ill.) 478; McHenry v. Ridgely, 2 Scam. (Ill.) 309; s. c. 35 Am. Dec. 110; Horah v. Long,

§ 7594. **Doctrine that Action may be Brought either in the Name of the Corporation or Agent.**—It does not at all follow, from the preceding decisions, that the action may not be maintained in the name of the corporation, especially in those States which have abolished the distinction between legal and equitable actions, and which allow an action to be brought by the real party in interest. On the contrary, there are many judicial expressions in favor of the proposition, that, in the case of a note made, for instance, to *A. B., Cashier*, an action thereon may be brought in the name of the cashier, or in the name of the bank.¹

4 Dev. & Bat. L. (N. C.) 274; *s. c.* 34 Am. Dec. 378. This view was carried so far in one early case in the United States Circuit Court for the District of Vermont, that a right of action was *denied to the bank* upon a note payable to “*Samuel Jaudon, Esq., Cashier, or order.*” *Bank of United States v. Lyman*, 20 Vt. 666. That actions by boards of commissioners, upon statutes, are properly brought in the individual names of the members,—see *Hait v. Benson*, 18 How. Pr. (N. Y.) 302.

¹ See the discussion in *Fairchild v. Adams*, 16 Pick. (Mass.) 381; *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234, 242; *Shaw v. Stone*, 1 Cush. (Mass.) 228, 254; *Trustees v. Parks*, 10 Me. 441. “The above cases,” said Morton, J. (referring to some of the cases cited to the preceding section), “seem to show that, upon such paper, when made in the name of an agent or officer, though the beneficial interest be in the corporation, they may be sued by him; but they do not show that an action might not also be maintained in the name of the corporation.” *Commercial Bank v. French*, 21 Pick. (Mass.) 486; *s. c.* 32 Am. Dec. 280. There is an early judicial expression in Vermont to the effect that where a note is given to A. and B., as

trustees of a corporation, it must be sued on in their individual names, though it is otherwise where a note is given to a mere servant or agent of a corporation. *Binney v. Plumley*, 5 Vt. 500; *s. c.* 26 Am. Dec. 313. Compare *Proctor v. Webber*, 1 D. Chip. (Vt.) 371. It is believed that the modern authorities do not justify any such distinction. There are some expressions of opinion to the effect that where the contract is not negotiable, suit cannot be maintained in the name of an agent who has no interest in the contract. *Garland v. Reynolds*, 20 Me. 45. But the true principle is believed to be that if any person, who is named as the payee or obligee in a written contract, negotiable or not negotiable, albeit the agent or trustee of another, has the *legal title*, he has with it such an interest as will support an action at law for its enforcement, so long as the beneficiary permits the action so to be brought. *Ante*, § 7593. Under the modern codes of procedure, which require the action to be brought in the name of the *real party in interest*, but which except from this requirement the case of a *trustee of an express trust*, the rule would be the same; since in such a case the payee or obligee would be the trustee of an express trust.

§ 7595. **Promise Made to Trustees of Unincorporated Concern Suable by Trustees.** — But if the concern or enterprise is *not incorporated*, but trustees are appointed to put the same on foot, and they open subscriptions to the shares, one who subscribes to the same and becomes thereby liable to pay for them on an express promise, is *suable by the trustees*.¹ So, the trustees of a *voluntary benevolent association*, whose funds are raised by the voluntary contributions of its members, may maintain an action upon a note, although the makers thereof were members of the association.² In such a case the words "trustees," etc., added to the names of the promisees, are rejected as mere *descriptio personarum*.³ This conclusion is supported by the analogy of many cases which hold that where a note, bond, or other writing obligatory, is payable to a person with the addition of "guardian,"⁴ or "executor,"⁵ it is suable by him individually; or, in case of his death by *his* personal representative, in either case for the use of the real beneficiary.⁶

§ 7596. **When Successors in Office may Sue.** — Whenever the promise is made *to an officer* of a corporation, or unincorporated association, and his successors in office, then his *official successor* may sue to enforce the promise, if, under the rules of procedure in the particular jurisdiction, he might

¹ *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *s. c.* 32 Am. Dec. 514; *Cross v. Jackson*, 5 Hill (N. Y.), 478, 480.

² *Pierce v. Robie*, 39 Me. 205; *s. c.* 63 Am. Dec. 614; *Clap v. Day*, 2 Me. 305; *s. c.* 11 Am. Dec. 99.

³ *Ibid.* To the same effect, see *Innell v. Newman*, 4 Barn. & Ald. 419; *Potter v. Yale College*, 8 Conn. 52, 60. Compare *Garland v. Reynolds*, 20 Me. 45; *Ewing v. Medlock*, 5 Port. (Ala.) 82; *Alston v. Heartman*, 2 Ala. 699; *Harper v. Ragan*, 2 Blackf. (Ind.) 39; *Crawford v. Dean*, 6 Blackf. (Ind.) 181; *Southern Ex. Co. v. Craft*, 49 Miss. 480; *s. c.* 19 Am. Rep. 4.

⁴ *Thornton v. Rankin*, 19 Mo. 193; *s. c.* 59 Am. Dec. 338; *Jeffries v. McLean*, 12 Mo. 538; *Nickerson v. Gilliam*, 29 Mo. 456; *s. c.* 77 Am. Dec. 583. On the other hand, an administrator is liable upon a promissory note which he signs as administrator, but this is on the ground that he cannot bind the estate of the decedent by new contracts. *Davis v. French*, 20 Me. 21; *s. c.* 37 Am. Dec. 36; and see the cases cited in the note, 37 Am. Dec. 37.

⁵ *Turnbull v. Freret*, 5 Mart. (N. S.) (La.) 703.

⁶ *Buffum v. Chadwick*, 8 Mass. 103.

have sued instead of the corporation,¹—as where a promissory note was made to the president of the board of police of a county, and his successors in office.² So, where a note is given, in terms, to certain persons, as *trustees of an unincorporated association*, or their successors in office, such successors may, at the request of the association, maintain a suit upon it in the name of the former trustees, and such former trustees have no power, as plaintiffs of record, to dismiss the suit; but they may demand indemnity against the payment of costs.³

§ 7597. Corporation Party to Contract in Wrong Name, Suable by It in Right Name.—Closely allied to a principle already discussed, is the principle that where a promise is made to a corporation by a *wrong name*, the corporation may maintain an action thereon by its *right name*.⁴ On this principle where, in drawing a contract with a corporation, a name

¹ Haynes v. Covington, 13 Smedes & M. (Miss.) 408.

² *Ibid.*

³ Pierce v. Robie, 39 Me. 205; s. c. 63 Am. Dec. 614.

⁴ Commercial Bank v. French, 21 Pick. (Mass.) 486; s. c. 32 Am. Rep. 280, *per* Morton, J.; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 176; s. c. 51 Am. Dec. 59; Gifford v. Rocket, 121 Mass. 431. "A contract," says Morton, J., "may be made to or with a person as well by description as by name, and where the party can be ascertained, it will be valid, although their names be mistaken or their description be incorrect. It cannot be doubted that a note to the *Commercial Bank* would be valid and might be declared on as a promise to the plaintiffs, although their legal name is, 'the *President, Directors and Company of the Commercial Bank*.' So, a contract with the *stockholders*, or with the *president and directors*, or with the *directors of the Commercial Bank*, would doubtless be,

in its legal effects, a contract with the corporation." *Commercial Bank v. French*, 21 Pick. (Mass.) 486; s. c. 32 Am. Dec. 280, 282. Thus, it was held, in an early case in Massachusetts, that a note payable to Richardson, Metcalf & Co., might well be declared on as a promise to the Medway Cotton Manufactory. *Medway Cotton Manufactory v. Adams*, 10 Mass. 360. In another case in the same State, it was held that the promise in a subscription paper to the shares of a corporation, to pay the assessments which should be made on the shares, to John Gilmore or order, would support an action in the name of the corporation. *Taunton & c. Turnp. v. Whiting*, 10 Mass. 327; s. c. 6 Am. Dec. 124. In *Gilmore v. Pope*, 5 Mass. 491, it was directly decided that an action would not lie upon the same subscription in the name of Gilmore, but that it *must* be brought by the corporation. See also *Piggott v. Thompson*, 3 Bos. & Pul. 147.

is given variant with its true name, for the purpose of distinguishing it from other corporations having similar names, an action may be maintained thereon in its true name.¹ The principle of these and other cases is that the misnomer of a corporation in a grant, or written obligation made to it, does not destroy or defeat the grant or obligation, nor prevent a recovery by the corporation upon it in its true name, provided the corporation designed and intended by the parties to the instrument be shown by apt averments and proof.² The cases are numerous where a corporation, suing in its true name upon an instrument made to it, but varying from its true name, succeeds in its action, by averring and proving that the instrument was in fact *made to it by the name therein used*;³ and even where such an averment and proof are not made, the law will reject an unsubstantial and immaterial variance between the corporation as described in the writ and subsequent proceedings, and the corporation named in the instrument on which the action is bought.⁴

§ 7598. If Payable to the Officer by Description, the Corporation may Sue. — If the note is payable not to the officer by name, but by description of his office, as for instance, “to the cashier of the Commercial Bank or his order,” the corporation may sue.⁵

¹ Hagerstown Turnpike v. Creeger, 5 Har. & J. (Md.) 122; s. c. 9 Am. Dec. 495.

² Inhabitants v. String, 10 N. J. L. 323. Under this principle, where the declaration in an action on a bond alleged that the bond was made by the defendants to the “inhabitants of the township of Upper Alloway’s Creek, in the county of Salem, and State of New Jersey,” and proceeded thus: “And the said inhabitants of the township of Alloway’s Creek, in the county of Salem, do aver and say that they are one and the same body politic and corporate as is described and mentioned in the said writing obligatory, and no other,” — it was held

that this declaration was good on general demurrer. *Ibid.*

³ Case of Lynne Regis, 10 Coke Rep. 122; Case of the Abbot of York, cited 10 Coke Rep. 125; New York African Society v. Varick, 13 Johns. (N. Y.) 38; Inhabitants v. McCormick, 3 N. J. L. 500.

⁴ Berks &c. Turnp. Road v. Myers, 6 Serg. & R. (Pa.) 12; s. c. 9 Am. Dec. 402. But see Woolwich v. Forrest, 2 N. J. L. 115; *post*, § 7609.

⁵ Commercial Bank v. French, 21 Pick. (Mass.) 486; s. c. 32 Am. Dec. 280. See also Ramey v. Anderson, 1 McMull. (S. C.) 300; Alston v. Heartman, 2 Ala. 699.

§ 7599. **Effect of Change of Name of Corporation.**—A change of name by a corporation does not affect its identity or release it from the obligation to pay its just debts;¹ but it does affect the mode of pleading in an action brought against it upon a contract made by it by its former name. In such an action it is necessary to aver that the corporation now impleaded made the contract by its former name,² and without such an averment the action cannot be amended;³ since a judicial record thus made up would merely disclose a recovery against one corporation upon a contract made by another, without disclosing any reason why the latter corporation should be liable for the obligations of the former.⁴ There is a distinction, in respect of *variances* between the name of the corporation in the *writ* and the judgment, and its name in the *declaration* and the *judgment*. It is the variance between the name in the declaration and in the judgment which renders the judgment erroneous.⁵ The reason for this distinction seems to be that the process is merely the means of bringing the defendant into court, and if it appears and answers a declaration which describes it by a name different from that by which it has been summoned, its appearance and defense to the merits cure the defect in the process.⁶ Nevertheless, it has been held—though it seems to be a senseless refinement—that where a corporation has brought a suit by a name slightly variant from its true name, and it seeks to cure the defect by stating in its declaration its true name, with an averment that the defendant was served with process issued in the mistaken name, this variance between

¹ *Ante*, § 289.

² *Ready v. Tuscaloosa*, 6 Ala. 327; *Cumberland College v. Ish*, 22 Cal. 641, where it was held that the change of name was properly pleaded.

³ *Madison College v. Burke*, 6 Ala. 494.

⁴ It has been held, but upon reasons not stated, that where the name of a corporation has been changed by an amendatory act of the legislature,

but it has nevertheless brought a suit in its first name, it is not necessary, in order to sustain the suit as so brought, to show that the amendatory act has been rejected by its stockholders. *Beene v. Cahawba &c. R. Co.*, 3 Ala. 660.

⁵ *Beene v. Cahawba &c. R. Co.*, 3 Ala. 660.

⁶ *Ante*, § 7552.

the writ and the declaration can be pleaded in abatement; for the defect cannot be cured by such a recital in the declaration.¹

§ 7600. Member cannot Sue for the Corporation.—If a society or company is incorporated, then a member cannot bring an action to enforce an obligation made in its favor in his own name, because the right of action is in the corporation by its artificial name.² If it is unincorporated, he cannot bring the action without stating that the contract of association allows him so to do, or without stating other facts which enable one of a class of persons having a common interest, to sue for the benefit of all. An averment in such a case that the plaintiff is specially authorized to bring the action for the company or society, will not, it seems, be sufficient to sustain the action without showing how or why he is so authorized.³

§ 7601. Corporation not Affected by Judgment in Actions against its Officers.—If the action is prosecuted against an officer of the corporation, described in the pleadings with the addition of his official character, as, for instance, against “J., president of the M. Company,” and the execution runs in the same way, the sheriff cannot justify a seizure under it of the property of the corporation; for the simple reason that a judgment against A. does not authorize a levy upon the property of B.⁴ So, if one, describing himself as the president of a corporation, confesses judgment in favor of another, by such language as the following, — “I, A. B., president of the C. D. Co., confess judgment in favor of E. F.,” — this will not be a judgment confessed by the C. D. Company, and will not warrant the levy of an execution upon its property;⁵ but on the principle elsewhere alluded to, which excuses a variation between the *writ* and the *judgment*,⁶ although the writ runs

¹ *Beene v. Cahawba &c. R. Co.*, 3 Ala. 660, 668.

² *Ante*, § 4471, *et seq.*

³ *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657.

⁴ *North Carolina &c. Ins. Co. v. Hicks*, 3 Jones L. (N. C.) 58.

⁵ *Davidson v. Alexander*, 84 N. O. 621.

⁶ *Post*, § 7609.

against the officer of the corporation by such a description, yet if the declaration runs against the corporation, and if the corporation appears and pleads thereto, and does not plead in abatement the misnomer in the writ, it will be bound by the judgment.¹ It is said that the cases go merely to the extent that when a party is sued by a wrong name, and the writ is actually served on the right person, and he fails to appear and plead the matter in abatement, and judgment goes against him, though by the wrong name, he is concluded.²

§ 7602. Suing or being Sued in the Name of an Officer. — It was a feature of many of the English statutes creating companies, that a company might sue or be sued *in the name of a designated officer*. This feature was adopted by the legislature of New York with reference to *joint-stock companies and associations*, by an act passed in 1849 and amended in 1851.³ The original statute enacted that any joint-stock company or association, consisting of seven or more shareholders or associates, might sue or be sued in the name of its president and treasurer. The amendatory act extended the provisions of the former act "to any company or association composed of not less than seven persons, who are owners of or have an interest in any property, right of action, or demand, jointly or in common, or who may be liable to any action on account of any such ownership or interest," etc. In one case, the question was discussed, but not decided, whether the provisions of these acts extended to a voluntary association, such as a lodge of Odd Fellows, having more than seven members, but not organized in pursuance of any statutes.⁴ Subsequently it was held that a lodge of Masons was within the provision of the statute as amended;⁵ but it is to be observed that, by its terms, it extends to associations as well as to joint-

¹ Aycock v. W. & W. R. Co., 6 Jones L. (N. C.) 231.

² Davidson v. Alexander, 84 N. C. 621, 628.

³ N. Y. Laws 1849, ch. 258; amended by N. Y. Laws 1851, ch. 455.

⁴ Austin v. Searing, 16 N. Y. 112; s. c. 69 Am. Dec. 665.

⁵ Cohn v. Borst, 36 Hun (N. Y.), 562.

stock companies;¹ and so that, under it, it has been held that an action is well brought in the name of the treasurer of a division of a society known as the Sons of Temperance, where it is stated in the complaint that the association consists of seven associates and upwards;² and that the president of a Christian Association might bring such an action in his own name as such.³ So, an action against a mutual benefit society, composed of more than seven members, was held properly brought against its president by name, "and others."⁴ Judgment and execution, in such an action, are properly against the president, as such; but they bind, not his individual property, but the joint property of the association.⁵

§ 7603. Action in whose Name after Dissolution.—Under statutes, like those already considered,⁶ making the president and directors of a dissolved corporation its trustees for the purpose of winding up its affairs, with power to maintain or defend actions,⁷ if an action is brought by the *sole manager* of a corporation, after its dissolution, the action must be entitled in the name of such manager, and not in the name of the dissolved corporation itself.⁸

¹ *Sander v. Edling*, 13 Daly (N. Y.), 238.

² *Tibbetts v. Blood*, 21 Barb. (N. Y.) 650.

³ *De Witt v. Chandler*, 11 Abb. Pr. (N. Y.) 450.

⁴ *Olery v. Brown*, 51 How. Pr. (N. Y.) 92. See also *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69, 73; *Roobe v. Russell*, 2 Lans. (N. Y.) 244; *Westcott v. Fargo*, 61 N. Y. 542; *s. c.* 19 Am. Rep. 300; *Sallsman v. Schults*, 14 Hun (N. Y.), 256; *Columbia Bank v. Jackson*, 4 N. Y. Supp. 433.

⁵ *National Bank v. Van Derwerker*, 74 N. Y. 234. That the general agent of a joint-stock company, organized under an act of the British Parliament, may sue in New York, in his own name, for the benefit of the company, — see *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657. Compare *Myers v. Machado*, 6 Abb. Pr. (N. Y.) 198.

⁶ *Ante*, § 6739.

⁷ See Comp. Laws Kan. 1179, ch. 23, § 42.

⁸ *Paola Town Co. v. Krutz*, 22 Kan. 725.

CHAPTER CLXXXIII.

.PLEADINGS IN SUCH ACTIONS.

SECTION

- 7608. Variance in respect of corporate name.
- 7609. What variances immaterial.
- 7610. Misnomer and identity in case of corporations having similar names.
- 7611. Variance created by using names of the trustees.
- 7612. Misnomer in actions by or against joint-stock companies and unincorporated associations.
- 7613. Misnomer must be pleaded in abatement.
- 7614. Misnomer amendable.
- 7615. Effect of amendment where corporation is sued in wrong name.
- 7616. Declaring on obligations issued by corporations.
- 7617. Not necessary to aver that corporation had power to make the contract sued on.
- 7618. Qualifications of the foregoing.
- 7619. Pleading the defense of *ultra vires*.
- 7620. Not necessary to aver election, qualification, appointment, etc., of officer or agent.

SECTION

- 7621. Charter, when a private act, to be pleaded and proved.
- 7622. Declarations upon statutes other than charters.
- 7623. Statements before justices of the peace.
- 7624. Pleading in actions on by-laws.
- 7625. Declarations against corporations for improper or abusive exercise of statutory powers.
- 7626. Corporations plead and answer, how.
- 7627. Non-joinder of corporation plaintiff pleadable in abatement.
- 7628. Corporation may plead to the jurisdiction by attorney.
- 7629. Stage of proceedings at which it may so plead.
- 7630. Plea of the dissolution of the corporation.
- 7631. Plea of *non est factum* by a corporation.
- 7632. Verification of pleadings by corporations.
- 7633. Allegation of citizenship of corporations for purposes of Federal jurisdiction.

§ 7608. **Variance in Respect of Corporate Name.** — A writ and declaration against one corporation will not support the recovery of a judgment against another. If, therefore, a suit is brought against the president and directors of a branch bank, instead of the mother institution, this is not a mere *misnomer*,

which must be pleaded in abatement. No recovery can be had in such action. If a verdict is founded upon the general issue pleaded, the error is not cured by the statute of *jeofails*.¹ In order to prevent this result, the law demands a substantial *identity of name* between the corporation against which the action is brought and that against which the judgment is recovered.² Again in an action by a corporation *where the existence of the corporation is put in issue*, and the articles of association of the corporation are offered in evidence in proof of its corporate existence, such articles will not be admissible if there is so great a variance between the name of the corporation as recited in the petition and the name as recited in

¹ *Mason v. Farmers' Bank*, 12 Leigh (Va.), 84; *Tompkins v. Branch Bank*, 11 Leigh (Va.), 372.

² If, for instance, an action is brought against a company impleaded as "the Fuller Implement Co.," no judgment can be rendered against the "Fuller Implement and Coal Co." *without an averment and proof that the two corporations are identical*. *McGregor v. Fuller Implement Co.*, 72 Iowa, 143; *s. c.* 3 N. W. Rep. 464. So, where an action was brought against "the president and trustees of the Savings Bank for the County of Strafford," to recover compensation for serving a writ and execution for them, a copy of the writ and execution, running in the name of "the Savings Bank for the County of Strafford," was held not admissible in evidence. *Burnham v. Savings Bank*, 5 N. H. 446. But this rule, as has been held, does not extend so far as that mere similarity of identity in the names of two corporations, organized at different times, will be sufficient to warrant a conclusion that they are identical so as to render the one last organized liable for property sold to the former, although a person connected with the latter was, at the time

of the sale, an officer of the former. *Wyckoff v. Union & Co.*, 11 N. Y. Supp. 423; *s. c.* 33 N. Y. St. Rep. 423. On the other hand, where the declaration commenced by stating that "B. complains of H., president of the St. Lawrence Bank, a banking association," etc., and stating that the defendants became indebted, etc.,—this was understood to be a declaration against H. individually and not against the bank. This was under a statute such as we have already considered (*ante*, § 2602), enabling corporations to sue and be sued by their chief officer. *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill (N. Y.), 240. So where a *bill for an injunction* charged certain wrongs to have been done by the Chesapeake and Ohio Canal Company, that being the name of a corporation, but prayed for an injunction against the president and directors of the Chesapeake & Ohio Canal Company and M., and for a subpoena to issue "to the said president and directors and M.,"—it was held that the corporation itself, the canal company, was not made a party to the bill. *Binney's Case*, 2 Bland (Md.), 99.

the articles, as to lead to a doubt whether they refer to the same artificial being.¹

§ 7609. **What Variances Immaterial.**—In the matter of *misnomers* of corporations, a difference was early established between omitting *matter of substance* and mere *matter of addition*,² and the authorities show that the plea was discouraged,³ and few precedents of the plea of *nul tiel corporation* in the English reports will be found outside of the Year Books.⁴ Some

¹ Accordingly, where the petition described the plaintiff as the "Bank of Commerce," and the articles of association offered in evidence described it as the "Bank of Commerce in New York," it was held that the articles were not admissible in evidence. *Bank of Commerce v. Mudd*, 32 Mo. 218. In an action of replevin, the property was described in the writ as belonging to "A, B, and C, of Haverhill, the trustees of the ministerial fund in the north parish in Haverhill." In the subsequent portions of the writ, the plaintiffs were referred to as "the said trustees," and "the said plaintiffs." The replevin bond described them as first described in the writ, and they were referred to in the condition of the bond as "the above bounden A, B, and C, trustees as aforesaid," and the bond was signed by them individually, with separate seals. Other papers in the case referred to them by their individual names as plaintiffs. It appeared that there was a corporation named "The Trustees of the Ministerial Fund in the North Parish of Haverhill," and the plaintiffs claimed title as such corporation. Here it was held that the action was not brought in the name of the corporation, and could not be maintained. *Bartlett v. Brickett*, 14 Allen (Mass.), 62.

² The Case of Lynne Regis, 10 Co. Rep. 120, 122.

³ *Stafford v. Bolton*, 1 Bos. & P. 40; *Dumper v. Syms*, Cro. Eliz. 815; *Dr. Ayray's Case*, 11 Co. Rep. 18; *Croydon Hospital v. Farley*, 6 Taunt. 467; *Attorney-General v. Rye*, 7 Taunt. 546.

⁴ Upon this subject it has been said in a modern case: "The plea must show, when in bar, that it goes to the cause of action alleged in the declaration, and not to the form or name in the writ. It has been settled, therefore, from the earliest period, that it is not enough in such a plea, in a suit by a natural person, to aver that there was no such person *in rerum natura* at the time of the impetration of the writ, but it must allege that there never was such a person. The same rule applies to the plea of *nul tiel corporation*, for the same reason exists in both cases. *Ubi eadem ratio, ibi idem jus*. A man or corporation may change his or their name between the time the cause of action arose and the bringing of the suit. And a corporation certainly loses none of its franchises or rights by such a change when authorized by law; and they can recover by their new name a debt due before." *Northumberland County Bank v. Eyer*, 60 Pa. St. 436, 440.

of the foregoing cases, and others which could be cited,¹ proceed with a degree of strictness which degrades, instead of advancing justice. The true rule is that when a question of misnomer of a corporation plaintiff arises, not upon a plea in abatement, but upon an objection to proof of an organization offered under the general issue, it is a question of *identity* merely; and that no slight variation which does not raise a doubt of the identity should be regarded.² Thus, if, in an action by a corporation, it appears upon the assessment of damages that there is a variance between its real name and the name employed in the instrument given to it, which is the subject of the suit, but enough appears clearly to show what corporation was intended, it is sufficiently good.³ So, where the declaration styled the plaintiff "The W. R. National Bank of Jamaica, Vermont," but described the corporation as doing business in Vermont,—it was held that the identity was clear, and that the variance was therefore immaterial.⁴ So also where a note was given to "the president, directors, and company of the Newport Mechanics' Man. Co.," instead of to "The Newport Mechanics' Man. Co.," which was the real name of the corporation, it was held that the variance was not such as to preclude a recovery in the name of the corporation, and that it might be shown by extraneous testimony that the plaintiff was intended to be designated.⁵ It is a rule of evidence that identity of name is presumptive evidence of identity of person. Although identity of name carries with it the presumption of identity of person, yet it seems that in an action by a corporation upon an obligation executed in its favor, there is always a question for the jury as to its identity, if a challenge is properly made in the pleadings. In a case brought before Lord Tenterden, C. J., an action of *assumpsit* on a bill of exchange, and for money had and received, after the introduction of letters of the defendant, acknowledging

¹ *Ante*, § 290, *et seq.*; § 7599.

² *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

³ *Peirce v. Somersworth*, 10 N. H. 369.

⁴ *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

⁵ *Newport Mechanics' Man. Co. v. Starbird*, 10 N. H. 123; *s. c.* 34 Am. Dec. 145.

his indebtedness to a corporation of the same name as the plaintiff, the only question for the jury was said to be, whether the corporation suing was that corporation.¹

§ 7610. Misnomer and Identity in Case of Corporations having Similar Names.—There is a general presumption that *identity of name proves identity of person*; and conversely that a substantial difference of name proves a difference of person. This presumption seems to be as applicable to corporations as to individuals.² When, therefore, an action is brought against a corporation on a contract, if it appears in evidence that the contract was made by a corporation of the same name as the one against which the action is brought, then it will be presumed that the corporation which executed the contract was the corporation which is impleaded in the action, without special proof of that fact; but this presumption may be rebutted by the defendant by showing that the contract was in fact made by another corporation of the same name, existing in another State.³ On the other hand, an ac-

¹ *National Bank v. De Bernales*, 1 Car. & P. 569. A variance in the style of an *inferior corporation court* between the entry on the judgment roll and return on the process, has been held immaterial. Thus, in a writ of error to a judgment of such a court, the first error assigned was, "because the style of the court was 'placita coram J. S., Majore et Joh. Chapman, recordatore, et J. D. et J. N., aldermannis burgi prædicti secundum consuetudinem burgi prædicti, etc.,' and the complaint being entered upon summons, a *non est inventus* upon it was returned at a court held 'coram dicto J. S. Majore et J. N. et J. D. aldermannis, secundum consuetudinem burgi prædicti, etc.,' omitting the recorder, which was alleged to be error, *et coram non iudice*. But the court did not allow this; 'for it may be that at the first court holden the re-

corder was there, and at the second court he was absent, and the court is well held by the custom there before the mayor and two aldermen.'" *Bryan v. Wilkes*, 3 Cro. Car. 572.

² There is, however, a holding by an inferior court to the effect that mere similarity or identity in the names of two corporations organized at different times is not alone sufficient to warrant a holding that they are identical, so as to render the one last organized liable for property sold by the former, although a person connected with the latter was at the time of the sale an officer of the former. *Wyckoff v. Cleveland Union Loan & Co.*, 33 N. Y. St. Rep. 423; *s. c.* 11 N. Y. Supp. 423.

³ *Dean v. LaMotte Lead Company*, 59 Mo. 523. The author cites this case to the text, although the defense was not successful.

tion against a corporation impleaded by one name is not sustained by evidence of a corporation having a substantially different name;¹ though, as already seen,² the plaintiff would succeed by bringing his action against the corporation in his true name and averring and proving that it contracted with him by another name, if such were the fact. It is a settled principle of procedure that where a person, natural or artificial, is sued by a wrong name, and appears by and in his or its true name in the action without objection, the error is waived.³ Upon this principle, the omission in a complaint and proceedings by attachment against a corporation, of the word "company" from its corporate name, does not affect the *attachment lien*, where the corporation has appeared by its true name and demurred and made motions in the proceeding.⁴

§ 7611. Variance Created by Using Names of the Trustees.— We have seen that a deed conveying land made to the trustees by a corporation is a deed to the corporation itself;⁵ and other relations have been discovered in which a promise to the trustees is a promise to the corporation.⁶ In view of these rules, it seems a senseless refinement to hold that a mere use, in a pleading, or in an obligation drawn in favor of a corporation, of the words "the trustees of" prefixed to the proper name of the corporation, creates a variance such as will defeat a recovery.⁷ Where the name of the corporation which brought the action was correctly given at the commencement of the declaration, thus, — "the trustees of the Baptist Church

¹ An action against "The Union Loan & Trust Co. of Cleveland, Ohio," for the price of goods sold, is not sustained by proof of a sale to the "Union Loan & Trust Co.," doing business in New York City, the officers and stockholders of the two companies being different, except that one person connected with defendant company was, at the time of the sale, an officer in the other company. *Wyckoff v. Union Loan & Trust Co.*,

11 N. Y. Supp. 423; *s. c.* 33 N. Y. St. Rep. 423.

² *Ante*, § 7597.

³ *McCreery v. Everding*, 54 Cal. 168; *Hammond v. Starr*, 79 Cal. 556, 558; *s. c.* 21 Pac. Rep. 971.

⁴ *Hammond v. Starr*, 79 Cal. 556; *s. c.* 21 Pac. Rep. 971.

⁵ *Ante*, § 5038.

⁶ *Ante*, § 5113.

⁷ To the effect that such is not the law, see *Peirce v. Somersworth*, 10 N. H. 369.

of," etc., and in a subsequent part of the declaration it was alleged that "being indebted, they, the said trustees, promised" etc., this was held a sufficient allegation that the promise was made by the corporation, and not by the trustees individually, and it was regarded as unnecessary to repeat the full name of the corporation at every recurrence.¹

§ 7612. Misnomer in Actions by or against Joint-stock Companies and Unincorporated Associations.—Statutes have been enacted to the effect that, in actions by or against joint-stock companies or unincorporated associations, it is sufficient, in pleading, to describe them by the name or title under which their business is transacted.²

§ 7613. Misnomer must be Pleaded in Abatement.—The misnomer of a corporation, like that of an individual defendant, should be taken advantage of *in limine*, by *plea in abate-*

¹ *Antipæda Baptist Church v. Mulford*, 8 N. J. L. 182.

² That such a statute exists in Maryland, see *Powhatan Steamboat Co. v. Potomac Steamboat Co.*, 36 Md. 238. A statute of California (Code Civ. Proc. Cal., § 388), provides that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name." It has been said that this statute is in derogation of the common law, and must be *strictly construed*. *King v. Randlett*, 33 Cal. 318, 321, *per* Sanderson, J. But there does not appear to be much force in the observation. Nevertheless, where the action was commenced before a justice of the peace, in favor of whose jurisdiction there are no presumptions, and it appeared on the face of the record that the action was commenced against "The Independent Company," and

that a summons was addressed to "The Independent Tunnel Co.," and return showed that it was served on one Randall, a member of "The Independent Company," and the court entered judgment against "The Independent Tunnel Company," it was held that the judgment was void in the sense that it could be attacked collaterally. *Ibid.* A bill to enjoin an interference by the defendants with a right which the complainants alleged to possess, of diverting water from a stream, brought against the "South Fork & Sunnyside Division of the Santa Ana River," which, it appears, is an association formed and existing pursuant to the laws of California, is well brought under this statute, without making the owners and stockholders parties in their individual capacities. *Hewitt v. Storey*, 39 Fed. Rep. 719. See further as to the procedure under this statute, *Welsh v. Kirkpatrick*, 30 Cal. 202; *s. c.* 89 Am. Dec. 85.

ment,¹ or it is waived. The true rule is that, although, in the writ and declaration or complaint, the name of the corporation may be inaccurately given, yet if the corporation appears and defends by its true name, and if judgment is rendered against it by that name, the judgment will be good, — and it cannot afterwards take advantage of the misrecital.² If the corporation pleads *nul tiel corporation in bar* of the action, it likewise waives any objection to the name in which it is sued.³

§ 7614. **Misnomer Amendable.** — Where a corporation has been sued by a wrong name, the mistake may be corrected by an *amendment of the writ*.⁴ If the suit is in equity, the bill may be amended in this respect at the hearing.⁵ If the judgment, as entered, omits a part of the name of the corporation, it may be amended by reference to the docket roll.⁶

§ 7615. **Effect of Amendment where Corporation is Sued in Wrong Name.** — If a corporation is sued in the wrong name, and appears only for the purpose of objecting to the

¹ *Stafford v. Bolton*, 1 Bos. & Pul. 40, 44; *Malden v. Miller*, 1 Barn. & Ald. 699; *Mellor v. Spateman*, 1 Saund. 340, note 2; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 778; *s. c.* 14 Am. Dec. 526; *Christian Society v. Macomber*, 3 Met. (Mass.) 235; *Stone v. Congregational Soc.*, 14 Vt. 86; *School Dist. v. Blaisdell*, 6 N. H. 197; *Northumberland County Bank v. Eyer*, 60 Pa. St. 436; *Hoereth v. Franklin Mill Co.*, 30 Ill. 151; *Bank v. Orme*, 3 Gill (Md.), 443.

² *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Wilton Town Co. v. Humphrey*, 15 Kan. 372; *Missouri River &c. R. Co. v. Shirley*, 20 Kan. 660; *East Tennessee &c. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607; *Louisville &c. R. Co. v. Reidmond*, 11 Lea (Tenn.), 205; *Hanover Savings Fund Soc. v. Suter*, 1 Md. 502; *Proprietors v. Call*, 1 Mass. 483, 485; *First Parish in Sutton v. Cole*, 3 Pick. (Mass.) 232, 236;

Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 450; *Society &c. v. Pawlet*, 4 Pet. (U. S.) 480, 501. Under the practice in Louisiana the objection can only be taken advantage of by pleading it as an *exception in limine litis*. *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53.

³ *Trustees of M. E. Church v. Tryon*, 1 Denio (N. Y.), 451; *Gray v. Monongahela Nav. Co.*, 2 Watts & S. (Pa.) 156; *s. c.* 37 Am. Dec. 500.

⁴ *Burnham v. Savings Bank*, 5 N. H. 573; *Sherman v. Connecticut River Bridge Co.*, 11 Mass. 338; *Bullard v. Nantucket Bank*, 5 Mass. 99; *Georgetown v. Beatty*, 1 Cranch C. C. (U. S.) 234; *Lane v. Seaboard &c. R. Co.*, 5 Jones L. (N. C.) 25.

⁵ *Hoboken &c. Asso. v. Martin*, 13 N. J. Eq. 427.

⁶ *Healings v. Mayor of London*, Cro. Car. 574.

jurisdiction, and, without a new citation in its proper corporate name, the petition is amended so as to state the name correctly, the case cannot proceed to judgment in the name stated in the amended petition; for no such corporation has been cited or made an appearance. If, therefore, there is a judgment for the plaintiff entered in the name in which the corporation was summoned, it cannot be amended *nunc pro tunc*, by inserting the correct name; for the judgment, as thus amended, would be a nullity.¹

§ 7616. Declaring on Obligations Issued by Corporations.

In a suit on a *bond* issued by a railroad company which, at the time it issued the bond, had the general power to borrow money, it is not necessary for the plaintiff to allege that it was necessary for the company to issue the bond, or that the money for which the bond was given was borrowed for the completion, furnishing or operating of the road.² The allegation in a complaint that certain drafts were accepted *by the defendant corporation* by its treasurer, is a good averment of authority on the part of the treasurer to accept them, since the acceptance would not have been by the corporation if the officer through whose agency it was done, had not had authority to do it. The reason is that whatever is necessarily understood or implied in a pleading forms part of it as much as if expressed.³

¹ *Brown v. Terre Haute &c. R. Co.*, 72 Mo. 567. So, where there were two corporations of the same name, one created in Nevada and another in California, both doing business in the State of Nevada, and an action intended to be brought against the California corporation was brought by service upon an officer of the Nevada corporation, and by transmitting a copy of the summons and complaint by mail to the trustees of the California corporation at their office in California,—it was held that an *amendment to the complaint* could not be

allowed, adding the words “of the State of California,” because this would change the action from an action against one person to an action against another person. *Little v. Virginia &c. Water Co.*, 9 Nev. 317. See further *ante*, § 293.

² *Miller v. New York & Erie R. Co.*, 8 Abb. Pr. (N. Y.) 431; *s. c.* 18 How. Pr. (N. Y.) 374; *post*, § 7617.

³ *Partridge v. Badger*, 25 Barb. (N. Y.) 146; citing *Steph. Pleas*, 220, 221; 1 Coit. Pl. 640; *Allen v. Patterson*, 2 Seld. (N. Y.) 478; *Heys v. Heseltine*, 2 Camp. 604.

§ 7617. Not Necessary to Aver that Corporation had Power to Make the Contract Sued on.—It is a general rule of pleading that, in an action by¹ or against² a corporation upon a contract, it is not necessary to allege either that the corporation had power, under its charter or governing statute, to enter into the contract; or that its officer, by whom the contract was entered into in its behalf, was duly empowered or authorized thereto. The reason is that the power of the corporation to make the contract is *presumed* in the first instance,³ and that an allegation that the corporation entered into the contract, necessarily includes the allegations of its power and the power of its officer to enter into it.⁴ In all cases, if there was a want of power in the corporation or in its officer to make the contract, that is a *matter of special defense*, which must be pleaded by the defendant.⁵

¹ St. Paul Land Co. v. Dayton, 37 Minn. 364; s. c. 34 N. W. Rep. 355; La Grange Mill Co. v. Bennewitz, 28 Minn. 62; Farmers' &c. Bank v. Detroit &c. R. Co., 17 Wis. 372; Howard v. Boorman, 17 Wis. 459.

² Sullivan v. Grass Valley Quartz &c. Co., 77 Cal. 418; s. c. 19 Pac. Rep. 757; Malone v. Crescent City Mill &c. Co., 77 Cal. 38; s. c. 18 Pac. Rep. 858; Montague v. Church School District, 34 N. J. L. 218; Hamilton v. Newcastle &c. R. Co., 9 Ind. 359; Toppan v. Cleveland &c. R. Co., 1 Flip. (U. S.) 74.

³ *Ante*, § 5967.

⁴ For instance, an allegation in a complaint by a corporation that "the plaintiff and defendant entered into an agreement to and with each other," includes and implies the plaintiff's capacity and power to make the agreement. La Grange Mill Co. v. Bennewitz, 28 Minn. 62.

⁵ Montague v. Church School District, 34 N. J. L. 218; Sullivan v. Grass Valley Quartz &c. Co., 77 Cal. 418; s. c. 19 Pac. Rep. 757; Malone

v. Crescent City Mill &c. Co., 77 Cal. 38; s. c. 18 Pac. Rep. 858. Thus, if a corporation is sued on a promissory note, it is not necessary for the plaintiff to aver that it had power to make the note. Montague v. Church School District, 34 N. J. L. 218. So, a bill in equity to foreclose a mortgage executed in favor of a corporation is not demurrable for failing to state affirmatively that the corporation did make the loan and take the mortgage. Boulware v. Davis, 90 Ala. 207; s. c. 8 So. Rep. 84. Still less is it necessary to aver that the agent of the company who made the note was appointed by a written or sealed commission. Hamilton v. Newcastle &c. R. Co., 9 Ind. 359; *ante*, § 5061. So, if a corporation sues to enforce a contract to convey land to it, it is sufficient to allege its corporate existence, and the making of the contract, without alleging or proving that it has power to acquire and hold land. St. Paul Land Co. v. Dayton, 37 Minn. 364; s. c. 34 N. W. Rep. 335. So, where a railroad company

§ 7618. **Qualifications of the Foregoing.**—Some decisions seem to limit the principle to cases where there is a *presumption in favor of the power*, holding that in such a case the corporation need not, when suing, aver any special circumstances tending to show that the power was *rightfully exercised in the particular instance*. Upon this theory, it is reasoned that, where a corporation may lawfully acquire a certain kind of property, take a particular security, or a promissory note, for a particular purpose, the presumption is that the property, security, or note was lawfully taken; and that in a suit respecting the same, the corporation need not aver the circumstances of its acquisition.¹ Seemingly in the same line of thought, it was said in an early case in Illinois that, “although the right of a corporation to maintain suits and to exercise such other powers as are necessary and essential to its existence, and to carry out the objects of its creation will be presumed, unless denied or put in issue, yet when chartered companies seek to enforce, in equity, rights which do not ordinarily and necessarily belong to such corporations, it becomes necessary that they set forth and prove their author-

has, under a general statute, though not by charter, authority to guarantee the payment of the bonds of another such company, in an action upon such guaranty, it is not necessary to set forth in the declaration such authority for making the indorsement. *Toppan v. Cleveland &c. R. Co.*, 1 Flip. (U. S.) 74. This case would seem to concede a distinction between the case where the power arises under a general enabling act and where it arises under a special charter,—taking the view that, in the latter case, the existence of the power is to be specially averred; but it is believed that there is no such distinction, since the averment that the corporation made the contract necessarily includes an averment that it

had the power to make it. And where the statute authorizing such guaranty provided that the same should not be given unless assented to by a *two-thirds vote of the stockholders* at a meeting called for the purpose, it was sufficient, in an action by a bondholder against a guarantor, to aver in the declaration “that the guaranty was duly signed by the defendant through its president, who was authorized so to execute the same, and was afterwards,” to wit, on the same day, “duly ratified and confirmed by the stockholders of the company.” *Toppan v. Cleveland &c. R. Co.*, 1 Flip. (U. S.) 74.

¹ *Farmers' &c. Bank v. Detroit &c. R. Co.*, 17 Wis. 372; *Howard v. Boorman*, 17 Wis. 459.

ity to do the particular thing.”¹ This statement of the doctrine seems not incorrect, though it was obviously misapplied in the particular case, which was simply the case where the Bank of Illinois was seeking to maintain a creditor’s bill to set aside certain conveyances alleged to be fraudulent. It was therefore seeking to enforce, in equity, a right of action which belongs to all corporations which are creditors, in common with individuals.² It is quite likely that where a corporation proceeds to exercise a power in derogation of common right, such as the condemnation of land for its uses, it will be necessary for it to allege and prove that it possesses the power to invoke the aid of the court for the particular relief.³

§ 7619. Pleading the Defense of Ultra Vires. — A corporation *cannot avail itself of the defense* that it had no power to enter into the obligation to enforce which the suit is brought, *unless it pleads that defense.*⁴ This principle applies equally where the defendant intends to challenge the *power of its officer or agent* to execute in its behalf the contract upon which the action is brought, and where it intends to defend on the ground of a total want of power in the corporation to make such a contract.⁵ Under the codes of procedure, which proceed upon

¹ Frye v. Bank of Illinois, 10 Ill. 332, opinion of the court by Trumbull, J.

² Ante, § 7380.

³ Contrary to the doctrine of the preceding section, and it is believed to all sound principle, it has been held that in an action against a corporation to recover damages for injuries inflicted upon the plaintiff by the employes of the defendant through their negligence, it is necessary to allege that the corporation had power to make the particular contract which is the foundation of the action; the reason being that the grants of power to corporate bodies are strictly construed, and that nothing is intended

to be within the power of a corporation unless it is shown to be such. Bathe v. Decatur County Agricultural Society, 73 Iowa, 11; s. c. 5 Am. St. Rep. 651.

⁴ Griesa v. Massachusetts Benefit Asso., 133 N. Y. 619; s. c. 30 N. E. Rep. 1146; affirming s. c. 15 N. Y. Supp. 71; German Sav. Inst. v. Jacoby, 97 Mo. 617; s. c. 11 S. W. Rep. 256.

⁵ If therefore, a corporation, when sued on a contract, would rely on the fact that its *president* had not the written authority to make it which a statute requires, this fact must be pleaded. Kenner v. Lexington Man. Co., 91 N. C. 421. So, where the

the principle that the office of pleading is to require each party to disclose to his adversary the real ground of his action or defense, it is not only necessary to plead the defense of *ultra vires*, but *facts must be set out* showing that the instruments were issued or the acts done contrary to law.¹

§ 7620. Not Necessary to Aver Election, Qualification, Appointment, etc., of Officer or Agent. — In an action against a corporation upon its contract, it is never necessary to aver that its officer, by whom the contract was made, was *duly elected and qualified*; because it is sufficient if he was an officer *de facto*.² Nor is it necessary to aver that its agent, by whom the contract was executed, was duly empowered by the proper commission.³

complaint set forth that the plaintiff rendered certain services for the defendant, for a certain agreed compensation, and the answer admitted the employment, but denied any express agreement as to compensation, it was held that the defendant could not set up, for the first time on the trial, by a motion to dismiss, that authority on the part of its president to make the contract was not shown. *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216; *s. c.* 21 N. E. Rep. 155; 23 N. Y. St. Rep. 114. But there is a decision of the New York City Court to the effect that, in an action against a manufacturing corporation on a note indorsed by it, under a denial that the note was indorsed by defendant, the company may show that, though the note was indorsed by the treasurer of the company, such indorsement was never authorized by the directors. *Wahlig v. Standard Pump Man. Co.*, 5 N. Y. Supp. 420; *s. c.* 1 Banking L. J. 125.

¹ *German Sav. Inst. v. Jacoby*, 97 Mo. 617, 628. A case in the English Court of Common Pleas is *in seeming conflict with these principles*. The action was brought by the indorsers on

a bill of exchange, against a railway company which had accepted the same. The company raised the defense that it had no power to accept bills, by pleading simply that it did not accept the particular bill. The defense was successful, although the acceptance was given by order of the directors and under the common seal of the company. *Bateman v. Mid-Wales R. Co.*, L. R. 1 Com. Pleas, 499, 508. The theory evidently was, that where there is a *total want of power* in the corporation to do the act, if its officers undertake to bind it by doing the act in its behalf, it is their act, and not the act of the corporation. But it is quite plain, on principle, that the defense of *ultra vires* ought not to be allowed to be set up under a plea of *non est factum*; otherwise the plaintiff might be taken by surprise.

² *Ante*, § 3893.

³ *Hamilton v. Newcastle & C. R. Co.*, 9 Ind. 359. For the same reasons, *where the action is against the directors* to charge them personally for a debt of the corporation, under a statute, it is not necessary to set

§ 7621. **Charter, when a Private Act, to be Plead and Proved.** — Unless the legislature has otherwise provided either in the act of incorporation or by a general law, a statute authorizing the incorporation of a particular company or association, is not the subject of *judicial notice*, but must be pleaded and proved like any other private statute.¹ Many charters expressly enacted that they shall be deemed and taken to be public acts, and that the courts shall take judicial notice of them. If an original charter so enacts, a court will take judicial notice of all its *supplements*, regarding them merely as modifications of the original act.²

§ 7622. **Declarations upon Statutes Other than Charters.** In a declaration to enforce a right of action given by a statute, the pleader must allege the existence of the facts upon which the statute bases the right of action.³ But it is not to be in-

out that the defendants were elected directors, and that they were *duly qualified* as such. It is sufficient, on general demurrer, if the declaration, after stating that subscriptions were received, etc., alleges that the defendants were elected directors, and that they entered into the duties of their offices respectively, and continued to act as directors until the corporation became insolvent, — adding an averment of their liability as directors, under the statute under which the action is brought. *Falconer v. Campbell*, 2 McLean (U. S.), 195; s. c. 10 Myer Fed. Dec., § 15. In this case, it was contended by counsel for the plaintiffs that the defendants were estopped to deny that they acted as directors. But Mr. Justice McLean said: "The doctrine of estoppel would seem to have no application in the present state of the pleadings. If, by plea, they should deny their own authority to act, after having acted as directors, the question whether they were not estopped might arise.

But the question is now on the sufficiency of the declaration, and it is clear that the plaintiffs must show everything material to the maintenance of their action." *Falconer v. Campbell*, 2 McLean (U. S.), 195; s. c. 10 Myer Fed. Dec., § 15.

¹ *First Nat. Bank v. Gruber*, 87 Pa. St. 468; s. c. 30 Am. Rep. 378. It has been held, in the same State, that an act which declares that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation agreeing to pay more than legal interest, is a private act. *Handy v. Philadelphia & C. R. Co.*, 1 Phila. (Pa.) 31.

² *Stephens & Co. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

³ *Ante*, §§ 3627, 4336, 4337; *Howser v. Melcher*, 40 Mich. 185; *Delashman v. Berry*, 21 Mich. 516; *Butterfield v. Seligman*, 17 Mich. 95; *Benalleck v. People*, 31 Mich. 200; *Austin v. Goodrich*, 49 N. Y. 266; *Churchill v. Onderdonk*, 59 N. Y. 134; *Bartlett v. Crozier*,

ferred from this that unreasonable strictness or particularity is required in declarations or complaints in actions to enforce rights given by statute.¹

§ 7623. **Statements before Justices of the Peace.** — To the foregoing rules of pleading, exceptions are admitted in cases prosecuted before those unlearned and popular tribunals, *justices of the peace*. Here, if strict accuracy of pleading were required, justice would in many cases be defeated; and there-

17 Johns. (N. Y.) 439, 449; *s. c.* 8 Am. Dec. 428; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *s. c.* 33 Am. Rep. 1; *Bath v. Freeport*, 5 Mass. 325; *Drowne v. Stimpson*, 2 Mass. 441, 444; *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166; *Barron v. Frink*, 30 Cal. 486, 489; *Smith v. Curry*, 16 Ill. 147, 149; *Moore v. Wade*, 8 Kan. 380, 390; *Hunt v. Hunter*, 29 Eng. Law & Eq. 195; *Hopkins v. Swansea*, 4 Mees. & W. 621. For instance, in an action against a railroad company under a statute of Michigan (Mich. Comp. L., §§ 2393, 2395), to recover a *preferential debt given a laborer and material-man* (*ante*, § 3164), it is not sufficient to employ the general counts in *assumpsit* with allusions to the statute, but the plaintiff must aver the existence of the facts on which the statute predicates the right of action. *Chicago & c. R. Co. v. Sturgis*, 44 Mich. 538. Where a railway contractor has assigned his contract to the superintendent of the company, and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt, does not rest on this statute, but is a liability at common law on a special contract; and the *declaration* must so aver the cause of action. *Bottomley v. Port Huron & c. R. Co.*, 44 Mich. 542.

¹ Thus, it has been held that, in an action against an incorporated com-

pany based upon an act of the legislature leasing certain lands, the property of the State, to such company, an averment in the declaration *that the company accepted the act*, implies that the company accepted and agreed to all the provisions of the lease as embodied in the act. Such an averment is therefore sufficient, without setting out the particular facts relied on to prove the acceptance. *State v. Newark & c. R. Co.*, 34 N. J. L. 301. So, in a *bill of particulars* in an action under a statute, against a railroad company, to recover damages for *killing domestic animals* belonging to the plaintiff, a statement that a demand for payment of the judgment had been made upon the agent of the defendant, has been held, after judgment, to be tantamount to a statement that it was made upon the agent designated by the statute. *Missouri Pac. R. Co. v. Morrow*, 36 Kan. 495; *s. c.* 13 Pac. Rep. 789. In such a bill of particulars an allegation that, "at a point where said railroad might properly have been securely fenced, but where it was not so fenced, said plaintiff's cow strayed in and upon the track," — was held tantamount to an allegation that the railroad was not inclosed with "a good and lawful fence," as required by the statute. *Ibid.*

fore much latitude is indulged in favor of their proceedings, both as respects pleading and other matters of procedure, but not so far as to sacrifice substantial statutory requirements.¹ For example, under a statute of Ohio similar to the statute of Michigan considered in a preceding section, enacted to protect persons performing labor and furnishing materials in constructing railroads, making such claims a lien upon a railway,² a *substantial*, though *not a technical compliance with the statute*, is required to be alleged.³

§ 7624. **Pleading in Actions on By-laws.**—"It is but repeating a long and well-established rule, to say that the by-laws of all corporate bodies, including all municipal corporations, from the largest to the smallest, *must be set forth in pleading*, when they are sought to be enforced by an action, or are set up as protection on the record. The courts cannot legally, or in the nature of things, judicially notice these cart laws, or any other corporate regulations."⁴ In an action on a by-law against a member of a corporation, it is not, in general, necessary to allege that he had *notice* of it; because, as a general rule, the principal members of a corporation are bound, and are therefore conclusively presumed to take notice of its

¹ A different course, it has been said, "would not only destroy their usefulness, but render them in a great degree deceptive and mischievous." *Railway Co. v. Cronin*, 38 Ohio St. 122; quoting *Harding v. New Haven Tp.*, 3 Ohio, 227, 232. For instance, under the Missouri practice, a statement of the cause of action, in a suit before a justice of the peace against a corporation, which is sufficiently definite to apprise the defendant of the claim and to *bar a second action* for the same cause, is, in general, sufficient to authorize the introduction of evidence to prove the incorporation of the defendant. *Mitchell Furniture Co. v. Payton*, 4 Mo. App. 563. That the statement before a justice may contain *two counts* for the same

injury, based upon different statutes, —see *Lincoln v. St. Louis &c. R. Co.*, 75 Mo. 27.

² 71 Ohio Laws, 51. See *ante*, § 3141, *et seq.*

³ *Railway Company v. Cronin*, 38 Ohio St. 122.

⁴ Cowen, J., in the opinion of the court in *Harker v. New York*, 17 Wend. (N. Y.) 199, 200. And see, to the effect that, in an action on a by-law, the by-law must be set out,—*Plant v. Wormager*, 5 Blackf. (Ind.) 236. The omission so to plead a by-law may, it has been held, be taken advantage of by demurrer in a *justice's court*, as well as in a court of record. *Harker v. New York*, 17 Wend. (N. Y.) 199.

by-laws.¹ But this principle does not apply to all the regulations which the directors of a corporation of extensive membership, such as the Western Union Telegraph Company, may make for the transaction of its business with the public; so that a member who sues a corporation for failing properly to transmit and deliver a dispatch delivered by him to its agent for that purpose, is not necessarily affected by a regulation relating to the manner in which the corporation serves the public.²

§ 7625. Declarations against Corporations for Improper or Abusive Exercise of Statutory Powers.—A very important rule of pleading, in declarations against corporations for nuisances or trespasses, where the corporation has proceeded ostensibly under a power conferred by its charter or governing statute, is that the pleader must do something more than state a case the *gravamen* of which is that the defendant has merely done that which its charter or governing statute authorizes it to do; but he must state that the defendant, in some particular, exceeded the power, or abused the privilege, thereby granted, or did the work which it was thereby empowered to do, negligently, unskillfully, or otherwise wrongfully, so as to result in the injury to the plaintiff for which he seeks damages.³ It is a principle in the law of pleading that

¹ James v. Tutney, Cro. Car. 497; ante, § 941.

² Pearsall v. Western Union Tel. Co., 44 Hun (N. Y.), 532; s. c. 9 N. Y. St. Rep. 132. Where, in an action by a corporation, the *validity of a by-law* becomes material, and it is alleged in the declaration that the by-law was adopted by the whole board of directors, naming them, this allegation will be sustained by evidence that the by-law was adopted by a majority of the board of directors, assembled at a legal meeting; since the majority, when so assembled, constitute the board, and their act is the act of the whole. The

allegation that they were adopted by the whole board, naming them, is therefore in legal effect true, provided the declaration does not allege that all the directors of the board were present at the meeting when the by-law was adopted. Cahill v. Kalamazoo Mutual Ins. Co., 2 Doug. (Mich.) 124; s. c. 43 Am. Dec. 457, 461. Customs of corporations how pleadable at common law: Wilton v. Wilks, 2 Ld. Raym. 1129; s. c. 1 Salk. 203; 3 Salk. 349; Holt, 187.

³ The case of Stephens & Co. Transp. Co. v. Central R. Co., 33 N. J. L. 229, is entirely devoted to this principle

a *count* in a declaration should show, plainly and certainly, all the circumstances material for the maintenance of the action, and that if there are *two intendments*, it shall be taken most strongly against the plaintiff.¹ Applying this principle to the case we are now supposing, if a declaration or complaint is so unskillfully drawn as to leave it uncertain upon its allegations, whether the defendant corporation acted within or without the powers conferred by its governing statute, then it will be deemed that it *acted within those powers*, and no cause of action will be stated.²

§ 7626. **Corporations Plead and Answer, how.** — It would be impossible to state any general rule upon this subject without misleading the practitioner; since there are distinct rules peculiar to pleas under the common-law system of pleading, to answers to bills in equity, to answers under the codes, and to pleas or answers under particular statutory systems. All that can be done is to state some precedents which have been discovered, and let the learned reader make his examination and draw his inferences. It may be premised, however, that the rule is well established, that a plea by a corporation aggregate must purport to be *by attorney*, because it is incapable of personal appearance.³ If the suit is in equity and the defendant is a corporation, it *cannot answer under oath*, because it cannot take an oath.⁴ In such a case it answers under its *common seal*.⁵ If, in such a case, the corporation seeks the

of pleading; and it is explained at length in a learned opinion by Beasley, C. J.

¹ *Dovaston v. Payne*, 2 H. Black. 527.

² *Stephens &c. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229. The following cases were referred to by Beasley, C. J., as sustaining the above view: — *Rex v. Liverpool*, 3 East, 86; *Bartlett v. Baker*, 3 Hurls. & Colt. 153. The following cases were cited by him, as exhibiting *good declarations*, within the meaning of the rule stated: —

State v. Godfrey, 24 Me. 232; *Brown v. Mallett*, 5 C. B. 599. He also cited the following cases, as containing *good declarations*, under this principle: *Delaware &c. R. Co. v. Lee*, 22 N. J. L. 243; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281.

³ 1 Chitty on Pl. (6th ed.), 584; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 830; *ante*, § 7560.

⁴ *Ante*, § 7409, *et seq.*

⁵ *Bronson v. La Crosse &c. R. Co.*, 2 Wall. (U. S.) 283, 302; *French v. First Nat. Bank*, 7 Ben. (U. S.) 488;

advantage accruing, under the rules of equity procedure, to a defendant answering under oath, its answer must be *verified by the oath of some of its officers*. Hence, a corporation cannot be required to answer a bill in equity under oath.¹ Unless the officers and agents of a corporation are made parties defendant, they cannot be required to answer interrogatories.² Accordingly, it has been held, that no dissolution of an injunction can be obtained upon the answer of a corporation, which is not duly verified by the oath of some officer of the corporation, or other person who is acquainted with the facts contained therein. "There can be no hardship in this rule as applied to corporations, as it only puts them in the same situation with other parties."³ But, although a corporation cannot be required to answer a bill in equity under oath, it can be compelled to answer without oath and to answer fully.⁴ The answer of a corporation in equity should be made by the principal officer of the corporation, who is able either to admit or deny the facts charged in the bill and propounded in the interrogatories, or to state a want of knowledge, clearly and truly, as a reason for not doing so.⁵

s. c. 11 Nat. Bank. Reg. 189; *Fulton Bank v. New York &c. Canal Co.*, 1 Paige (N. Y.), 311.

¹ *Gamewell &c. Tel. Co. v. Mayor*, 31 Fed. Rep. 312.

² *French v. First Nat. Bank*, 11 Nat. Bank. Reg. 189. See *ante*, § 7409, *et seq.*

³ *Fulton Bank v. New York &c. Canal Co.*, 1 Paige (N. Y.), 311, *per Walworth, Ch.*

⁴ *Gamewell &c. Tel. Co. v. Mayor*, 31 Fed. Rep. 312; *Colgate v. Compagnie Française*, 23 Fed. Rep. 82; s. c. 23 Blatchf. (U. S.) 88; *Kittridge v. Claremont Bank*, 1 Woodb. & M. (U. S.) 244.

⁵ Therefore, an answer made by the secretary, who merely states his belief as to a certain fact, but without directly admitting or denying the existence of the fact, or averring any want of knowledge of the other offi-

cers of the company as to the fact, is insufficient. *Hale v. Continental Life Ins. Co.*, 16 Fed. Rep. 718. Where a change has taken place in the officers of a corporation sued in equity, between the time when it is brought into court and the time when its answer is filed, its answer must be made by the persons who are its officers at the time of filing it. *Mechanics' Nat. Bank v. Burnet Man. Co.*, 32 N. J. Eq. 236. Under the system of pleading established in New York, it has been held that, in an action against a corporation, an answer verified by its treasurer, denying, upon information and belief, each and every allegation of the complaint except that of incorporation, creates an issue of fact, which must be disposed of by a trial. *Macauley v. Bromell &c. Printing Co.*, 67 How. Pr. (N. Y.) 252.

§ 7627. **Non-joinder of Corporation Plaintiff Pleadable in Abatement.** — In an action upon a contract made by two or more parties, one of which *was* a corporation, a *demurrer* to the declaration on the ground of the non-joinder of the corporation is bad. The non-joinder should be *pleaded in abatement*; since, for aught that appears on the face of the declaration, the corporation which was the other contracting party, may have been dissolved, or may have otherwise passed out of existence.¹

§ 7628. **Corporation may Plead to the Jurisdiction by Attorney.** — It was a well-settled rule of the common law, at least in its application to natural persons, that a plea to the jurisdiction could only be made *in propria personæ*.² The technical reason why it *could not be made by attorney* was that a plea entered by attorney must be supposed to have been made by leave of the court.³ We have already seen that a corporation, being an intangible person, can appear in an action only by attorney.⁴ If, then, a corporation cannot plead to the jurisdiction by its attorney, the *reductio ad absurdum* is reached that it cannot so plead at all. It has been held, however, that a corporation may plead by others, as well as by officers of the court, — for example, by its *president* or other chief officers, — who may enter a plea of this kind in its behalf.⁵ Indeed, a corporation has been permitted to enter this plea by its attorney.⁶

¹ *State v. Woram*, 6 Hill (N. Y.), 33; s. c. 40 Am. Dec. 378.

² 1 Chitty Pl. (6th ed.) 479.

³ 1 Bac. Abr., p. 2.

⁴ *Ante*, § 7560.

⁵ *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; s. c. 27 Am. Rep. 582.

⁶ "We are clearly of opinion," said Mr. Justice Barbour, "that in the case of a corporation aggregate, no waiver of an objection to jurisdiction could be produced, by their ap-

pearing and pleading by attorney; because, as such a corporation cannot appear but by attorney, to say that such an appearance would amount to a waiver of the objection, would be to say, that the party must, from necessity, forfeit an acknowledged right, by using the only means which the law affords of asserting that right." *Commercial &c. Bank v. Slocomb*, 14 Pet. (U. S.) 60, 65.

§ 7629. Stage of Proceedings at Which It may so Plead.

In respect of this question, a distinction must be taken between a plea to the jurisdiction of the court *over the person* of the defendant corporation, and a plea to its jurisdiction *over the cause of action*. The two things are different, in respect of the principle that an objection to the jurisdiction over the person of the defendant may be waived, while an objection to the jurisdiction over the cause of action can never be waived,—the principle being that consent cannot confer such jurisdiction. It follows that an objection to the jurisdiction of the court over the person of the defendant corporation, as where it is sued in the wrong county within the State, or in the wrong Federal district, or in a State where it has no existence for jurisdictional purposes,—must be made *in limine*, and before making any defense to the merits, and that the right to make the objection is waived by appearing and answering to the merits.¹ On the other hand, since the right to object to the jurisdiction of the court over the cause of action is never waived, this objection may be raised at any stage of the proceedings, even in an appellate court.² Between these two elements of jurisdiction rests a middle class of cases where the objection may be regarded as *quasi-jurisdictional* merely. We refer to a class of cases where the *situs* of the contract which is the subject-matter of the action, is such that the court ought not to take jurisdiction of it. In such a case, if the court does take jurisdiction, and does proceed to judgment, its action may be regarded as *error* merely, and its judgment will not be void, in the sense that it can be treated as a nullity in a collateral proceeding. But here it seems that the objection to the jurisdiction of the court, if such it can properly be called, need not be taken within the time allotted for filing dilatory pleas.³

¹ *Ante*, § 7552; *Dart v. Farmers' &c. Bank*, 27 Barb. (N. Y.) 337; *Carpentier v. Minturn*, 65 Barb. (N. Y.) 293.

² *Harriott v. New Jersey R. Co.*, 8 Abb. Pr. (N. Y.) 284; *Jones v. Nor-*

wich Trans. Co., 50 Barb. (N. Y.) 193.

³ *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *s. c.* 33 Am. Rep. 258.

§ 7630. **Plea of the Dissolution of the Corporation.**—In strictness, when a corporation becomes dissolved, all rights of action against it abate, except in so far as they are continued by statute;¹ though a court of equity will lay hold of its assets and administer them as a trust fund for its creditors and stockholders.² If, pending an action or an appeal from an action, against a corporation, its *charter expires by limitation*, the action, and with it the appeal, must abate; but, as it cannot appear in court, or have any attorney after it is dead, there is a certain awkwardness in getting the fact of its death upon the record, but no greater, it may be presumed, than is presented in many cases in the case of the death of a natural person. In one case the counsel for the corporation suggested to the appellate court that, pending the appeal, its charter had expired by limitation; and the court, treating the suggestion as coming from an *amicus curiæ*, ordered that the appeal abate.³ Since corporations are capable of continuing an existence, under the statute law, for limited periods of time, for the purpose of winding up their affairs after dissolution, or the expiration of their charters,⁴ it is no longer regarded as a good defense to an action, merely to plead that the corporation has been dissolved.⁵ On the other hand, there may be a *de facto dissolution* of a corporation such as takes place by the voluntary action or non-action of its members,⁶ which will not prevent its being revived at their pleasure.⁷ Therefore, an

¹ *Ante*, § 6722.

² *Ante*, § 2951, *et seq.*

³ *Rider v. Nelson &c. Union Factory*, 7 Leigh (Va.), 154; *s. c.* 30 Am. Dec. 495.

⁴ *Ante*, § 6734, *et seq.*

⁵ Accordingly, it has been held that a private business corporation which failed to wind up its business upon the expiration of its charter, but which thereafter continued to carry on its business in its corporate name, might be sued for a tort committed after its charter had expired; so that a plea alleging that all its

property had passed into the hands of its directors for the purposes of liquidation, and that its power of creating any liability had ceased, etc., was bad on demurrer. *Miller v. Coal Co.*, 31 W. Va. 836; *s. c.* 13 Am. St. Rep. 903; 8 S. E. Rep. 600. The court placed its decision partly on the ground that the plea did not show that the corporation was not still in existence *de facto*. *Ibid.*

⁶ *Ante*, § 6650, *et seq.*; and see, especially, *ante*, § 3345.

⁷ See *Welch v. Sainte Genevieve*, 1 Dill. (U. S.) 130.

avermment that a corporation has distributed its shares among its stockholders, and has ceased to make any use of its franchises, is not equivalent to an averment of its dissolution, so as to render it unnecessary to join it as a party in a suit in equity, in a case where, if still *in esse*, it would be a necessary party.¹

§ 7631. **Plea of Non est Factum by a Corporation.**—If an action is brought against a corporation upon a contract alleged to be its contract, if it desires to set up the defense that the contract was executed by one not authorized as its agent, it *must plead non est factum*, although there is a statute requiring such a plea to be *on oath*.² In such a case the corporation must of course *make an oath by its proper officer or agent*, and it must appear that the oath is made on behalf of the corporation, and that the person making it has authority from the corporation to make such denial.³

§ 7632. **Verification of Pleadings by Corporations.**—Statutes exist, in some of the States, requiring the answers and pleas of corporations to be *verified by some officer* or person in their behalf. A New York statute provides that, where the party is a domestic corporation, its pleadings must be verified “by an officer thereof”;⁴ and a statute of Maryland requires the pleas of a corporation to be verified by the oath of some natural person, capable of making an affidavit.⁵ A statute

¹ Swan Land and Cattle Co. v. Frank, 39 Fed. Rep. 456.

² San Antonio &c. R. Co. v. Wilson (Tex. App.), 19 S. W. Rep. 910; Barrett Min. Co. v. Tappan, 2 Colo. 124, 128. Compare Mather v. Union Loan &c. Co., 26 N. Y. St. Rep. 58; s. c. 7 N. Y. Supp. 213.

³ Barrett Min. Co. v. Tappan, 2 Colo. 124. That a statement in *assumpsit*, under Pennsylvania act of May 25, 1887, where plaintiff is a corporation, must not only be *signed* by an officer of the corporation, but must show his *title*,—see Merchants' Nat.

Bank v. Brooks, 6 Pa. County Ct. 314. Where the petition declared on a note and mortgage, which it alleged were executed by the duly authorized board of trustees of the defendant corporation, an answer denying that either note or mortgage were executed or made in any way by defendant was held sufficient to put in issue their validity. Babbage v. Second Baptist Church, 54 Iowa, 172.

⁴ New York Code Civ. Proc., § 525.

⁵ Knickerbocker &c. Ins. Co. v. Hoeske, 32 Md. 317.

requiring the pleading of litigants generally to be verified, applies, it seems, to corporate litigants, as well as to natural persons; for, though a corporation cannot take an oath, it can verify a pleading by the oath of an officer or agent thereto appointed.¹ In such a case as the last named, it must appear that the oath is made on behalf of the corporation, and that the person making it has authority from the corporation to make it.²

§ 7633. Allegation of Citizenship of Corporations for Purposes of Federal Jurisdiction.—As the jurisdiction of the Federal courts, under the Constitution of the United States, in ordinary controversies between the inhabitants of different States, is founded upon the fact that the contending parties

¹ *Ante*, § 7469.

² *Barrett Min. Co. v. Tappan*, 2 Colo. 124. Under the provisions of the Code of Civil Procedure of New York, above referred to, it seems that the "officer" who may verify a pleading for a corporation is an officer on whom process in an action against a corporation may, under another statute, be served. But a "*general manager*" cannot make such a verification, because he is not included in the statute relating to *service of process*, though the statute does include a "managing agent." *Meton v. Isham Wagon Co.*, 15 N. Y. Civ. Proc. 259; *s. c.* 4 N. Y. Supp. 215. But, under the same statute, the *treasurer* of a corporation may verify its answer on information and belief. *Macauley v. Bromell & Berkely Printing Co.*, 14 Abb. N. Cas. (N. Y.) 316. A verification by one who stated in the affidavit that he was "the former president of the defendant"; that all the officers, including deponent, had tendered their resignations; and that "no other officers have yet been elected or chosen in their places,"—was insufficient.

Kelley v. Woman's Pub. Co., 4 N. Y. Supp. 99; *s. c.* 15 N. Y. Civ. Proc. Rep. 259. A verification of a pleading by an officer of a corporation, under this statute, is a verification *by the party*; and such officer need not set forth therein the grounds of his belief as to matters not stated upon his knowledge. *American Insulator Co. v. Bankers and Merchants' Telegraph Co.*, 13 Daly (N. Y.), 200. The rule seems to be the same *under the North Carolina statute*; so that a verification of a complaint made by an officer of a corporation, need not set forth "his knowledge, or the grounds of his belief on the subject, and the reason why it was not made by the party." *Bank v. Hutchison*, 87 N. C. 22; following *Alspaugh v. Winstead*, 79 N. C. 526. A statute of Alabama enacts that whenever *interrogatories* shall be propounded to a corporation (under Code, § 2816), the answer thereto shall be made by such officer, agent, or servant of the corporation *as shall be cognizant of the fact*. Ala. Acts 1888-89, No. 141, p. 121.

are *citizens of different States*,¹ the proper allegation which is necessary to show Federal jurisdiction even in the case of a corporation, is that it is a "citizen" of a particular State, other than that of the other party to the action. But it seems that equivalent expressions are admissible. Thus, in one case it was said that the citizenship of a corporation is sufficiently disclosed, for the purposes of Federal jurisdiction, by the allegation that it is a corporation duly organized under the laws of a particular State.² But an allegation that a corporation was "*doing business*" in a "particular State" does not necessarily import that it was *created* by the laws of that State, or that it is a citizen of that State for the purposes of Federal jurisdiction.³ .

¹ *Ante*, § 7447, *et seq.*

² *Brock v. North Western Fuel Co.*

³ *Dodge v. Tulleys*, 144 U. S. 451. 130 U. S. 341.

CHAPTER CLXXXIV.

QUESTIONS RELATING TO CORPORATE EXISTENCE.

ART. I. IN GENERAL. §§ 7641-7652.

II. QUESTIONS OF PLEADING. §§ 7658-7682.

III. PROOF OF CORPORATE CHARACTER. §§ 7689-7713.

IV. EFFECT OF DISSOLUTION. §§ 7720-7724.

ARTICLE I. IN GENERAL.

SECTION	SECTION
7641. Preliminary.	plaintiff as a corporation
7642. Validity of corporate existence not questioned collaterally.	estopped to deny that it is such.
7643. Not even in case of a fraudulent organization.	7648. Extent and illustrations of this estoppel.
7644. Suing a corporation as such admits its corporate existence.	7649. Cases denying this principle.
7645. A general appearance by a corporation admits corporate existence.	7650. Assumed corporation contracting as such estopped to deny its own existence.
7646. Corporate existence admitted by taking an appeal.	7651. This estoppel extends to officers, directors, and members.
7647. Defendant contracting with	7652. The question of corporate existence in criminal proceedings.

§ 7641. Preliminary.—The inconvenience of litigating, in an action between a corporation and a private person, the question whether it is a corporation *de jure*, and whether it may sue or be sued as such, is so great, that courts have resorted to various expedients to avoid the determination of this question in such a collateral way. They have been moved to these expedients by the further consideration that a determination of the question would be a determination of it for that particular case only, and not for the purposes of a case between other parties; and consequently, to that extent, its determination would be inconclusive. It is proposed to

consider in this chapter, as briefly as may be, the expedients to which the courts have thus resorted.¹

§ 7642. Validity of Corporate Existence not Questioned Collaterally, but only by the State.—There is a principle of very extensive application in the law, both in civil and criminal cases,² subject to many exceptions, already considered,³ to the general effect that where a corporation has an existence *de facto*, the rightfulness of its existence can only be questioned by the State, and cannot be questioned collaterally in a litigation between it and a private party.⁴

¹ See, on the general subject, *ante*, § 495, *et seq.*, and § 518, *et seq.*; and consult Index, title *Estoppel*.

² As to its application in criminal cases, see *post*, § 7652.

³ *Ante*, §§ 502, 511, 1854, 1855, 4355, 5652, and others.

⁴ *Finch v. Ullman*, 105 Mo. 255; *s. c.* 24 Am. St. Rep. 383; *Snider's Sons' Co. v. Troy*, 91 Ala. 224; *s. c.* 24 Am. St. Rep. 887; *Re Congregational Church*, 131 N. Y. 1; *s. c.* 42 N. Y. St. Rep. 701; 30 N. E. Rep. 43; *Grand River Bridge Co. v. Rollins*, 13 Colo. 4; *s. c.* 2 Denv. Leg. News, 226; *s. c.* 21 Pac. Rep. 897; *Duggan v. Colorado Mortg. &c. Co.*, 11 Colo. 113; *s. c.* 17 Pac. Rep. 105; *Walton v. Riley*, 85 Ky. 413; *s. c.* 3 S. W. Rep. 605; *People v. Ulster &c. R. Co.*, 34 N. Y. St. Rep. 983; *s. c.* 12 N. Y. Supp. 303; *Demarest v. Flack*, 32 N. Y. St. Rep. 675; *s. c.* 11 N. Y. Supp. 83; *s. c.* affirmed, 128 N. Y. 205; *Chase's Patent Elevator Co. v. Boston Tow Boat Co.*, 155 Mass. 211; *s. c.* 9 L. R. A. 339; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43; *s. c.* 3 S. E. Rep. 227; *Denver &c. R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Cayuga County Nat. Bank v. Dunklin*, 29 Mo. App. 442; *Keith &c. Coal Co. v. Bingham*, 97 Mo. 196; *Haskell v. Worthington*, 94 Mo. 560; *First Baptist Church v.*

Branham, 90 Cal. 22; *s. c.* 27 Pac. Rep. 60; *Searcy v. Yarnell*, 47 Ark. 269; *s. c.* 1 S. W. Rep. 319; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531; *East Norway &c. Church v. Froislie*, 37 Minn. 447; *s. c.* 35 N. W. Rep. 260; *Re Short*, 47 Kan. 250; *s. c.* 27 Pac. Rep. 1005; 20 Am. & Eng. Corp. Cas. 522, n. For the scope and illustrations of this rule, see *Snider's Sons' Company v. Troy*, 91 Ala. 224; *s. c.* 24 Am. St. Rep. 887; *Re Congregational Church*, 131 N. Y. 1; *s. c.* 42 N. Y. St. Rep. 701; 30 N. E. Rep. 43; *Demarest v. Flack*, 32 N. Y. St. Rep. 675; *s. c.* 11 N. Y. Supp. 83; 128 N. Y. 205; *Lumber Co. v. Ward*, 30 W. Va. 43; *s. c.* 3 S. E. Rep. 227; *Searcy v. Yarnell*, 47 Ark. 269; 1 S. W. Rep. 319; *Chase's Patent Elevator Co. v. Boston Tow Boat Co.*, 155 Mass. 211; *s. c.* 9 L. R. A. 339; *Cayuga County Nat. Bank v. Dunklin*, 29 Mo. App. 442; *Finch v. Ullman*, 105 Mo. 255; *s. c.* 24 Am. St. Rep. 383; *Keith &c. Coal Co. v. Bingham*, 97 Mo. 196; *People v. Ulster &c. R. Co.*, 34 N. Y. St. Rep. 983; *s. c.* 12 N. Y. Supp. 303, *Welch v. Old Dominion Min. &c. R. Co.*, 31 N. Y. St. Rep. 916; *s. c.* 10 N. Y. Supp. 174. That the same rule exists under statutes, such as the *California Code of Civil Procedure*, see

§ 7643. Not Even in Case of a Fraudulent Organization. The principles discussed in this chapter would go for little, if private persons, in a litigation with a corporation, could, for the purposes of the litigation, overthrow its existence, by averring and proving that it had been organized in fraud of the governing statute. If it has been *colorably organized*, the question whether it has been fraudulently organized will undoubtedly be one which can only be litigated between the corporation and the State. Especially will a customer of the corporation, who has entered into an obligation in its favor, be estopped from setting up such a defense; and the estoppel will, for stronger reasons, work against the corporation to prevent it from pleading *fraud in its own organization*.¹

§ 7644. Suing a Corporation as Such Admits its Corporate Existence.—Where a plaintiff brings an action against a corporation the direct object of which is to operate upon it and for relief against it in its corporate character, he will be estopped, at any subsequent stage of the cause, from denying that the defendant is a corporation.² Still less can a corporation be sued as such, and brought into court, and the action be maintained against it, *on the ground that it is not a corporation*; and other defendants sued jointly with it cannot be charged, in such an action, with having jointly, with such corporation, usurped the rights of a corporation, etc.,—because, by suing the corporation as such, its existence is admitted.³

§ 7645. A General Appearance by a Corporation Admits Corporate Existence.—The first of these expedients has been

Hitt. Gen. Laws Cal., art. 751; Oroville &c. R. Co. v. Plumas Co., 37 Cal. 354; Spring Valley Water Works v. San Francisco, 22 Cal. 434, 440; Dunnebroge Mining Co. v. Allment, 26 Cal. 286; Rondell v. Fay, 32 Cal. 354; Stockton &c. Gravel Road Co. v. Stockton &c. R. Co., 45 Cal. 680;

Bakersfield &c. Asso. v. Chester, 55 Cal. 98.

¹ Southern Bank v. Williams, 25 Ga. 534, 736. Compare Napier v. Poe, 12 Ga. 170; Mitchell v. Rome R. Co., 17 Ga. 574.

² Society v. Morris Canal &c. Co., 1 N. J. Eq. 157; s. c. 21 Am. Dec. 41.

³ People v. Stanford, 77 Cal. 360; s. c. 2 L. R. A. 92; 19 Pac. Rep. 693.

found in the principle, which is obviously sound and sensible as a mere rule of technical pleading, that where an action is brought against a body, and the declaration, complaint, or petition, alleges that it is a corporation, if the body appears generally to the action for the purpose of contesting the merits, its appearance admits that it is a corporation. This is necessarily so; because, as it is the corporation,—that is, the artificial body alone,—which is summoned, it necessarily admits its identity when it responds to the summons. The rule, then, is that a corporation, by appearing in a suit which has been brought against it, admits its corporate existence, and estops itself from denying the same.¹ So, if a *foreign corporation*, proceeded against by attachment, voluntarily appears and gives bond in its corporate name, it cannot afterwards deny its corporate existence.²

§ 7646. Corporate Existence Admitted by Taking an Appeal.—So, if a defendant is sued as a corporation, and makes no appearance until judgment is rendered against it, but *appeals from such judgment to a higher court*, its appearance for the purpose of taking an appeal, and its appeal, will have the effect of admitting its existence as a corporation, so that it will not be a good point in the appellate court that the plaintiff failed to prove the defendant's corporate existence.³ So, an assumed corporation, against which a judgment has been rendered, becomes estopped to deny its existence, by *executing a bond* for the purpose of appealing from such judgment.⁴

§ 7647. Defendant Contracting with Plaintiff as a Corporation Estopped to Deny that It is Such.—This rule of estop-

¹ Seaton v. Chicago &c. R. Co., 55 Mo. 416; United States Express Co. v. Bedbury, 34 Ill. 459; Oxford Iron Co. v. Spradley, 46 Ala. 98; Missouri River &c. R. Co. v. Shirley, 20 Kan. 660. Compare Stoddard v. Onondaga Ann. Conf., 12 Barb. (N. Y.) 573; ante, § 7552, et seq.

² Hudson v. St. Louis &c. R. Co.,

53 Mo. 525; Seaton v. Chicago &c. R. Co., 55 Mo. 416; Smith v. Burlington &c. R. Co., 55 Mo. 526.

³ Kansas City &c. R. Co. v. Bolson, 36 Kan. 534; s. c. 14 Pac. Rep. 5; 2 Rail. & Corp. L. J. 83.

⁴ East Tennessee &c. R. Co. v. Evans, 6 Heisk. (Tenn.) 607.

pel also applies where an alleged corporation sues as plaintiff upon a promissory note, or other written obligation which has been made to it by the defendant or by his assignor in its corporate name. In such a case the defendant, by entering into the contract with the plaintiff in its assumed character of a corporation, is held to have effectually *estopped himself from denying that it is a corporation*, when it sues in that character to enforce the contract.¹

§ 7648. Extent and Illustrations of This Estoppel.—It has been held not necessary that the instrument sued on should formally recite that the plaintiff is a corporation; but it is sufficient, to bring it within this rule, that the instrument is made to a pledgee having *an artificial name such as is usually conferred upon a corporation*,—as, for instance, where it was a promissory note payable to the “Continental Insurance Company.”² The case is, of course, stronger where the contract sued on recites the fact of the incorporation of the plaintiff.³ So, where a person, by his deed, declares the grantee therein to be a corporation, receives from it the purchase price, binds himself and his heirs to defend the title of such corporation, its successors and assigns, and delivers possession of the premises, such grantor and his heirs are forever estopped from denying the corporate existence of the grantee, as against those who have acquired possession and title under that deed.⁴

¹ Brickley v. Edwards, 181 Ind. 3; s. c. 30 N. E. Rep. 708; Perine v. Grand Lodge, 48 Minn. 82; s. c. 50 N. W. Rep. 1022; Snider v. Troy, 91 Ala. 224; s. c. 24 Am. St. Rep. 887; 8 South. Rep. 658; Topping v. Bickford, 4 Allen (Mass.), 120; German Bank v. Stumpf, 6 Mo. App. 17; Ramsey v. Peoria &c. Ins. Co., 55 Ill. 311; East River Bank v. Rogers, 7 Bosw. (N. Y.) 493; Ragan v. McElroy, 98 Mo. 349; Automatic Phonograph Exhibition Co. v. North American Phonograph Co., 45 Fed. Rep. 1; Searcy v. Yarnell, 47 Ark. 269; s. c. 1 S. W.

Rep. 319; Stout v. Zulick, 48 N. J. L. 599; s. c. 7 Atl. Rep. 362; Mullen v. Beech Grove Driving Park, 64 Ind. 202; Farmers' &c. Ins. Co. v. Needles, 52 Mo. 17; Vanneman v. Young, 52 N. J. L. 403; s. c. 20 Atl. Rep. 53; Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764; s. c. 12 S. E. Rep. 771.

² Topping v. Bickford, 4 Allen (Mass.), 120.

³ German Bank v. Stumpf, 6 Mo. App. 17.

⁴ Ragan v. McElroy, 98 Mo. 349. The same principle prevents persons

So, a person dealing with a *de facto* corporation as such, and becoming its creditor, will not be allowed to set up the invalidity of its organization, for the purpose of going beyond the artificial body and *charging its stockholders as partners*, in the absence of fraud;¹ though if there is really no corporation which can be charged, the promoters or other co-adventurers, who procured the credit in its pretended behalf, may be liable on the principle of *breach of warranty of agency*, already considered.² The estoppel under consideration, like other estoppels, extends to the *privies* of the contracting parties; so that if a note is given to an assumed corporation, in its corporate name, and the corporation indorses the note to another in good faith, the maker will not be permitted to set up the non-existence of the corporation, when sued upon the note by the indorsees.³

§ 7649. Cases Denying This Principle.—Cases are not wanting denying or limiting the exercise of this principle. Thus, it has been held in Texas, where there is a statute absolutely prohibiting the doing of business in that State by mercantile corporations, that where an assumed mercantile corporation has never been formally organized as such, a

or *municipal corporations*, which *subscribe for shares* of the stock of a private corporation, from afterwards denying its corporate existence, whether sued by the private corporation to enforce the contract of subscription, or otherwise. Thus, where a town had so subscribed to the shares of a railroad company, and the company had been subsequently sold out under a mortgage, and the town brought an action to cancel the sale, it was held that, having dealt with the alleged company as ostensibly a corporation, it was estopped to deny its corporate character. *Searcy v. Yarnell*, 47 Ark. 269; *s. c.* 1 S. W. Rep. 319.

¹ *Snider v. Troy*, 91 Ala. 224; *s. c.* 24 Am. St. Rep. 887; *Merchants' &c.*

Bank v. Stone, 38 Mich. 779; *Stout v. Zulick*, 48 N. J. L. 599; *s. c.* 7 Atl. Rep. 362.

² *Ante*, §§ 418, 419, 2939, 4650.

³ *Brickley v. Edwards*, 131 Ind. 3; *s. c.* 30 N. E. Rep. 708; *Topping v. Bickford*, 4 Allen (Mass.), 120. A promissory note was made payable "to the order of C. W. S., Treasurer of the I. M. B. Co."; it was held that the legal intendment was that the contract was made with the company, and not with the treasurer individually, and that the maker of the note in an action thereon was estopped from alleging the non-existence of the corporation at the time he made the contract. *Vater v. Lewis*, 36 Ind. 288; *s. c.* 10 Am. Rep. 29.

creditor who deals with the body as such, is not thereby estopped from denying its corporate capacity, but may hold its members liable as partners.¹

§ 7650. Assumed Corporation Contracting as Such Estopped to Deny its Own Existence. — The operation of this principle is also such that a party, individual or collective, which holds itself out as a corporation, acts as such in making a contract, and *promises in a corporate name*, may be sued on the contract, and charged in that name, and will not be heard to deny the corporate character which it has thus assumed.²

¹ *Empire Mills v. Alston Grocery Co.* (Tex.), 15 S. W. Rep. 505; affirming *s. c.* 15 S. W. Rep. 200. The principle that a party can be estopped by his conduct from showing that a pretended corporation is not such *de jure* is denied *in toto* in *Boyce v. Trustees*, 46 Md. 359, 373. So, it has been held in Pennsylvania that, in an action of *assumpsit* by the creditors of an association, organized under a statute of that State, *against the stockholders*, the plaintiff proceeding under the personal liability clause of the statute, — it is competent for the plaintiff to show, either that the certificate required by law in order to obtain the charter was essentially untrue, and consequently that the corporation was organized in fraud of the statute, or that a portion of the stock was not paid for in money, as required thereby. The court reasoned that the charter — so-called — understood to have been granted by a public officer of the State, — was conclusive evidence of its own validity, but that it did not cover any frauds perpetrated by the co-adventurers in procuring it; and that the creditors of the corporation might show the fraud in order to avoid the immunity with which a charter fairly obtained would clothe the stockholders and thereby

charge them as partners. *Paterson v. Arnold*, 45 Pa. St. 410.

² *Ante*, § 532; *Scheufler v. Grand Lodge*, 45 Minn. 256; *s. c.* 20 Ins. L. J. 241; 47 N. W. Rep. 799; *Liter v. Ozokerite Min. Co.*, 7 Utah, 487; *s. c.* 27 Pac. Rep. 690. Thus, in an action by a director against an assumed corporation to recover for his personal services, the corporation cannot give evidence to prove that it exists only in name, and that an investment company which is not made a party, is the organization for which defendant holds its franchises, and that plaintiff's claim as to such other company is unjust. *Ten Eyck v. Pontiac & c. R. Co.*, 74 Mich. 226; *s. c.* 16 Am. St. Rep. 633; 3 L. R. A. 378; 5 Rail. & Corp. L. J. 401; 41 N. W. Rep. 905. So, a corporation organized under a general law, which has assumed liabilities and held itself out to the community as a corporation, will not be permitted to defeat the claims of creditors, by showing the falsity of the certificate of organization filed by it under such law. *Doolley v. Cheshire Glass Co.*, 15 Gray (Mass.), 494. *Contra*, *Boyce v. Trustees*, 46 Md. 359. Upon the same principle, it cannot show its own neglect to publish the certificate of organization, as required by the gov-

§ 7651. **This Estoppel Extends to Officers, Directors, and Members.**—This estoppel operates in favor of persons who have given credit to the assumed corporation, or otherwise changed possession to their loss, upon the faith of its being what it purports to be, as against those who, by their active conduct, have held it out to the world as a corporation.¹ It therefore estops *promoters*, *directors*, and *stockholders*, from denying the fact of the existence of the corporation, when proceeded against to charge them upon the assumption of its existence, and of their connection with it as such. We have already considered at length how this estoppel operates against *stockholders*,² and against *directors*.³ It may be added that, in an action to recover from *promoters* the profits which they have made in buying property for one price and selling it to the corporation for a greater price, the defendants, by reason of their active participation in the formation of the corporation, are estopped from denying that it has been regularly organized.⁴ Yet, while it is a rule of law that persons who have assumed to make a contract, as agents of a corporation which has no existence, bind themselves personally, on the principle of *breach of warranty of agency*,⁵—nevertheless, this doctrine, in the absence of fraud, has no application where the other contracting party is himself a member of the supposed

erning statute; nor that, contrary to such statute, it assumed the name of a corporation already in being. *Doolley v. Cheshire Glass Co.*, *supra*.

¹ *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; *s. c.* 17 Am. St. Rep. 149; 5 Rail. & Corp. L. J. 566; 42 N. W. Rep. 259.

² *Ante*, §§ 528, 1853, 3383, *et seq.*

³ *Ante*, § 4354, *et seq.*

⁴ *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; *s. c.* 17 Am. St. Rep. 149; 5 Rail. & Corp. L. J. 566. So, where, in an action in the name of an insurance company, suing as a corporation, upon a subscription executed to the company in liquidation of a

subscription to its capital stock, it appeared that the defendant was one of the original subscribers to such capital stock, and that he had been elected and had served as one of the directors of the company,—it was held that these facts estopped him from objecting that the plaintiff had failed to prove a legal corporate organization. *Ramsey v. Peoria &c. Ins. Co.*, 55 Ill. 311. So, where a certificate of incorporation has been signed by certain persons who accept the office of trustees, they are estopped from denying the validity of the certificate. *Parrott v. Byers*, 40 Cal. 614.

⁵ *Ante*, §§ 417, 2969.

or pretended corporation. The reason is that where several persons have agreed among themselves to be liable only as the members of a corporation are liable, each one of them is estopped by his own agreement from charging the others with a greater liability.¹

§ 7652. **Question of Corporate Existence in Criminal Proceedings.**—In criminal proceedings against others than the corporation, it has been held that proof of the corporate existence may be demanded, as in actions by or against the corporation, where the subject-matter of the criminal charge relates to corporate property or rights.² In some jurisdictions this requirement is not strictly followed. In Vermont, for example, it was said on one occasion: "It is every day's practice, to admit proof of the existence of corporations, without even the production of the charter; and this in criminal cases. In indictments for uttering counterfeit bank notes, parol proof of the existence of the corporation in fact, is uniformly admitted. Indeed, frequent as these indictments are, as well as convictions upon them, I do not recollect a single instance of the production of the bank charter in such a case, since I have been upon the bench."³ In Indiana it has been held, in a prosecution for a trespass upon the property of persons holding the same in a corporate capacity, that it did not concern the defendant to inquire whether such persons were legally

¹ *Foster v. Moulton*, 35 Minn. 458; s. c. 29 N. W. Rep. 155. Compare *Buffalo &c. R. Co. v. Cary*, 26 N. Y. 75; *White v. Ross*, 4 Abb. App. Dec. (N. Y.) 589; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Eaton v. Aspinwall*, 19 N. Y. 119; *Sands v. Hill*, 46 Barb. (N. Y.) 651; *Chubb v. Upton*, 95 U. S. 665. It has been reasoned that, to warrant the conclusion that a person is estopped from disputing the existence of a corporation, on the ground that he has co-operated in its organization and assumed corporate action, the acts shown must be unmistakably corporate acts. Proof that members

of a religious body held meetings, and elected the defendant their treasurer, and that he accepted the office, did not estop him from denying, in an action brought in the corporate name against him, that the plaintiffs were ever incorporated; for these things might have been done in a voluntary association. *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476.

² *United States v. Johns*, 4 Dall. (U. S.) 412.

³ *Searsburgh Turn. Co. v. Cutter*, 6 Vt. 315, 323, *per Phelps, J.*

organized as a corporation. "They own and are in possession of the land described in the indictment," said Hawk, C. J., "and owned and possessed the same, under their corporate name, long before and at the time of the commission of the trespass for which the appellant is prosecuted, and that is sufficient for the purposes of this case."¹

ARTICLE II. QUESTIONS OF PLEADING.

SECTION

7658. When not necessary to allege corporate existence.

7659. Doctrine that it is necessary to allege corporate existence.

7660. Necessary when suing for rights which can only inhere in a corporation.

7661. What averments of corporate existence sufficient.

7662. Whether necessary to repeat averment of corporate existence in successive counts.

SECTION

7663. Declaring against a corporation which has changed its name.

7664. Question of corporate existence must be raised by defendant.

7665. Plea to the merits admits corporate existence.

7666. How question of corporate existence raised in pleading.

7667. Statutory rule in New York requiring plea in abatement or in bar.

¹ White v. State, 69 Ind. 273, 279. A statute of Missouri provides as follows: "If, on the trial or other proceeding in a criminal cause, the existence, constitution, or powers of any banking company or corporation, shall become material, or be in any way drawn in question, it shall not be necessary to produce a certified copy of the charter or act of incorporation, but the same may be proved by general reputation, or by the printed statute book of the State, government or country by which such corporation was created." Gen. Stat. Mo. 850, § 22; Rev. Stats. Mo. 1879, § 1915. It seems that this statute is to read as though a comma were placed after the words "banking company"; for in one case it was held, on an indictment for an embezzlement of the funds of an *express company*, that the incorporation of the company might be proved by parol. State v. Cheek, 63 Mo. 364. In the same State, in a

prosecution for assault with intent to kill the marshal of a city of the fourth class, the defendant cannot, for the purpose of negating the official character of the marshal, interpose the defense that the city was not legally incorporated. In such a case it is enough that the State recognizes its right to exist and to exercise the powers of a city of the fourth class. State v. Fuller, 96 Mo. 165. The same rule applies where the town or city is itself the plaintiff. It is therefore not competent for the defendant, in an action by a municipal corporation to recover a fine for a violation of one of its ordinances, to disprove the fact of its incorporation. Here again the question can only be raised by the State in a proceeding in the nature of *quo warranto*, or in some other direct proceeding. Fredericktown v. Fox, 84 Mo. 59. See also Catholic Church v. Tobbein, 82 Mo. 418.

QUESTIONS OF CORPORATE EXISTENCE. [6 Thomp. Corp. § 7658.

SECTION

- 7668. When must be raised by a denial under oath.
- 7669. Question raised by plea of *nul tiel corporation*.
- 7670. This plea raises only question of existence *de facto* of corporation.
- 7671. *Nul tiel corporation*, how pleaded.
- 7672. Further as to particularity of averment in raising question of corporate existence.
- 7673. Particularity of statement where defendant pleads corporate existence.
- 7674. Particularity in replication to plea of *nul tiel corporation*.

SECTION

- 7675. Burden of proof under this plea.
- 7676. Plea of *nul tiel corporation* defendant.
- 7677. *Nul tiel corporation* defendant, how pleaded.
- 7678. Stage of the proceedings at which defense of *nul tiel corporation* pleadable.
- 7679. Amendments in case of failure to plead corporate existence.
- 7680. Defense that plaintiff corporation was organized for unlawful purposes.
- 7681. Corporate existence how put in issue in actions before justices of the peace.
- 7682. Manner of pleading dissolution.

§ 7658. When not Necessary to Allege Corporate Existence.—There is a mass of authority, more or less definite, to the effect that, in an action by¹ or against a corpora-

¹ Bank of United States *v.* Has-
kins, 1 Johns. Cas. (N. Y.) 132; Hen-
derson &c. R. Co. *v.* Leavell, 16 B.
Mon. (Ky.) 358; Bank of Utica *v.*
Smalley, 2 Cow. (N. Y.) 770; *s. c.* 14
Am. Dec. 526; Dutchess Cotton Man.
Co. *v.* Davis, 14 Johns. (N. Y.) 238;
s. c. 7 Am. Dec. 459; Wilson *v.*
Sprague Mowing Machine Co., 55
Ga. 672; Cicero &c. Co. *v.* Craighead,
28 Ind. 274; Bank of Michigan *v.*
Williams, 5 Wend. (N. Y.) 478, 482;
Adams Express Co. *v.* Hill, 43 Ind.
157; Union Mutual Ins. Co. *v.* Os-
good, 1 Duer (N. Y.), 707; Bank *v.*
Beltser, 13 How. Pr. (N. Y.) 270;
Camden &c. R. Co. *v.* Remer, 4 Barb.
(N. Y.) 127; Marine &c. Ins. Bank *v.*
Jauncey, 1 Barb. (N. Y.) 486; Stod-
dard *v.* Onondaga Annual Conference,
12 Barb. (N. Y.) 573; Kennedy *v.*
Cotton, 28 Barb. (N. Y.) 59; Cheraw
&c. R. Co. *v.* White, 14 S. C. 51;
Williams *v.* Franklin &c. Asso., 26

Ind. 310; Bennington Iron Co. *v.*
Rutherford, 18 N. J. L. 105; *s. c.* 35
Am. Dec. 528; Richardson *v.* St.
Joseph Iron Co., 5 Blackf. (Ind.)
146; *s. c.* 33 Am. Dec. 460; Zion
Church *v.* St. Peter's Church, 5
Watts & S. (Pa.) 215; Lighte *v.* Ev-
erett Fire Ins. Co., 5 Bosw. (N. Y.)
716; La Fayette Ins. Co. of Brook-
lyn *v.* Rogers, 30 Barb. (N. Y.)
491; Phenix Bank *v.* Donnell, 41
Barb. (N. Y.) 571; Acome *v.* Amer-
ican Mineral Co., 11 How. Pr.
(N. Y.) 24; Shoe & Leather Bank
v. Brown, 9 Abb. Pr. (N. Y.) 218;
s. c. 18 How. Pr. (N. Y.) 308;
Heaston *v.* Cincinnati &c. R. Co.,
16 Ind. 275; *s. c.* 79 Am. Dec. 430;
Harris *v.* Muskingum Man. Co., 4
Blackf. (Ind.) 267; *s. c.* 29 Am.
Dec. 372; Seymour & Sons *v.* Thomas
Harrow Co., 81 Ala. 250; *s. c.* 1
South. Rep. 45; Mackenzie *v.* Board
of School Trustees, 72 Ind. 189;

tion,¹ whether *ex contractu* or *ex delicto*, it is not necessary to allege the fact that the plaintiff or the defendant is a corporation. Most of these decisions proceed upon the ground that where the plaintiff or the defendant, as the case may be, is *described* in the declaration or complaint *by a name which naturally imports that it is a corporation*, that is a sufficient allegation that such is the fact, for the purpose of an action, until it is controverted.² Others proceed on the ground that, in an

Phoenix Bank *v.* Donnell, 40 N. Y. 410; Gillett *v.* American Stove Co., 29 Gratt. (Va.) 565; Farmers' &c. Ins. Co. *v.* Needles, 52 Mo. 17; Harris Man. Co. *v.* Marsh, 49 Iowa, 11; Exchange Nat. Bank *v.* Capps, 32 Neb. 242; *s. c.* 29 Am. St. Rep. 433; 49 N. W. Rep. 223.

¹ Woolff *v.* City Steamboat Co., 7 C. B. 103; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; United States Express Co. *v.* Bedbury, 34 Ill. 459; Stoddard *v.* Onondaga Annual Conference, 12 Barb. (N. Y.) 573; Brauser *v.* New England Fire Ins. Co., 21 Wis. 506; Adams Express Co. *v.* Harris, 120 Ind. 73; *s. c.* 16 Am. St. Rep. 315; 21 N. E. Rep. 340; Cincinnati &c. R. Co. *v.* McDougall, 108 Ind. 179; *s. c.* 8 N. E. Rep. 571; Cribb *v.* Waycross Lumber Co., 82 Ga. 597; *s. c.* 9 S. E. Rep. 426; Odd Fellows' Building Asso. *v.* Hogan, 28 Ark. 261; Stanly *v.* Richmond &c. R. Co., 89 N. C. 331; Adams Express Co. *v.* Hill, 43 Ind. 157; Sayers *v.* First Nat. Bank, 89 Ind. 230; Ladd *v.* Methodist Episcopal Church, 1 Mich. (N. P.) 47.

² Thus, where a defendant was sued in a declaration commencing thus,—“The plaintiff complains of the City Steam-boat Company, who have been summoned to answer the plaintiff,” etc.,—it was held that this was a sufficient declaration, without alleging the defendant to be char-

tered, or incorporated, or registered. Woolf *v.* City Steam-boat Co., 7 C. B. 103. See also Stanly *v.* Richmond &c. Co., 89 N. C. 331; Lighte *v.* Everett Fire Ins. Co., 5 Bosw. (N. Y.) 716; Seymour *v.* Thomas Harrow Co., 81 Ala. 250; Harris *v.* Muskingum Man. Co., 4 Blackf. (Ind.) 267; *s. c.* 29 Am. Dec. 372; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146; *s. c.* 33 Am. Dec. 460; O'Donald *v.* Evansville &c. Co., 14 Ind. 259; Northwestern Conf. *v.* Myers, 36 Ind. 375; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Cicero Hygiene Draining Co. *v.* Craighead, 28 Ind. 274; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275; *s. c.* 79 Am. Dec. 430; Union Mutual Ins. Co. *v.* Osgood, 1 Duer (N. Y.), 707. This has been held where a plaintiff sues as the “Thomas Harrow Company” (Seymour *v.* Thomas Harrow Co., 81 Ala. 250; *s. c.* 1 South. Rep. 45); or as “the Board of Trustees for the Town of,” etc. (Mackenzie *v.* Board of School Trustees, 72 Ind. 189); or as the “Phoenix Bank” (Phoenix Bank *v.* Donnell, 40 N. Y. 410); or as the “American Stove and Hollow-ware Company” (Gillett *v.* American Stove &c. Co., 29 Gratt. (Va.) 565); or as the “Adams Express Company” (Adams Express Co. *v.* Hill, 43 Ind. 157); or where the *defendant is sued* as the “Cincinnati, Hamilton, and Indianapolis Railroad

action on a contract, it will be sufficient for the declaration or complaint to describe the plaintiff or defendant, as the case may be, by the artificial name by which such party is described in the contract, and that the defendant will be *estopped by the contract* to deny the capacity of such party to sue or be sued by that name.¹ Still others rest upon statutes such as that of Iowa providing that "when an action is founded on a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument."² But neither of these grounds would sustain the rule for the purposes of an *action ex delicto*. For the purposes of such an action, most of the decisions, as already noted, rest upon the theory that it is sufficient to describe the plaintiff or defendant by an artificial name which naturally imports that it is a corporation. Others rest upon the broader ground that the plaintiff may, on the one hand, sue by whatever name or description he chooses to take, and that he may sue the defendant, on the other hand, by whatever name or description he chooses to give; so that if, in the former case, there is no such plaintiff, the defendant may appear and show that fact,³ and that until he does appear

Company" (Cincinnati & C. R. Co. v. McDougall, 108 Ind. 179; s. c. 8 N. E. Rep. 571; see also Stanly v. Richmond & C. R. Co., 89 N. C. 331); or as the "Waycross Lumber Company" (Cribb v. Waycross Lumber Co., 82 Ga. 597; s. c. 9 S. E. Rep. 426); or as the "Adams Express Company" (Adams Express Co. v. Harris, 120 Ind. 73; s. c. 16 Am. St. Rep. 315; 21 N. E. Rep. 340); or as the "Odd Fellows' Building Association" (Odd Fellows' Bldg. Asso. v. Hogan, 28 Ark. 261).

¹ *Ante*, §§ 518, 7647; Farmers' & C. Ins. Co. v. Needles, 52 Mo. 17; National Ins. Co. v. Bowman, 60 Mo. 252; Dutchess Cotton Man. Co. v. Davis, 14 Johns. (N. Y.) 238, 245; s. c. 7 Am. Dec. 459; Platte Valley Bank v.

Harding, 1 Neb. 461; Exchange Nat. Bank v. Capps, 32 Neb. 242; s. c. 29 Am. St. Rep. 433. It has been held that where the defendant has contracted in writing with the plaintiffs as a corporation, they will not be required to prove their corporate existence, because he avers in his answer that he is informed and believes that they "are not a corporation." East River Bank v. Rogers, 7 Bosw. (N. Y.) 493.

² Iowa Code, § 2558; Harris Man. Co. v. Marsh, 49 Iowa, 11. For a similar statute in California, and its construction, see *post*, § 7661, note. Compare Gaines v. Bank, 12 Ark. 769; Hoereth v. Franklin Mill Co., 30 Ill. 151, 157.

³ "A party," says Nevius, J., "must come into court in his true

and show that fact, by an appropriate plea, it is immaterial whether the plaintiff is a corporation or a partnership, or an individual, but his petition is good on demurrer,¹ and it is not necessary for the plaintiff on the trial to introduce any evidence of its existence as a corporation;² and so that, on the other hand, if there is no such defendant, it is not necessary for any one to appear at all. Again, in cases where the plaintiff is described by a name which is ordinarily given to a corporation, many of the decisions hold that the declaration or complaint is sufficient on demurrer, because it does not appear on the face of it that the plaintiff is *not* a corporation;³ and the same rule has been suggested as applicable to the case where the defendant is so sued even in an *action ex delicto*;⁴ and this conclusion is strengthened in those jurisdictions which practice under the modern codes of procedure, which allow the want of capacity of the plaintiff to sue to be taken advantage of by demurrer, when it appears on the face of the complaint, but which expressly require all other objections to parties to be made by answer.⁵ And finally many of the cases lay stress upon the failure of the defendant to raise the objection by the proper plea, or until after verdict;⁶ and it is the implication of all the cases that the objection must be made *in limine* and by *plea in abatement*, or otherwise in the mode pointed out by

and proper name. If he fails to do so, the defendant may interpose his plea in abatement; but if he pleads to the action, he admits the plaintiff's right to sue in the name assumed." *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 107; s. c. 35 Am. Dec. 528.

¹ *Seymour v. Thomas Harrow Co.*, 81 Ala. 250; s. c. 1 South. Rep. 45. All of the decisions above cited in this paragraph either state in terms, or necessarily imply, that the declaration or complaint, in each of the actions stated, is good on demurrer. See also *Phoenix Bank v. Donnell*, 40

N. Y. 410; *Mackenzie v. School Trustees*, 72 Ind. 189.

² *Adams Express Co. v. Hill*, 43 Ind. 157; *Gillett v. American Stove & Co.*, 29 Gratt. (Va.) 565.

³ *Union Mut. Ins. Co. v. Osgood*, 1 Duer (N. Y.), 707.

⁴ *Stanly v. Richmond & C. R. Co.*, 89 N. C. 331.

⁵ See, for instance, N. C. Code Civ. Proc., § 95, as thus interpreted in *Stanly v. Richmond & C. R. Co.*, 89 N. C. 331.

⁶ *Cribb v. Waycross Lumber Co.*, 82 Ga. 597; s. c. 9 S. E. Rep. 426; *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

statute, as by *affidavit* in Virginia;¹ and it seems that this rule applies in *equity*, as well as at law;² and this would be the conclusion in the *code States*, where there is one code of procedure applicable alike to cases at law and in equity. Under no system of pleading is it necessary for the corporate existence to be averred and where the suit is in the name of *trustees* who hold the *legal title*.³

§ 7659. Doctrine that It is Necessary to Allege Corporate Existence.—On the contrary, there are some judicial holdings, mostly it seems, rendered in deference to statutory provisions, that in an action by⁴ or against⁵ a corporation, it is necessary for the declaration, complaint, or petition to allege that it is a corporation. Some of these decisions proceed upon a distinction between the case where a corporation is created by a public statute, which the courts will notice judicially, and the case where it is created by a private charter, which must be pleaded and proved,—holding that in the latter case the plaintiffs must aver and prove that they are a body corporate, duly constituted by competent authority,⁶—while conceding that the rule is otherwise where the act of incorporation is a public statute of the State in which the action is brought, of which the court can take judicial notice.⁷ This principle,

¹ *Gillett v. American Stove &c. Co.*, 29 Gratt. (Va.) 565; *post*, § 7678.

² Thus, in a bill in equity filed by a corporation, an averment of the corporate existence of the complainants is unnecessary. *German Reformed Church v. Von Puechelstein*, 27 N. J. Eq. 30; *Frye v. Bank of Illinois*, 10 Ill. 332, 335; *Central Man. Co. v. Hartshorne*, 3 Conn. 199.

³ *Wolf v. Goddard*, 9 Watts (Pa.), 544.

⁴ *Oroville &c. R. Co. v. Plumas Co.*, 37 Cal. 354, 360, *per Rhodes, J.*; *Central Man. Co. v. Hartshorne*, 3 Conn. 199; *Bank v. Simonton*, 2 Tex. 531; *Connecticut Bank v. Smith*, 17 How. Pr. (N. Y.) 487; *Johnson v.*

Kemp, 11 How. Pr. (N. Y.) 186; *Bank v. Wickham*, 16 How. Pr. (N. Y.) 97. The last two cases are disapproved in *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59. And see *Phoenix Bank v. Donnell*, 40 N. Y. 410.

⁵ *Middletown Bank v. Russ*, 3 Conn. 135; *s. c.* 8 Am. Dec. 164; *Byington v. Mississippi &c. R. Co.*, 11 Iowa, 502; *People v. Central Pac. R. Co.*, 83 Cal. 393.

⁶ *Bank v. Simonton*, 2 Tex. 531; *Holloway v. Memphis &c. R. Co.*, 23 Tex. 465; *s. c.* 76 Am. Dec. 68; *Central Man. Co. v. Hartshorne*, 3 Conn. 199.

⁷ *Holloway v. Memphis &c. R. Co.*, 23 Tex. 465; *s. c.* 76 Am. Dec. 68.

it has been held, applies with equal force in a case where the action is brought by a *foreign corporation*¹ and where it is brought by a *domestic corporation* created by a private statute;² since in the latter, as well as in the former case, the act under which the plaintiff claims to exist as a corporation cannot be judicially known by the court. Other courts repudiate this distinction, and hold that it is not necessary to plead the charter of the corporation, although it is a public or a private statute.³ One case takes a further distinction between actions *ex delicto* and actions *ex contractu*, holding that in an action *ex delicto* against a defendant impleaded by an artificial name, the petition should allege the defendant to be either a corporation or a partnership, or capacitated to be sued in the action, while conceding that if the action were upon a contract, and the defendant were impleaded by the artificial name used therein, that would be sufficient.⁴ It should also be noted that some of the decisions holding that it is necessary to aver in a complaint that the plaintiff is a corporation, rest upon the language of positive statutes, such as recent decisions in New York.⁵ Even if the general rule of procedure stated in

¹ Bank *v.* Simonton, 2 Tex. 531.

² Holloway *v.* Memphis &c. R. Co., 23 Tex. 465; *s. c.* 76 Am. Dec. 68.

³ United States Bank *v.* Haskins, 1 Johns. Cas. (N. Y.) 132. See also Grays *v.* Turnpike Co., 4 Rand. (Va.) 578; Taylor *v.* Bank, 5 Leigh (Va.), 471.

⁴ Byington *v.* Mississippi &c. R. Co., 11 Iowa, 502. Compare Harris Man. Co. *v.* Marsh, 49 Iowa, 11; Falconer *v.* Campbell, 2 McLean (U. S.), 195; *s. c.* 10 Meyer Fed. Dec., § 13.

⁵ That the failure to allege either that the plaintiff or the defendant is a corporation is ground of demurrer under § 1775 of the New York Code of Civil Procedure, — see National Temperance Soc. *v.* Anderson, 17 N. Y. St. Rep. 389; *s. c.* 2 N. Y. Supp. 49; Oesterreicher *v.* Sporting Times Pub.

Co., 5 N. Y. Supp. 2; Schillinger Fireproof Cement & Asphalt Co. *v.* Arnott, 14 N. Y. Supp. 265; *post*, § 7667. In an action for a *penalty* given by a statute against "the several railroad companies in this State," for *transporting slaves* from place to place without the permission of their masters, it was held, in Missouri, that it is necessary for the plaintiff to aver in his complaint that the defendant is a railroad company in this State; that, without this averment, the petition showed no cause of action which would support a judgment; and that a judgment rendered upon such a petition would be reversed and the cause remanded with leave to the plaintiff to amend. Welton *v.* Pacific R. Co., 34 Mo. 358, 361. The court proceeded upon the ground that it

the preceding section is admitted, yet on sound principles an exception to it must be admitted in the case where a party is suing by an artificial name *to enforce a right which, from its nature, can only be possessed by a corporation*, in which case it must allege and prove that it is a corporation; because such allegation and proof are necessary — not to its right of action generally, but to its right or title to maintain the particular action.¹

§ 7660. Necessary when Suing for Rights Which can only Inhere in a Corporation. — Where the existence of the plaintiff as a corporation is a *condition precedent to its right of recovery upon the merits*, then the burden is upon it both to allege in due form and to prove its corporate existence, — as where it sues to recover property of a previously existing company, and its own charter requires it to purchase such property as a condition precedent to becoming organized as a body corporate. Here, as no recovery can be had without the fulfillment of the condition, that is to say, without organizing as a corporation, the fact of its having so organized must be alleged by it and proved.² So, where there is a statute giving, as a substitute to a discovery in equity, the right to examine the officers of the opposite party, to a suit where the opposite party is a corporation,³ then, in order to entitle the other party to file interrogatories thereunder, he must prove that the opposite party is in fact a corporation.⁴

was not a question of the capacity of the defendant to be sued, but whether it belonged to the class embraced within and exposed to the penalties of the statute. The weakness, if not the nonsense, of the decision lay in the fact that the "Pacific Railroad" was a corporation created by public law, of which the courts of Missouri were bound to take judicial notice; that it was a great public corporation, operating a railroad within the State of Missouri, of which fact the court was bound further to take notice, be-

cause it was a fact known to all the inhabitants of the State; and besides, there was doubtless no other corporation in the world known by the same name, and certainly not in the State of Missouri.

¹ *Frye v. Bank of Illinois*, 10 Ill. 332, 335, *per* Trumbull, J.

² *Ante*, § 511; *Wheadon v. Peoria & C. R. Co.*, 42 Ill. 494.

³ Mass. Gen. Stat., ch. 129, § 50.

⁴ *Gott v. Adams Express Co.*, 100 Mass. 320.

§ 7661. **What Averments of Corporate Existence Sufficient.** In an action by¹ or against² a corporation, it is in general not necessary for the plaintiff to do more than to allege the fact that the plaintiff or the defendant, as the case may be, is a corporation, created under laws of a State or country named. The plaintiff need not go further and set forth the charter, whether it be a public or private statute,³ nor state whether the corporation has been created by a public or private act of the legislature,⁴ nor give the names of the individuals composing it,⁵ nor how they came to be a corporation,⁶ nor the manner in which the corporation was organized,⁷ nor aver the

¹ *Bank of United States v. Haskins*, 1 Johns. Cas. (N. Y.) 132; *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. (N. Y.) 573; *Chillicothe Savings Asso. v. Ruegger*, 60 Mo. 218; *Cheraw &c. R. Co. v. White*, 14 S. C. 51; *Cheraw &c. R. Co. v. Garland*, 14 S. C. 63; *Little v. Virginia &c. Water Co.*, 9 Nev. 317; *Paine v. Lake Erie &c. R. Co.*, 31 Ind. 283; *Camden &c. R. &c. Co. v. Remer*, 4 Barb. (N. Y.) 127; *Spangler v. Indiana &c. R. Co.*, 21 Ill. 276; *Wilson v. Sprague &c. Co.*, 55 Ga. 672; *Smith v. Weed Sewing Mach. Co.*, 26 Ohio St. 562; *Washer v. Allensville &c. Turnp. Co.*, 81 Ind. 78; *South Yuba Water &c. Co. v. Rosa*, 80 Cal. 333; *s. c.* 22 Pac. Rep. 222; *Sun &c. Ins. Co. v. Dwight*, 1 Hilt. (N. Y.) 50.

² *Dodge v. Minnesota &c. Roofing Co.*, 14 Minn. 49; *Hart v. Baltimore &c. R. Co.*, 6 W. Va. 336; *Sun &c. Ins. Co. v. Dwight*, 1 Hilt. (N. Y.) 50; *Minter v. Union Pac. R. Co.*, 3 Utah, 500; *s. c.* 24 Pac. Rep. 911.

³ *Paine v. Lake Erie &c. R. Co.*, 31 Ind. 283; *Bank v. Haskins*, 1 Johns. Cas. (N. Y.) 132; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Smith v. Weed Sewing Mach. Co.*, 26 Ohio St. 562 (foreign corporation); *Sun &c. Ins. Co. v. Dwight*, 1 Hilt. (N. Y.) 50; *Dodge v. Minnesota &c. Roofing Co.*,

14 Minn. 49. *Contra*, that plaintiff must set forth such parts of its acts of incorporation as are necessary to show that it is a corporation and has power to sue: *Central Man. Co. v. Harts-horne*, 3 Conn. 199.

⁴ *Bank of United States v. Haskins*, 1 Johns. Cas. (N. Y.) 132.

⁵ *Ibid.*

⁶ *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770; *s. c.* 14 Am. Dec. 526; *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. (N. Y.) 573.

⁷ *Selma &c. R. Co. v. Tipton*, 5 Ala. 787; *s. c.* 39 Am. Dec. 344; *In-stone v. Frankfort Bridge Co.*, 2 Bibb (Ky.), 576; *s. c.* 5 Am. Dec. 638; *Wilson v. Sprague &c. Co.*, 55 Ga. 672; *Washer v. Allensville &c. Turnp. Co.*, 81 Ind. 78; *Hart v. Baltimore &c. R. Co.*, 6 W. Va. 336. The same rule has been applied under the common-law system of pleading in an *action ex contractu* against the directors of an alleged corporation,—the court taking the view, that the averment of the existence of the corporation need not be made in positive language, but may be made *by way of recital*; nor so formal as to set out *how* the corporation came into existence, —reciting the various steps necessary

performance of statutory conditions precedent.¹ But everything beyond the general fact of incorporation, alleged in the declaration, necessary to maintain the action, is matter of

to make it a corporation; but suggesting that the rule is otherwise, at least on special demurrer, where the action is founded on tort: *Falconer v. Campbell*, 2 McLean (U. S.), 195; *s. c.* 10 Myer Fed. Dec., § 14. This is in conformity with the doctrine of an old case to the effect that where the fact of incorporation is *pleaded as an inducement* to something else, for instance, as a means of alleging seizure in the defendants, it is not necessary to set forth how they became incorporated. *Manby v. Long*, 3 Lev. 107. The rule is the same where the due organization of a corporation is the foundation of the plaintiff's action, as where two parties agree to organize a corporation, combining their business under a scheme by which one of them is to receive certain guaranteed dividends, and his action is to recover those dividends. Here it is enough for him to allege that the corporation was duly organized, without alleging the details of its organization. *Lorillard v. Clyde*, 86 N. Y. 384.

¹ *Cheraw &c. R. Co. v. White*, 14 S. C. 51; *Cheraw &c. R. Co. v. Garland*, 14 S. C. 63; *South Yuba Water &c. Co. v. Rosa*, 80 Cal. 333; *s. c.* 22 Pac. Rep. 222. A statute of California provides that no corporation now in existence, or hereafter formed, shall maintain or defend any action in relation to its property until it has filed a certified copy of its articles of incorporation with the clerk of the county in which such property is situated. Civ. Code Cal., § 299. The construction of this statute is that where the complaint contains no averment upon the subject, whether the plaintiff has complied with this provision or not,

it is not for that reason demurrable; it is a defense to be specially pleaded in the answer. As a defense, it is only matter in abatement of the action, and if not specially pleaded it is deemed to have been waived. *South Yuba Water &c. Co. v. Rosa*, 80 Cal. 333; *s. c.* 22 Pac. Rep. 222; *Phillips v. Goldtree*, 74 Cal. 151; *s. c.* 13 Pac. Rep. 313; *Southern &c. R. Co. v. Purcell*, 77 Cal. 69; *s. c.* 18 Pac. Rep. 886; *Ontario State Bank v. Tibbits*, 80 Cal. 68; *s. c.* 22 Pac. Rep. 66; *Sweeney v. Stanford*, 67 Cal. 635; *s. c.* 8 Pac. Rep. 444. Moreover a plea in abatement setting up this matter is strictly construed. *Ontario State Bank v. Tibbits*, 80 Cal. 68; *s. c.* 22 Pac. Rep. 66. See *Larco v. Clements*, 36 Cal. 132; *Thompson v. Lyon*, 14 Cal. 39, 42; *Tooms v. Randall*, 3 Cal. 438, 440. An answer setting up "that plaintiff has not, and at the commencement of this action had not, legal capacity to sue; that plaintiff never was a corporation duly or otherwise organized under the laws of this State, nor a copartnership, nor an individual," states a mere conclusion of law and does not properly plead this defense so as to admit evidence of it. *Ontario State Bank v. Tibbits*, 80 Cal. 68; *s. c.* 22 Pac. Rep. 66. From the foregoing it follows that a complaint which does not show that the plaintiff has complied with this law, nevertheless, if otherwise good, states a cause of action. *Phillips v. Goldtree*, 74 Cal. 151; *s. c.* 13 Pac. Rep. 313. It is also held that the expression in the above statute, "every corporation now in existence," was intended to embrace only corporations formed in the State of Califor-

evidence upon the trial.¹ Under the foregoing principles, in an action by a corporation, an averment that the plaintiff was a corporation "duly incorporated under and by virtue of an act of the General Assembly of the State of Missouri, entitled," etc., is the usual way of making the averment of the corporate existence of the plaintiff, and is sufficient.²

§ 7662. Whether Necessary to Repeat Averment of Corporate Existence in Successive Counts.—Where the declaration, petition, or complaint contains several counts, each stating a separate cause of action, then, according to the rule in some jurisdictions, if proper averments be made in the

nia, whether formed under the provisions of the Civil Code of that State, or under the provisions of statutes existing in that State prior to the Civil Code; and that it has no application to foreign corporations. *South Yuba Water &c. Co. v. Rosa*, 80 Cal. 333; *s. c.* 22 Pac. Rep. 222. The theory has been put forward that where a corporation brings an action, if it has been created by an act of the legislature which *requires certain acts to be done* before it can be considered *in esse*, it must allege and prove that such acts have been done, in order to establish its corporate existence; but that when a corporation is *declared such by its act of incorporation*, without the doing of any further act to make it such, the existence of the charter need not be alleged. *St. Paul Division v. Brown*, 9 Minn. 157. But this is not the law. The true theory is that of the text, that it is not necessary to do more in any case than to allege that the plaintiff is a corporation.

¹ *Stoddard v. Onondaga* Ann. Conf., 12 Barb. (N. Y.) 573.

² *Chillicothe Savings Asso. v. Ruegger*, 60 Mo. 218; *Dodge v. Minnesota &c. Roofing Co.*, 14 Minn. 49.

As to the averment of corporate existence *under the Code of New York, prior to the statute of 1880* (N. Y. Code Civ. Proc., § 1775), see *Sonoma Valley Wine &c. Co. v. Heyman*, 11 Week. Dig. (N. Y.) 327; *Canandarqua Academy v. McKechnie*, 19 Hun (N. Y.), 62; *Howe Machine Co. v. Robinson*, 7 Daly (N. Y.), 399; *Roberts v. National Ice Co.*, 6 Daly (N. Y.), 426. Among the more or less contradictory and confusing decisions *construing this statute* are: *Second Nat. Bank v. Wells*, 53 How. Pr. (N. Y.) 242; *Irving Bank v. Corbett*, 10 Abb. N. Cas. (N. Y.) 85; *Adams v. Lamson Consolidated Store Service Co.*, 35 N. Y. St. Rep. 518; *s. c.* 13 N. Y. Supp. 118; *Oesterreicher v. Sporting Times Pub. Co.*, 5 N. Y. Supp. 2; *National Temperance Soc. v. Anderson*, 17 N. Y. St. Rep. 389; *s. c.* 2 N. Y. Supp. 49; *Gilpin v. Baltimore &c. R. Co.*, 17 N. Y. Supp. 520; *First Nat. Bank v. Doying*, 13 Daly (N. Y.), 509; *s. c.* 11 N. Y. Civ. Proc. 61; *Farmers' &c. Nat. Bank v. Rogers*, 15 N. Y. Civ. Proc. 250; *s. c.* 1 N. Y. Supp. 757; *Columbia Bank v. Jackson*, 4 N. Y. Supp. 433; *American Baptist Home Mission Soc. v. Foote*, 52 Hun (N. Y.), 307; *s. c.* 5 N. Y. Supp. 236.

first count of the petition, showing the corporate existence and powers of parties to the action, they need not be repeated in subsequent counts;¹ while in other jurisdictions the averment must be repeated in each count.²

§ 7663. Declaring against a Corporation Which has Changed its Name.—A change of name by a corporation does not change its character, or abrogate its contracts;³ and an action against a corporation by a former name cannot be defeated by showing that it has changed its name without any change of membership.⁴ Where, since the making of the contract, or the happening of the event which gives the right of action, the corporation liable to the action has changed its name, the plaintiff *proceeds against it in its true name*, and simply declares that the defendant by the name of—here inserting its old name—made the contract sued on, or did the act complained of; and it is not necessary to explain how its name came to be changed, because the question can only arise on a defensive pleading.⁵

§ 7664. Question of Corporate Existence must be Raised by Defendant.—Under all theories of pleading, whether the declaration or complaint sets out that the plaintiff is a corporation or not, the question will never be noticed unless it is distinctly raised by the defendant by some defensive pleading;⁶ and therefore the capacity of the plaintiff to sue, in the

¹ Aull Savings Bank *v.* Lexington, 74 Mo. 104; West *v.* Eureka Imp. Co., 40 Minn. 394; *s. c.* 42 N. W. Rep. 87.

² People *v.* Central &c. Co., 83 Cal. 393; *s. c.* 23 Pac. Rep. 303.

³ *Ante*, § 289.

⁴ Welfley *v.* Shenandoah Iron &c. Co., 83 Va. 768; *s. c.* 3 S. E. Rep. 376; Dean *v.* La Motte Lead Co., 59 Mo. 523.

⁵ *Ante*, § 7597. Contrary to the text is an old case to the effect that where in an action it becomes necessary to plead an authority under a

corporation, if the pleader describes the corporation by one name and recites that after a period named it was known by another name, it is incumbent upon him to show *in what manner* the name of the corporation became changed. Adney *v.* Vernon, 3 Lev. 243.

⁶ Young Men's Christian Asso. *v.* Dubach, 82 Mo. 475. To the same effect is Bulkley *v.* Big Muddy Iron Co., 77 Mo. 105; Ontario State Bank *v.* Tibbits, 80 Cal. 68; *s. c.* 22 Pac. Rep. 66; Rembert *v.* Railway Co., 31 S. C. 309; *s. c.* 9 S. E. Rep. 968; South

character assumed by it, is always *admitted by a default*.¹ It also follows that if it is not appropriately raised by the defendant, the existence of the plaintiff as a corporation will be *presumed after verdict*, whether the plaintiff's affirmative pleading states that it is a corporation or not.²

§ 7665. **Plea to the Merits Admits Corporate Existence.**— Whether the corporation is the plaintiff or the defendant in the action, if its existence is alleged in the declaration, complaint, or petition, a *plea to the merits of the action* operates as an *admission* that it is a corporation. Thus, although there are some early and *overruled decisions to the contrary*,³ if the action is brought by a plaintiff, alleging itself to be a corpora-

Yuba Water &c. Co. v. Rosa, 80 Cal. 333; s. c. 22 Pac. Rep. 222; Stanly v. Richmond &c. R. Co., 89 N. C. 331; Exchange Nat. Bank v. Capps, 32 Neb. 242; s. c. 29 Am. St. Rep. 433; 49 N. W. Rep. 233; Palmetto Lumber Co. v. Risley, 25 S. C. 309; Southern &c. R. Co. v. Purcell, 77 Cal. 69; s. c. 18 Pac. Rep. 886; Imperial Refining Co. v. Wyman, 38 Fed. Rep. 574; s. c. 6 Rail. & Corp. L. J. 94; 3 L. R. A. 503; Bailey v. Valley Nat. Bank, 127 Ill. 332; s. c. 19 N. E. Rep. 695; affirming s. c. 21 Ill. App. 642; Heron v. Cole, 25 Neb. 692; National Life Ins. Co. v. Robinson, 8 Neb. 452; s. c. 1 N. W. Rep. 124; Bliss Code Pl., 2d ed., § 408.

¹ Harris v. Muskingum Man. Co., 4 Blackf. (Ind.) 267; s. c. 29 Am. Dec. 372; Hubbard v. Chappel, 14 Ind. 601; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; s. c. 79 Am. Dec. 430; McIntire v. Preston, 5 Gilm. (Ill.) 48; s. c. 48 Am. Dec. 321; Phenix Bank v. Curtis, 14 Conn. 437; s. c. 36 Am. Dec. 492.

² British American Land Co. v. Ames, 6 Met. (Mass.) 391; Girls' Industrial Home v. Fritchey, 10 Mo.

App. 344, 350; Williams v. Bank, 7 Wend. (N. Y.) 539. Compare Wolf v. Goddard, 9 Watts (Pa.), 544, 554.

³ Agnew v. Bank of Gettysburg, 2 Har. & G. (Md.) 478; Jackson v. Plumbe, 8 Johns. (N. Y.) 378; Dutchess Cotton Man. Co. v. Davis, 14 Johns. (N. Y.) 238, 245; s. c. 7 Am. Dec. 459; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194, 205; Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300, 303; Vernon Society v. Hills, 6 Cow. (N. Y.) 23, 25; s. c. 16 Am. Dec. 429; United States Bank v. Stearns, 15 Wend. (N. Y.) 314; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770, 778; s. c. 14 Am. Dec. 526; Bill v. Fourth Great Western Turnp. Co., 14 Johns. (N. Y.) 416; Fire Department v. Kip, 10 Wend. (N. Y.) 266; Buncombe Turnp. Co. v. M'Carson, 1 Dev. & B. (N. C.) 306; Holloway v. Memphis &c. R. Co., 23 Tex. 465; s. c. 76 Am. Dec. 68; Lucas v. Bank, 2 Stew. (Ala.) 147; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520; Bank of Michigan v. Williams, 5 Wend. (N. Y.) 478; s. c. affirmed, 7 Wend. (N. Y.) 539; Welland Canal Co. v. Hathaway, 8 Wend.

tion, a plea of the *general issue* at common law admits the corporate existence of the plaintiff, and its right to sue in the character which it has assumed;¹ and the same effect is ascribed to the general denial under the codes and practice

(N. Y.) 480; *s. c.* 24 Am. Dec. 51; *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326; *s. c.* 16 Am. Dec. 755; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Jackson v. Bank*, 9 Leigh (Va.), 240; *Carmichael v. Trustees*, 3 How. (Miss.) 84; *Taylor v. Bank*, 5 Leigh (Va.), 471; *Hargrave v. Bank*, Breese (Ill.), 122; *Jones v. Bank*, Breese (Ill.), 124; *Society v. Young*, 2 N. H. 310; *Farmers' & C. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457; *Lewis v. Bank of Kentucky*, 12 Ohio, 132; *s. c.* 40 Am. Dec. 469; *Smith v. Adrian*, 1 Mich. 495. The rule in England seems to be as held in these earlier American cases: 1 *Kyd on Corp.* 292; *Norris v. Staps*, Hob. 210 b; *Dutch West India Co. v. Van Moses*, 2 Ld. Raym. 1535. This rule is hence frequently spoken of in the American law books as the "rule of the common law." See, for example, *Central Land Co. v. Calhoun*, 16 W. Va. 361; and *Smith v. Adrian*, 1 Mich. 495; and compare *Ætna Ins. Co. v. Wires*, 28 Vt. 93.

¹ *Alderman v. Finley*, 10 Ark. 423; *s. c.* 52 Am. Dec. 244; *Yeaton v. Lynn*, 5 Pet. (U. S.) 224, 231; *Mississippi & C. R. Co. v. Cross*, 20 Ark. 443; *Phenix Bank v. Curtis*, 14 Conn. 437; *s. c.* 36 Am. Dec. 492; *Railsback v. Liberty & C. Turnp. Co.*, 2 Ind. 656; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Hardy v. Merryweather*, 14 Ind. 203; *Hubbard v. Chappel*, 14 Ind. 601; *Harrison v. Martinsville & C. R. Co.*, 16 Ind. 505; *s. c.* 79 Am. Dec. 447; *Carpenter v. Mercantile Bank*, 17 Ind. 253; *Board of Commissioners v. Bright*, 18 Ind. 93;

Penobscot Boom Corp. v. Lamson, 16 Me. 224; *s. c.* 33 Am. Dec. 656; *Savage Man. Co. v. Armstrong*, 17 Me. 84; *s. c.* 35 Am. Dec. 227; *Putnam Free School v. Fisher*, 30 Me. 523; *Roxbury v. Huston*, 37 Me. 42; *People v. Ravenswood & C. Turnp. & Bridge Co.*, 20 Barb. (N. Y.) 518; *Orono v. Wedgewood*, 44 Me. 49; *s. c.* 69 Am. Dec. 81; *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 356; *Bank of the Metropolis v. Orme*, 3 Gill (Md.), 443; *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Concord v. McIntire*, 6 N. H. 527; *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489; *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 576, 584; *Methodist Episcopal Church v. Wood*, 5 Ohio, 283, 286; *Price v. Grand Rapids & C. R. Co.*, 18 Ind. 137; *Liberian Exodus Jointstock S. S. Co. v. Rodgers*, 21 S. C. 27; *Union Cement Co. v. Noble*, 15 Fed. Rep. 502; *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. (U. S.) 555; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293 (under a statute); *Swift & Co. v. Crawford*, 34 Neb. 450; *s. c.* 51 N. W. Rep. 1034; *Smith v. Adrian*, 1 Mich. 495; *Commercial Ins. & C. Co. v. Turner*, 8 S. O. 107; *Bailey v. Valley Nat. Bank*, 127 Ill. 332; *s. c.* 19 N. E. Rep. 695; *Hart v. Baltimore & C. R. Co.*, 6 W. Va. 336; *McKiel v. Real Estate Bank*, 4 Ark. 592; *Prince v. Commercial Bank*, 1 Ala. 241; *s. c.* 34 Am. Dec. 773. But see *Carmichael v. Trustees*, 3 How. (Miss.) 84; *Proprietors & C. v. Horton*, 6 Hill (N. Y.), 501; *Wolf v. Goddard*, 9 Watts (Pa.), 544; *Society v. Pawlet*,

6 Thomp. Corp. § 7665.] ACTIONS BY AND AGAINST.

acts,¹ and to a *special plea* to the merits.² It is substantially another statement of this rule to say that, in an action by a plaintiff declaring itself to be a corporation, the question of its corporate existence can only be raised by a *plea in abatement*, a *plea of nul tiel corporation*, or other pleading designed to raise that question distinctly, and that a *plea to the merits of the action*, in any form, admits the capacity of the plaintiff to sue in the name assumed.³

4 Pet. (U. S.) 480; *School District v. Blaisdell*, 6 N. H. 197; *Christian Society v. Macomber*, 3 Met. (Mass.) 235; *Zion Church v. St. Peter's Church*, 5 Watts & S. (Pa.) 215.

¹ *Rembert v. Railway Company*, 31 S. C. 309; *s. c.* 9 S. E. Rep. 968; *Palmetto Lumber Co. v. Risley*, 25 S. C. 309; *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574; *s. c.* 6 Rail. & Corp. L. J. 94; 3 L. R. A. 503; *Heron v. Cole*, 25 Neb. 692; *s. c.* 41 N. W. Rep. 765; *National Life Ins. Co. v. Robinson*, 8 Neb. 452.

² *Central Land Co. v. Calhoun*, 16 W. Va. 361; *Bailey v. Valley Nat. Bank*, 127 Ill. 332; *s. c.* 19 N. E. Rep. 695.

³ *Taylor v. Bank*, 7 T. B. Mon. (Ky.) 576, 584; *Putnam Free School v. Fisher*, 30 Me. 523; *Savage Man. Co. v. Armstrong*, 17 Me. 34; *s. c.* 35 Am. Dec. 227; *First Parish v. Cole*, 3 Pick. (Mass.) 232, 245; *Monumoi Great Beach v. Rogers*, 1 Mass. 159; *Kennebeck Purchase v. Call*, 1 Mass. 483, 484; *Methodist Episcopal Church v. Wood*, 5 Ohio, 283; *Ministerial &c. Fund v. Kendrick*, 12 Me. 381; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; *s. c.* 33 Am. Dec. 656; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Society v. Pawlet*, 4 Pet. (U. S.) 480; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386; *Freeman v. Machias Water &c. Co.*, 38 Me. 343; *Penobscot &c. R. Co. v. Dunn*, 39 Me. 587; *Whittington*

v. Farmers' Bank, 5 Har. & J. (Md.) 489; *Stone v. Congregational Soc.*, 14 Vt. 86; *School Dist. v. Blaisdell*, 6 N. H. 197; *Concord v. McIntire*, 6 N. H. 527; *Bank v. Allen*, 11 Vt. 302; *Boston &c. Foundry v. Spooner*, 5 Vt. 93; *Heaston v. Cincinnati &c. R. Co.*, 16 Ind. 275; *s. c.* 79 Am. Dec. 430; *Hubbard v. Chappel*, 14 Ind. 601; *Oldtown &c. R. Co. v. Veazie*, 39 Me. 571; *Orono v. Wedgewood*, 44 Me. 49; *s. c.* 69 Am. Dec. 81; *Jones v. Cincinnati Type Foundry*, 14 Ind. 89; *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202; *Dunning v. New Albany &c. R. Co.*, 2 Ind. 437; *Railsback v. Liberty &c. Turnp. Co.*, 2 Ind. 656; *Cicero &c. Co. v. Craighead*, 28 Ind. 274; *Adams Exp. Co. v. Hill*, 43 Ind. 157; *McIntire v. Preston*, 10 Ill. 48; *s. c.* 48 Am. Dec. 321; *Phenix Bank v. Curtis*, 14 Conn. 437; *s. c.* 36 Am. Dec. 492; *Prince v. Commercial Bank*, 1 Ala. 241; *s. c.* 34 Am. Dec. 773; *Montgomery &c. R. Co. v. Hurst*, 9 Ala. 513; *West Winsted &c. Asso. v. Ford*, 27 Conn. 282; *s. c.* 71 Am. Dec. 66; *Litchfield Bank v. Church*, 29 Conn. 137; *Board v. Bright*, 18 Ind. 93; *People's Sav. Bank v. Collins*, 27 Conn. 142; *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. (U. S.) 555; *s. c.* 3 Fisher, 87; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105; *s. c.* 35 Am. Dec. 528; *Butterfield's Overland Dispatch Co. v. Wedeles*, 1 N. Mex. 528; *Kenton Furnace Railroad & Man. Co. v. McAlpin*, 5 Fed. Rep. 737; Na-

§ 7666. **How Question of Corporate Existence Raised in Pleading.** — It has been elsewhere said, in a State practicing under a code, that the question must be raised by *demurrer or answer*, or it will be deemed *waived*;¹ but as a demurrer has no larger office under the codes than a special demurrer had at common law, it is clear that it cannot be raised by demurrer, unless the declaration, complaint, or petition affirmatively shows that the party described is *not* a corporation.² At common law, and under some of the modern codes, it is necessary, in order to raise the question, to *plead in abatement* that the party is not a corporation.³ This plea in abatement is called, in the language of common-law pleading, a plea of *nul tiel corporation*; and this, where that system of pleading prevails, is generally the plea by which such an issue is raised.⁴ Under some modern statutes it can only be raised by

tional Life Ins. Co. v. Robinson, 8 Neb. 452; School District v. Bragdon, 23 N. H. 507; Reed v. Benton & Co. R. Co., 4 How. (Miss.) 257 (under a statute).

¹ Young Men's Christian Association v. Dubach, 82 Mo. 475, 480.

² South Yuba Water & Co. v. Rosa, 80 Cal. 333; s. c. 22 Pac. Rep. 222; Exchange Nat. Bank v. Capps, 32 Neb. 242; s. c. 29 Am. St. Rep. 433; 49 N. W. Rep. 223; Crane Bros. Man. Co. v. Reed, 3 Utah, 506; Stanly v. Richmond & Co. R. Co., 89 N. C. 331. *Contra*, in Massachusetts, prior to the Code of 1881, ch. 113: Goodwin Invalid Bedstead Co. v. Darling, 133 Mass. 358; citing Hungerford Nat. Bank v. Van Nostrand, 106 Mass. 559; Mosler v. Potter, 121 Mass. 89; Hebron Church Deacons v. Smith, 121 Mass. 90, note; Williamsburg & Co. Ins. Co. v. Frothingham, 122 Mass. 391. It has been held in Missouri that where the incorporation is not by public act, and where the action is not upon a contract made by the defendant with the plaintiff in the name by which it sues, so as to raise an *estoppel*, the fact of

the incorporation of the plaintiff should be averred, and if a general denial is pleaded, should be proved. Girls' Industrial Home v. Fritchey, 10 Mo. App. 344, 349. So, as elsewhere seen (*ante*, § 7665) it was the early theory in several American jurisdictions, and notably in New York, that, *under a general denial*, the plaintiff suing as a corporation was required to prove the fact of its incorporation: Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300; Williams v. Bank, 7 Wend. (N. Y.) 539.

³ Ontario State Bank v. Tibbits, 80 Cal. 68; s. c. 22 Pac. Rep. 66; Imperial Refining Co. v. Wyman, 38 Fed. Rep. 574; s. c. 6 Rail. & Corp. L. J. 94; 3 L. R. A. 503.

⁴ Bailey v. Valley Nat. Bank, 127 Ill. 332; s. c. 19 N. E. Rep. 695; affirming s. c. 21 Ill. App. 642; Stafford v. Bolton, 1 Bos. & Pul. 40, 44; Mellor v. Spateman, 1 Saund. 339, note 2; Gaines v. Bank, 12 Ark. 769; Bank of Auburn v. Aikin, 18 Johns. (N. Y.) 137; Hoereth v. Franklin Mill Co., 30 Ill. 151; Gauga Iron Co. v.

a *plea, verified by affidavit*,¹ and under others it stands admitted, unless the plaintiff, within a specified time prior to the filing of his answer, makes a *special demand for proof* of the fact.² From all the foregoing, it must be concluded that this question cannot be raised by a motion in *arrest of judgment*, or on a *writ of error*; but that the doctrine of *aider by verdict* applies, and that the court will, after a verdict in favor of the plaintiffs who sue as a corporation, presume that it was proved or admitted at the trial that they were a corporation, capable of suing in the character assumed by them.³ Where a body of persons affect to sue *in chancery*, in a corporate character, if they have no such title to this character, their want of title may, according to the English chancery practice, be *set up by demurrer*, provided the objection appear on the face of the bill;⁴ for it is the exclusive power of the government to create corporations and invest them with the power of suing by their corporate name.⁵ "It is the absolute duty of courts of justice," said Lord Eldon, "not to permit persons not incorporated to affect to treat themselves as a corporation upon the record."⁶ But *at common law*, the question of corporate existence cannot be raised by demurrer.⁷

Dawson, 4 Blackf. (Ind.) 202; Harris v. Muskingum Man. Co., 4 Blackf. (Ind.) 267; s. c. 29 Am. Dec. 372; Hubbard v. Chappel, 14 Ind. 601; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; s. c. 79 Am. Dec. 430; Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 285; McIntire v. Preston, 5 Gilm. (Ill.) 48; s. c. 48 Am. Dec. 321, Phenix Bank v. Curtis, 14 Conn. 437; s. c. 36 Am. Dec. 492; Bailey v. Valley Nat. Bank, 127 Ill. 332; s. c. 19 N. E. Rep. 695. In one jurisdiction, where practice is conducted under a code of procedure, if the plaintiff, suing in a name which *prima facie* imports a corporation, is in fact not assuming to act as a corporation, but only as a partnership, this fact may be raised by answer alleging *want of parties in*

interest to the suit. Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; s. c. 79 Am. Dec. 430, 433. See also Brown v. Killian, 11 Ind. 449.

¹ *Post*, § 7668.

² Goodwin Invalid Bedstead Co. v. Darling, 133 Mass. 358; Mass. Stat. 1881, ch. 113.

³ British American Land Co. v. Ames, 6 Met. (Mass.) 391; Williams v. Bank, 7 Wend. (N. Y.) 539.

⁴ Lloyd v. Loaring, 6 Ves. 773.

⁵ Story Eq. Pl., §§ 496, 497.

⁶ Lloyd v. Loaring, 6 Ves. 773, 777.

⁷ Lighte v. Everett Fire Ins. Co., 5 Bosw. (N. Y.) 716; Union Mutual Ins. Co. v. Osgood, 1 Duer (N. Y.), 707. But see Bank v. Beltser, 13 How. Pr. (N. Y.) 270.

§ 7667. **Statutory Rule in New York Requiring Plea in Abatement or in Bar.**—The rule of the early decisions in New York already alluded to,¹ was afterwards changed by a statute providing that “in suits brought by a corporation created by or under any statute of this State, it shall not be necessary to prove, on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation.”² This provision was not afterwards affected by the changes in pleading made by the New York Code of Procedure; hence, under an answer which merely denies the allegations of the complaint, in which the plaintiff is described as a corporation created under the laws of this State, it is not necessary to prove that the plaintiff was duly incorporated.³ If the defendant desires to litigate this question he must still plead the fact expressly. This enactment has no application to an action of *ejectment*, where, by the New York statute,⁴ the defendant cannot plead in abatement or in bar that the plaintiffs are not a corporation, but is confined to the general issue. In such an action the corporation is bound to prove its existence upon the general issue as under the old practice.⁵ Nor has it any application to actions brought *against* alleged corporations. Here the rule of pleading is said to be, as before the statute, where a plea of *nul tiel corporation* was bad on demurrer.⁶

§ 7668. **When must be Raised by a Denial under Oath.** It is now provided by statute in several of the States that in actions by a corporation, proof of the corporate existence is put in issue by answer or plea *verified by oath*.⁷ Under such

¹ *Ante*, § 7665.

² 2 N. Y. Rev. Stats., p. 458, § 3. See *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Eaton v. Aspinwall*, 19 N. Y. 119, 121; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Union Mutual Ins. Co. v. Osgood*, 1 Duer (N. Y.), 707; *Bank v. Beltser*, 13 How. Pr. (N. Y.) 270.

³ *Bank of Genesee v. Patchin Bank*, *supra*; *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482. See also *Stone v. Western Union Transp. Co.*, 38 N. Y. 240; *Concordia Savings &c. Asso. v. Read*, 93 N. Y. 474; *Beng-*

ston v. Thingvalla S. S. Co., 31 Hun (N. Y.), 96; *East River Electric Light Co. v. Clark*, 18 N. Y. Supp. 463.

⁴ 2 N. Y. Rev. Stats. 306, § 22.

⁵ *Southbold v. Horton*, 6 Hill (N. Y.), 501.

⁶ *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. (N. Y.) 573.

⁷ The author does not assume to state the language of particular statutes, but merely their substance. See *Alabama Acts 1888-89*, p. 57; applied in *Rosenberg v. Clafin Co.*, 95 Ala. 249; *s. c.* 10 South. Rep. 521; N. Y. Code Civ. Proc., § 1776; Wis. Code,

a statute a denial upon *information and belief* is not sufficient.¹ Such a statute applies in actions brought by *foreign* corporations.² So in Indiana, there is this distinction, — that whereas a general denial unverified by oath, will not put the plaintiff to the proof of its corporate existence,³ yet the contrary will be held where the general denial is verified by oath.⁴

§ 7669. **Question Raised by Plea of Nul Tiel Corporation.**—In jurisdictions where the common-law system of pleading prevails, it has been a controverted question whether the plea of *nul tiel corporation* is to be treated as a plea in *abatement*, or as a plea in *bar* of the action. The general opinion seems to be that it is a *plea in bar*;⁵ though some of the courts take the view that a plea that there is no such corporation in existence is substantially matter of abatement only, and cannot be relied upon in bar of the action.⁶ Moreover, where such a plea is regarded as a plea in abatement, it must, under most systems of pleading, precede the answer to the merits.⁷ There was, under the principles of common-law pleading, another distinction, which was extremely technical. It was that, whereas, under the general issue, the plaintiff was bound to prove, in the first instance, that it was a corpo-

§ 4199; applied in *Michigan Ins. Bank v. Eldred*, 130 U. S. 693; *s. c.* 12 Sup. Ct. Rep. 450; Mo. Act Mar. 15th, 1883; applied in *White v. Bellefontaine Lodge*, 30 Mo. App. 682.

¹ *Taendstickfabriks Aktiebolaget Vulcan v. Myers*, 34 N. Y. State Rep. 122; *s. c.* 11 N. Y. Supp. 663.

² *Williams &c. Co. v. Smith*, 33 Wis. 530.

³ *Price v. Grand Rapids &c. R. Co.*, 18 Ind. 137.

⁴ *Chance v. Indianapolis &c. Gravel Road Co.*, 32 Ind. 472; *Indianapolis &c. Min. Co. v. Herkimer*, 46 Ind. 142.

⁵ *Bac. Abr.*, Abatement; *Northumberland Co. Bank v. Eyer*, 60 Pa. St. 436; *Hoereth v. Franklin Mill Co.*, 30 Ill. 151; *Lewiston v. Proctor*, 27 Ill.

414; *Marsh v. Astoria Lodge*, 27 Ill. 421; *Proprietors v. Eastman*, 32 N. H. 470; *School Dist. v. Aldrich*, 13 N. H. 139; *School Dist. v. Blaisdell*, 6 N. H. 197; *Mahony v. Bank*, 4 Ark. 620; *Christian Society v. Macomber*, 3 Met. (Mass.) 235.

⁶ *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.) 122, 123; *s. c.* 46 Am. Dec. 540; *Woodson v. Bank*, 4 B. Mon. (Ky.) 203.

⁷ *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Phenix Bank v. Curtis*, 14 Conn. 437; *s. c.* 56 Am. Dec. 492. In Missouri, and no doubt under some other codes, *all matters of defense*, whether in abatement or in bar, are pleadable in *one answer*.

ration, therefore, a special plea setting up negatively that it was not a corporation, was bad on special demurrer as amounting to the general issue.¹ But this principle would have no application, and a special plea of *nul tiel corporation* would be open to no such objection, in those jurisdictions where the modern doctrine obtains, that the question of the corporate existence of the plaintiff cannot be raised upon the general issue.² If, therefore, in any case, the plaintiff would not be bound to prove its incorporation, the plea of *nul tiel corporation* would raise the issue. But if the nature of the action was such — as where the plaintiff sued upon a promise made upon condition of its becoming a corporation — that it was bound, in order to state and prove a case for a recovery, to allege and prove that it was a corporation, then it was held the plea of *nul tiel corporation* amounted to a general denial, and, if pleaded with an answer of general denial, might be stricken out on motion.³

¹ Bank of Auburn v. Weed, 19 Johns. (N. Y.) 300. See also Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194; Farmers' &c. Bank v. Rayner, 2 Hall (N. Y.), 195; Carmichael v. Trustees, 3 How. (Miss.) 84, 100.

² Bank v. Allen, 11 Vt. 302; Boston &c. Foundry v. Spooner, 5 Vt. 93; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; s. c. 79 Am. Dec. 430; Hubbard v. Chappel, 14 Ind. 601; Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 285; Jones v. Cincinnati Type Foundry, 14 Ind. 89; Guaga Iron Co. v. Dawson, 4 Blackf. (Ind.) 202; McIntire v. Preston, 10 Ill. 48; s. c. 48 Am. Dec. 321; Montgomery R. Co. v. Hurst, 9 Ala. 513; Prince v. Commercial Bank, 1 Ala. 241; s. c. 34 Am. Dec. 773; Wert v. Crawfordsville &c. Turnp. Co., 19 Ind. 242.

³ Wert v. Crawfordsville &c. Turnp. Co., 19 Ind. 242. In Massachusetts, the party who intends to avail himself of this circumstance

must give notice of his intention to do so, in a specification of defense. Townsend v. First Freeville Baptist Church, 6 Cush. (Mass.) 279. Accordingly, in an action by a corporation, the defendant may plead the general issue, giving notice at the same time that he shall deny that the plaintiff is a corporation, in which case the plaintiff is bound to prove its corporate existence. Christian Society v. Macomber, 3 Met. (Mass.) 235; First Universalist Society v. Currier, 3 Met. (Mass.) 417. It was held, in several early cases in Arkansas, that in the case of a public corporation created under a public law, of which the courts take *judicial notice*, a plea of *nul tiel corporation* will be bad on demurrer; since the court will look to the statute, and from it determine the question of the existence of the corporation. McKiel v. Real Estate Bank, 4 Ark. 592; Mahoney v. Bank, 4 Ark. 620, 622; Murphey v. State

§ 7670. **This Plea Raises only Question of Existence de Facto of Corporation.**—Upon the trial of the issue of fact raised by such an answer and a reply thereto, it is said that the evidence is limited to the question of the existence *de facto* of a corporation, under an authority sanctioning such a corporation *de jure*. In other words, mere irregularities in organization cannot be shown collaterally, where there is no defect of power.¹ But this, on a principle already considered,² is restrained to cases where, under the law, such a corporation *might exist*.³

§ 7671. **Nul Tiel Corporation, how Pleaded.**—In an action by a plaintiff, alleging itself to be a corporation, a plea

Bank, 7 Ark. 57; Pickett v. Trustees, 8 Ark. 224; Conway v. State Bank, 13 Ark. 43, 51 (where the plea was *stricken out* for the same reason). But these holdings were clearly unsound; since in the case of private corporations it requires something more than an enabling act to create a corporation, but the charter must have been *accepted*. *Ante*, § 52. And it is upon this principle that the ordinary mode of proving the existence of a corporation is to prove a *charter* and *user* thereunder. *Ante*, § 220; *post*, § 7689. These decisions were accordingly evasively overruled in a case where the court saw the true principle. Hammett v. Little Rock &c. R. Co., 20 Ark. 204. "If, however," said English, J. "the statute does not *ipso facto* create the corporation *eo instanti*, but prescribes something to be done after its passage, as a condition precedent to the legal existence of the corporation, we suppose the plea would be good, and the plaintiff would have to reply to it, and prove that the thing was done, which the statute required to be done as a condition precedent to the coming into existence of the corporation."

¹ Heaston v. Cincinnati &c. R. Co.,

16 Ind. 275; *s. c.* 79 Am. Dec. 430; Bank of Toledo v. International Bank, 21 N. Y. 542; Ewing v. Robeson, 15 Ind. 26; Harriman v. Southam, 16 Ind. 190; Gillespie v. Fort Wayne &c. R. Co., 17 Ind. 243; Williams v. Franklin &c. Asso., 26 Ind. 310; Brown v. Killian, 11 Ind. 449; Evansville &c. R. Co. v. Evansville, 15 Ind. 395.

² *Ante*, § 505.

³ Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 279; *s. c.* 79 Am. Dec. 430. When, therefore, it was alleged in an answer in the nature of a plea of *nul tiel corporation*, that the articles by which the corporation was organized were filed before the law authorizing its organization was in force, it was held that such allegations were properly *stricken out*; since they would be bad on demurrer, as the court *judicially knew* that the general railroad law was in force at the time when the corporation was formed. Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; *s. c.* 79 Am. Dec. 430. In State v. Bailey, 16 Ind. 46; *s. c.* 79 Am. Dec. 405,—it was held that courts will take judicial notice of the time when a statute took effect and will decide the question as a question of law.

that, at the time the suit was commenced, there was no such corporation in existence as the plaintiff, has been held substantially good.¹ A plea stating that the plaintiff "is not a corporation duly authorized by law to maintain this suit," was held, although brief, to contain all that is of substance in the plea of *nul tiel corporation*.² Where a corporation, once legally existing, is alleged to have *ceased so to exist*, it is necessary that the pleading should show and set forth particularly the *manner* in which the corporate powers have ceased.³ If we advert to the rule of pleading that it is not necessary for the plaintiff, suing in a name which imports its corporate existence, formally to allege that it is a corporation,⁴ then it would seem to be immaterial whether the issue is raised by such a formal allegation, and is traversed by a special plea, or whether it is raised by a special plea and replication, in the absence of such a formal allegation.⁵

§ 7672. Further as to Particularity of Averment in Raising Question of Corporate Existence. — Where the rule has been adopted, whether by statute or judicial decision, that the existence of the plaintiff as a corporation is not open to contest, unless the defendant alleges, in his answer or other defensive pleading, that it is not a corporation, — the allegation *must be made in positive terms*, or by a *direct negative aver-*

¹ *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285. That an answer pleading *nul tiel corporation* may be *stricken out as a sham*, on plaintiffs producing evidence of their incorporation, and the defendant showing nothing to the contrary, — see *Commonwealth Bank v. Pryor*, 11 Abb. Pr. (N. S.) (N. Y.) 227. Where the complaint described the plaintiffs as the "St. Louis Bagging & Rope Company," and nothing more, it was held that a plea of *nul tiel corporation* might be stricken out as irrelevant, because it did not appear from the complaint that the plaintiff sued as a corporation. *Ware v. St. Louis Bagging & Co.*, 47 Ala. 667.

² *Johnson v. Hanover Nat. Bank*, 88 Ala. 271.

³ *Sutherland v. Lagro & Co.*, 19 Ind. 192. Compare *Underhill v. Bank*, 6 Ark. 135.

⁴ *Ante*, § 7658.

⁵ Thus, under the Massachusetts practice, in an action against persons sued in a corporate name, if their incorporation is not alleged as a fact in the declaration, or if, being alleged, it is denied in the answer, the plaintiff is bound to prove it affirmatively on the trial, if then controverted by the defendants. *Gott v. Adams Express Co.*, 100 Mass. 320.

ment, and will not be sufficient if made merely upon *information and belief*.¹ On the other hand, in an action by a corporation, a plea that plaintiff is not a corporation authorized to maintain the action, is a defense to the whole action, and devolves on plaintiff the burden of proving its corporate existence.²

¹ *Concordia Savings &c. Asso. v. Read*, 93 N. Y. 474; *Bengston v. Thingvalla S. S. Co.*, 31 Hun (N. Y.), 96; *East River Electric Light Co. v. Clark*, 18 N. Y. Supp. 463; *East River Bank v. Rogers*, 7 Bosw. (N. Y.) 493; *First Nat. Bank v. Loyhed*, 28 Minn. 396 (under a statute). Accordingly, an answer stating that "the defendant has *no information sufficient to form a belief*," concerning the plaintiff's allegation that it is a corporation, "and therefore denies the same," is therefore insufficient under such a statute. *Crane Bros. Man. Co. v. Morse*, 49 Wis. 368. Accordingly, a verified plea, which (omitting the formal parts) recites that "the defendant says the plaintiff is a corporation, not incorporated under the laws of the State of Indiana, but is incorporated and organized under the laws of the State of New York; and that, at the commencement of this action, the plaintiff had not complied with the provisions of an act of the General Assembly of the State of Indiana, entitled 'An act respecting foreign corporations and their agents in this State,' approved June 15, 1852," is not a good plea in abatement, raising the question of the right of the plaintiff to maintain a suit in the domestic jurisdiction; because it states merely a conclusion, and not a fact. *Singer Man. Co. v. Effinger*, 79 Ind. 264. Similarly, an information in the nature of *quo warranto* against a corporation, alleging that it did not file a copy of its articles of association with the recorder of the

county in which it was pretending to exercise the functions of a corporation, is not a reasonably certain averment that the articles were not filed in the recorder's office. *State v. Bethlehem &c. Gravel Road Co.*, 32 Ind. 357.

² *Johnson v. Hanover Nat. Bank*, 88 Ala. 271; *s. c.* 6 South. Rep. 909. Under a statute (Cal. Civ. Code, § 299), requiring corporations to file a copy of their articles of incorporation in the county where their property is situated, and providing that, until this is done, they "shall not maintain or defend any action or proceeding in relation to such property," the failure so to file a copy of the articles must be specifically set up in the answer, in order to state a defense under the statute, and is not well pleaded by an answer which merely denies the existence of the corporation. *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69; *s. c.* 18 Pac. Rep. 886; *Ontario State Bank v. Tibbits*, 80 Cal. 68; *s. c.* 22 Pac. Rep. 66. That a want of compliance with the statute cannot be specially pleaded,—see, further, *Phillips v. Goldtree*, 74 Cal. 151; *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69; *ante*, § 7661, note. That an allegation of incorporation is "new matter," within the meaning of a stipulation of New York,—see *Becht v. Harris*, 4 Minn. 504. That the abbreviation "C. B. & Q. R. R. Co.," was not a sufficient description of a party in a petition to take depositions, was held in *Accola v. Chicago &c. R. Co.*, 70 Iowa, 185; *s. c.* 30 N. W. Rep.

§ 7673. Particularity of Statement where Defendant Pleads Corporate Existence.—It seems that where a *defendant* pleads the existence of a corporation *by way of inducement*, or otherwise, it is not necessary for him to plead it more specifically than where a plaintiff pleads it, but that he may make the allegation in general language.¹

§ 7674. Particularity in Replication to Plea of Nul Tiel Corporation.—Under the *old practice*, where the plaintiff *replied* to a plea of *nul tiel corporation*, it was necessary for him to plead with more accuracy than in stating the fact of corporate existence in his original declaration. For instance, it has been held that a *replication* to a plea alleging that there is no such a corporation as the plaintiff, must set forth specially *how* the plaintiffs are a corporation, if their incorporating act requires certain things to be done before they can become such.² And where, under the Revised Statutes of New York³ he pleaded the *title* of the incorporating act, it was necessary to state it with entire accuracy, and a variance between the statement and the title of the act as it really was, was ground of *demurrer* if the act was a public statute⁴ so that the court could notice it judicially. This will impress the modern practitioner as senseless technicality; since it is not necessary to plead a public statute at all, because the court will notice it judicially.

§ 7675. Burden of Proof under This Plea.—Where the declaration, or other affirmative pleading, substantially alleges that the plaintiff is a corporation, and a plea of *nul tiel cor-*

503; although the most ignorant man in Iowa undoubtedly knows that the abbreviation, which is in constant use, means the Chicago, Burlington, & Quincy Railroad Company.

¹ *Manby v. Long*, 3 Lev. 107. This is especially true where the rule of the forum does not require it to be pleaded at all, in a case where the name used imports that the party is

a corporation. *Johnson v. Gibson*, 78 Ind. 282.

² *Bank of Auburn v. Aikin*, 18 Johns. (N. Y.) 137.

³ Permitting an act of incorporation to be pleaded by its title and date of passage: 2 Rev. Stat. N. Y. 459, § 13.

⁴ *Union Bank v. Dewey*, 1 Sandf. (N. Y.) 509.

poration is interposed by the defendant, this plea operates as a special traverse of the averment that the plaintiff is a corporation, and puts *upon the plaintiff* the burden of proving that fact.¹

§ 7676. **Plea of Nul Tiel Corporation Defendant.** — Where the defendant is sued as a corporation, and pleads that it is not a corporation, the governing principles are totally different from those discussed in the preceding sections. In the first place, there is an incongruity in a corporation, or in any party sued as a corporation, *appearing* by attorney, as a corporation must appear if at all,² and defending on the ground that it is not a corporation. It looks at first blush somewhat like the case of a natural person, upon being served with summons in an action, appearing by attorney and alleging that there is no such person as himself. Some judges have thought this incongruity insuperable.³ The strict logic of this ques-

¹ Spangler *v.* Indiana &c. R. Co., 21 Ill. 276; Lewiston *v.* Proctor, 27 Ill. 414; Stone *v.* Great Western Oil Co., 41 Ill. 85; Ramsey *v.* Peoria &c. Ins. Co., 55 Ill. 311; Bailey *v.* Valley Nat. Bank, 127 Ill. 332; *s. c.* 19 N. E. Rep. 695; Indianapolis &c. Min. Co. *v.* Herkimer, 46 Ind. 142; Hallett *v.* Harrower, 33 Barb. (N. Y.) 537; Saltsman *v.* Schultz, 14 Hun (N. Y.), 256; Johnson *v.* Hanover Nat. Bank, 88 Ala. 271; *s. c.* 6 South. Rep. 909; Savage *v.* Russell, 84 Ala. 103. The rule is the same in the proceedings in the *District Courts of the United States in admiralty*; so that a libellant, suing as a corporation, has the burden of proving its organization, where its corporate existence is put in issue by the answer. The Guy C. Goss, 53 Fed. Rep. 839. So, where plaintiffs sue as a corporation, in Massachusetts, and the defendant, on pleading the general issue, gives notice, conformably to a rule of court, that he will deny their corporate existence,

they must prove it, or they cannot maintain their action. First Universalist Soc. *v.* Currier, 3 Met. (Mass.) 417. Circumstances under which the *onus* of disproving the articles of incorporation are upon those who signed them: Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

² *Ante*, § 7645.

³ Thus, in Oxford Iron Co. *v.* Spradley, 46 Ala. 98, it is said, in the opinion of the court by Peck, C. J.: "The plea of *nul tiel corporation*, where a defendant is sued as a corporation aggregate, is an inappropriate plea, and an inconsistency in itself. We find no precedent for such a plea in such a case, nor any case in which it has been pleaded. The appointment of an attorney, and an appearance by him for the defendant, is an admission on the record that the defendant is a corporation." So, in Colorado it is held that a defendant, impleaded as a corporation, cannot deny its existence, either in abatement or in

tion would be that if a defendant is sued as a corporation, and there is no such corporation, then no one can be interested in appearing, for the purpose of setting up that fact; because, as already seen,¹ a judgment against a dead corporation, like a judgment against a dead man, would be void. But a little reflection will show that this argument is untenable. In the first place, it is a disputed question whether a judgment against a dead corporation or a dead man is *void*, or whether it is merely *erroneous* or *voidable*, in the sense that it is capable of being reversed in a proceeding in the nature of a writ of error *coram nobis*, for an error of fact, upon such error being shown.² In the second place, although we may call it void, it is nevertheless good until its invalidity is made to appear in some proceeding, direct or collateral. Until then, it is capable of mischief. It may operate injuriously upon the rights of parties interested in a proper distribution of the assets of the corporation, and upon the rights of other creditors and of the stockholders. It is therefore believed that it will not do to say that where a defendant is impleaded as a corporation, which is not such, no one can appear for the real parties in interest and show the real fact.³ Indeed, the same court that put forth the proposition that a defendant, sued as a corporation, could not plead *nul tiel corporation*, added, in a subsequent case, the following qualification: "The substance of such a plea seems necessary or permissible only in cases of misnomer or dissolution, and in the form and manner required in the case

bar; because, if it is not a corporation, it cannot as such appear and plead. *Western Union Tel. Co. v. Eyser*, 2 Colo. 141, 153. Upon the same principle, it has been held that an information against a body in its corporate name, charging that it has not been legally organized, and pointing out certain supposed defects in its organization, and praying for its dissolution, is bad, by reason of not having been brought against the *persons* claiming to be the corporation, — the court reasoning that if a body

is brought into court by a corporate name, its corporate existence is thereby admitted. *Mud Creek Draining Co. v. State*, 43 Ind. 236; *ante*, § 7645. Compare *Stoddard v. Onondaga Ann. Conf.*, 12 Barb. (N. Y.) 573; *Curtis v. Central R. Co.*, 6 McLean (U. S.), 401.

¹ *Ante*, §§ 6725, 6726.

² *Ante*, § 6725.

³ See the strong reasoning upon this question of Hammond, J., in *Kelley v. Mississippi Cent. R. Co.*, 1 Fed. Rep. 564, 569.

of a person.”¹ But whatever doubt there may have been upon the question whether the plea of *nul tiel corporation*, where the plaintiff sued as a corporation, and the defendant by its plea challenges its corporate existence, was a plea *in abatement* or *in bar*,²—there would seem to be no doubt, on principle, that where the plaintiff impleads a defendant as a corporation, and the defendant pleads *nul tiel corporation* in respect of itself, it is a plea in the nature of a plea *in abatement*, and the persons interposing such a plea are bound to state *who they really are*,—that is to say, by analogy to the common-law principle where the defendant pleads a misnomer, they are bound to *give the plaintiff a better writ*. Again, whatever doubt there may have been in cases where the plaintiff was suing as a corporation, there never was any foundation for a doubt that where a defendant, sued as a corporation, appeared and pleaded the *general issue*, this was an admission of its corporate existence, that is to say, of its capability of being sued as a corporation,—and also its capability of being sued as a corporation in the place *where* the action against it was prosecuted.³

• § 7677. *Nul Tiel Corporation Defendant, how Pleaded.*—When certain defendants, sued as a corporation, appear and plead *in abatement* that they, “together with others,” are doing business under a corporate name—that of the defendant to the suit—but deny that the company is now, or ever has been, a corporation, this plea may be successfully attacked by a demurrer. It is defective in that it *does not give the plaintiff a better writ*.⁴ The plea should set forth who were the “others” with whom the persons answering are doing busi-

¹ *McCullough v. Talladega Ins. Co.*, 46 Ala. 376. In Massachusetts, in an action against a corporation, after the entry of a general appearance on the docket, and the filing by the corporation of an affidavit of merits, or, in the language of the statute (Laws Mass. 1852, ch. 312), that the party “verily believes that the defendants have a substantial defense to the ac-

tion on its merits,” it is competent for the defendants, in their answer, to deny that they are a legal corporation. *Greenwood v. Lake Shore R. Co.*, 10 Gray (Mass.), 373; *Gott v. Adams Express Co.*, 100 Mass. 320.

² *Ante*, § 7669.

³ *Freeman v. Machias Water &c. Co.*, 38 Me. 343.

⁴ 1 Chitty on Pl. (6th ed.), p. 481.

ness in the corporate name of the defendant, to the end that the plaintiff may know against whom to bring his suit, if the plea should be sustained.¹

§ 7678. **Stage of the Proceedings at Which Defense of Nul Tiel Corporation Pleadable.** — Unquestionably if, as some of the courts hold, the plea of *nul tiel corporation*, or a plea of that nature under the codes of procedure, is to be regarded as a plea in abatement merely, then, unless the ordinary rule of pleading has been changed by statute, the plea must be made *in limine*, before pleading to the merits; otherwise it will be waived. Indeed, as elsewhere seen,² judicial authority is now overwhelming, to the effect that it is *waived by pleading to the merits*; and in conformity with this principle the general rule is believed to be that where such a plea is combined with an answer to the merits, though in different paragraphs, it may be disregarded. But this principle yields to statutory rules of pleading in particular jurisdictions. Thus, in Missouri, the defendant may set up in a single answer as many defenses as he may have, and matter in abatement may be pleaded with matter in bar in different paragraphs of the same answer.³ So, in Massachusetts, even where the defendants are sued in the character of a corporation, they may deny that they are a

¹ *American Express Co. v. Haggard*, 37 Ill. 465; s. c. 87 Am. Dec. 257. Where a defendant was sued as a corporation, which was in fact a limited partnership, a denial in its answer "that defendant is or ever was a corporation, organized and existing under the laws of England," was held a *negative pregnant*, — pregnant with the admission that the defendant was a corporation, and it consequently raised no issue. *Wright v. Fire Ins. Co.*, 12 Mont. 474. Where a defendant, sued as a corporation, answered; denying that "it is or ever has been a corporation, either public or private, and duly organized, chartered, or existing under the laws of

the State of Pennsylvania, or under the laws of any other State or government, for the purpose of carrying on the business of common carrier in goods and merchandise, or otherwise," it was held that this pleading was sufficiently specific under a statute (Iowa Code, § 2717), providing that where the defendant is sued as a corporation, "it shall not be sufficient to say so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." *Folsom v. Star Union &c. Freight Line*, 54 Iowa, 490, 497.

² *Ante*, § 7665.

³ *Cohn v. Lehman*, 93 Mo. 574; *McIntire v. Calhoun*, 27 Mo. App. 513.

corporation, after they have appeared generally and filed an affidavit of merits. The entry of a general appearance is regarded as a waiver of all objections grounded on the want of a proper service of the writ upon the defendants, but not as affecting the merits; and the question of the defendant being a corporation is consequently regarded as a question affecting the merits.¹ In Vermont, in an action of *book account* against a corporation, if the defendant would deny its corporate existence, the question must be raised *by plea* before judgment to account is rendered.²

§ 7679. Amendments in Case of Failure to Plead Corporate Existence.—In an action by³ or against⁴ a party described by an artificial name, it is always proper, if deemed necessary, to allow the plaintiff to amend his writ, declaration or complaint, so as to allege the fact of corporate existence. And the rule is, of course, the same where the corporation is not sufficiently described so as to identify it from some other corporation; but in such a case an amendment cannot be made substituting the other corporation, because this would amend an action against one party so as to make it an action against another party, which cannot be done; but a new action must be commenced against the right party, founded upon new process.⁵

§ 7680. Defense that Plaintiff Corporation was Organized for Unlawful Purposes.—It seems pretty clear that it will not be a good defense to an action brought by a corporation, although organized under the laws of another State, that the corporation was organized primarily for an unlawful purpose, — that is to say, during the late Civil War, for the purpose of running the blockade *in aid of the rebellion*, — unless the purpose of the action is in aid of the unlawful purpose for which the corporation was organized.⁶

¹ Greenwood v. Lake Shore R. Co., 10 Gray (Mass.), 373.

² Hunneman v. Fire District, 37 Vt. 40.

³ Wilson v. Sprague &c. Co., 55 Ga. 672.

⁴ Western Railway v. Sistrunk, 85 Ala. 352; s. c. 5 South. Rep. 79.

⁵ Little v. Virginia &c. Water Co., 9 Nev. 317.

⁶ Importing &c. Co. v. Locke, 50 Ala. 332.

§ 7681. **Corporate Existence how put in Issue in Actions before Justices of the Peace.** — In actions before justices of the peace, where formality of pleading is not required even on the part of the plaintiff, and where defensive pleadings may be made *ore tenus*, the existence of a corporation may be put in issue by the defendant, without a denial under oath, and even without a written denial of any kind;¹ and, on an appeal to a higher jurisdiction, where the trial is *de novo*, each party proceeds without filing new or more formal pleadings. In some jurisdictions this rule is varied, so that, on an appeal to a higher court, for the purpose of a trial *de novo*, in the absence of anything to the contrary, the defendant is presumed to have pleaded the *general issue*.² This plea goes to the merits, and as already seen, where the plaintiff sues as a corporation, it admits its corporate capacity, and its ability to sue as an artificial body.³ It is therefore deemed immaterial, in such an action, whether the plaintiff was in fact a corporation, or a mere voluntary association acting under the name which it assumed; and so, where a plaintiff, calling itself The Farmers' and Drovers' Bank, sued upon a note which had been transferred to it by the payee, the suit having been commenced before a justice of the peace, it was held unnecessary, upon an appeal to the Circuit Court, to prove that the plaintiff was a corporation.⁴

§ 7682. **Manner of Pleading Dissolution.** — That the corporation has ceased to exist or was not a corporation at the commencement of a suit upon a contract, may be pleaded in *abatement*, but *not in bar* of a recovery.⁵ Where an answer

¹ Stanley v. Farmers' &c. Bank, 17 Kan. 592.

² Reed v. Snodgrass, 55 Mo. 180.

³ Ante, § 7665.

⁴ Farmers' &c. Bank v. Williamson, 61 Mo. 259; Young Men's Christian Asso. v. Dubach, 82 Mo. 475, 480. In New Jersey the rule is similar. The defendant must take an exception in the justice's court to the

failure of the plaintiff to prove its corporate existence, or the right to make an objection is waived, and it cannot be interposed for the first time on appeal. State v. New York &c. Tel. Co., 49 N. J. L. 322; s. c. 8 Atl. Rep. 290. See also Johnston Harvester Co. v. Clark, 30 Minn. 308.

⁵ Dental Vulcanite Co. v. Wetherbee, 2 Cliff. (U. S.) 555; Meikel v.

denies the existence, at the commencement of the action, of a corporation which is shown to have once existed, the answer should, according to one theory, particularly set forth the manner in which the corporate powers ceased.¹ It must, according to this theory, show that the corporation has expired by limitation, or that it has been terminated by a competent legal proceeding. Merely to allege facts which would warrant an adjudication of forfeiture is not enough, since the right of the corporation to exist cannot be tried collaterally.² But the prevailing theory seems to be that a *general averment* of dissolution is enough.³

ARTICLE III. PROOF OF CORPORATE CHARACTER.

SECTION

7689. By proving charter and user thereunder.

7690. Proof of the charter.

7691. Judicial notice of charters and general statutes of incorporation.

7692. Distinction between judicial notice of charter and judicial notice of corporation.

7693. Presumption of ancient charter.

7694. Proof of corporate existence by reputation.

7695. Proof under statutes by showing that the body acted as a corporation.

7696. Proof of user under a charter.

SECTION

7697. User proved by proving a corporation *de facto*.

7698. User under a general law.

7699. Proving corporate existence where corporation is organized under general laws.

7700. Filing of articles and election of officers.

7701. Organization in fact and user thereunder.

7702. Corporate books and records as evidence of organization and user.

7703. Records need not show acceptance of charter.

7704. Proof by witnesses under notice to produce corporate books.

German Sav. Fund Soc., 16 Ind. 181. Compare *ante*, §§ 3348, 6672.

¹ *Heaston v. Cincinnati & C. R. Co.*, 16 Ind. 275; s. c. 79 Am. Dec. 430. The court say: "A faulty answer in this respect was erroneously held good in *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285."

² *Hartsville University v. Hamilton*, 34 Ind. 506.

³ *Ante*, §§ 3348, 6672. It has been ruled that where the receiver of a

railroad corporation is served with process, in an action proceeding on a right of action against the corporation, he may plead in abatement, in his own name, that the corporation is extinct, or he may make the defense by motion to dismiss the suit, or by a suggestion of his attorney on the record, supported by affidavits showing the facts. *Kelley v. Mississippi & C. R. Co.*, 2 Flipp. (U. S.) 581.

SECTION

- 7705. Where the corporation is unconditionally incorporated.
- 7706. Judicial notice of the existence of corporation.
- 7707. Proof by acts or admissions by the opposite party.
- 7708. Letters patent, certificate of incorporation, articles of association, etc.
- 7709. Conclusiveness of certificate issued by public official.

SECTION

- 7710. Certificate of commissioners that conditions precedent have been performed.
- 7711. Presumptions in favor of the regularity of organization.
- 7712. Proof of the existence of a foreign corporation.
- 7713. Proof of corporate existence in criminal cases.

§ 7689. **By Proving Charter and User thereunder.** — In respect of corporations created by *special charters*, granted either by the Crown in England or by the legislature in England or America, the ordinary mode of proving the existence of a corporation is to prove *a charter, and user thereunder*, in the name therein designated, of the powers, franchises, and privileges granted. Briefly stated, the mode is proof of a charter and user thereunder.¹

¹ *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Utica Ins. Co. v. Caldwell*, 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Tilman*, 1 Wend. (N. Y.) 555; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Eaton v. Aspinwall*, 19 N. Y. 119; *Searsburgh Turnp. Co. v. Cutler*, 6 Vt. 315; *Gaines v. Bank*, 12 Ark. 769; *Heaston v. Cincinnati & C. R. Co.*, 16 Ind. 275; *s. c.* 79 Am. Dec. 430; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Ewing v. Robeson*, 15 Ind. 26; *Buncombe Turnp. Co. v. M'Carson*, 1 Dev. & B. (N. C.) 306; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Marsh v. Astoria Lodge*, 27 Ill. 421; *Cochran v. Arnold*, 58 Pa. St. 399, 405; *Buffalo & C. R. Co. v. Cary*, 26 N. Y. 75; *Came v. Brigham*, 39 Me. 35; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78; *Mendota v.*

Thompson, 20 Ill. 197; *State v. Louisiana State Bank*, 20 La. An. 468; *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.), 494; *Barrett v. Mead*, 10 Allen (Mass.), 337; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *s. c.* 43 Am. Dec. 457; *Way v. Billings*, 2 Mich. 397; *Merchants' Bank v. Harrison*, 39 Mo. 433; *s. c.* 93 Am. Dec. 285; *People v. Beigler, Hill & D. Supp.* (N. Y.) 133; *Jones v. Dana*, 24 Barb. (N. Y.) 395; *Bank of Toledo v. International Bank*, 21 N. Y. 542; *Methodist Episcopal Church v. Pickett*, 19 N. Y. 482; *Wilmington & C. R. Co. v. Saunders*, 3 Jones L. (N. C.) 126; *Bank of Manchester v. Allen*, 11 Vt. 302; *Henderson v. Mississippi Union Bank*, 6 Smedes & M. (Miss.), 314; *Ramsey v. Peoria & C. Ins. Co.*, 55 Ill. 311. Compare *ante*, §§ 60, *et seq.*, 248, 249, 1846, 3652.

§ 7690. **Proof of the Charter.** — Where the corporation is created by a *special act* of the legislature, the courts will take *judicial notice* of the act if it so requires, or if there is a general statute of the State requiring the courts to take judicial notice of all acts of the legislature, general or special,—in either of which cases it is only necessary to produce to the judge the official book of statutes containing the act. But where the courts do not take judicial notice of the act, then it is, in strictness, necessary to prove the act by producing, from the office of the Secretary of State, a copy, duly authenticated by that officer, with the seal of State thereto affixed; and this is sufficient without further proof. But this strictness is probably dispensed with by statutes, or rules of evidence which make the *books of legislative acts*, printed by authority of the State, evidence of the private, as well as the public, acts contained therein. If the charter is the *act of the legislature of another State* of the Union, then the Act of Congress of May 26, 1790, which provides for the manner in which the official acts of one State shall be authenticated in order to have full faith and credit in another State, governs; and this statute provides that “the acts of the legislatures of the several States shall be authenticated by having the seals of their respective States affixed thereto.”¹ It is therefore not necessary that there should be the certificate of a Secretary of State, or other official authentication; but the seal of the State affixed thereto is alone a sufficient authentication.² Where judicial notice is not taken of a charter under the rule about to be considered,³ proof of it is generally made by the *production of the statute book*, printed by public authority, or by an exemplified copy of the particular statute, as found in such book.⁴ Although there is a statute making the printed statute books issued by public authority *evidence* of the statutes

¹ Rev. Stats. U. S., § 905.

² *State v. Carr*, 5 N. H. 367; *United States v. Johns*, 4 Dall. (U. S.) 412; *s. c.* 1 Wash. (U. S.) 363.

³ *Post*, § 7691.

⁴ *Chenango Bank v. Noyes*, cited

in *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194, 204; *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *United States v. Johns*, 4 Dall. (U. S.) 412, 415.

therein contained, yet this does not, it has been held, dispense with the necessity of formally *producing the statute book* and offering it in evidence. In other words, it does not change the common-law rule that private statutes must be *put in evidence*.¹

§ 7691. Judicial Notice of Charters and General Statutes of Incorporation. — Unless the rule is changed, by statute or otherwise, the charters of private corporations, when granted by the legislature in the form of *private acts*, are *not noticed judicially*, but must be proved.² But by statute in some of the States, all acts of the legislature are *public acts*, in the sense that the courts are required to take judicial notice of them without the necessity of their being formally proved. Where such a rule prevails, the courts will, of course, take judicial notice of *special acts* of the legislature chartering corporations.³ In many cases special charters of incorporation themselves declare that the act shall be noticed judicially by the courts. In such a case it has been held that a denial of the incorporation of the plaintiff does not put the plaintiff to proof of it at the trial.⁴ So, the courts are bound to take judicial notice of any statute, although of a private nature, which contains a clause declaring it to be a public act.⁵ General statutes also exist, under the provisions of which the courts are bound to take judicial notice of all special acts of incorporation.⁶ General enabling statutes authorizing asso-

¹ Bailey v. Lincoln Academy, 12 Mo. 174.

² Haven v. New Hampshire Asylum, 13 N. H. 532 (1843); s. c. 38 Am. Dec. 512.

³ By statute in Georgia, the charters of banks, granted by the General Assembly of that State, are public laws, and all courts take judicial notice of them. Terry v. Merchants' &c. Bank, 66 Ga. 177; s. c. 9 Am. Corp. Cas. 45; Davis v. Bank of Fulton, 31 Ga. 69.

⁴ Anderson v. Kerns' Draining Co., 14 Ind. 199; s. c. 77 Am. Dec. 63;

Eel River &c. Asso. v. Topp, 16 Ind. 242; Agnew v. Bank of Gettysburg, 2 Har. & G. (Md.) 478.

⁵ Brookville Ins. Co. v. Records, 5 Blackf. (Ind.) 170; Whitewater Valley Canal Co. v. Boden, 8 Blackf. (Ind.) 130.

⁶ Thus, it is enacted by statute in Massachusetts that "all acts of incorporation shall be deemed public acts, and, as such, may be declared on and given in evidence, without specially pleading the same." Rev. Stat. Mass. 1836, ch. 2, § 3.

ciations of individuals to become incorporated for trading or other purposes, are public acts, and are to be noticed judicially, without being proved in the ordinary mode.¹

§ 7692. **Distinction between Judicial Notice of Charter and Judicial Notice of Corporation.**—A distinction must consequently be taken between the *judicial notice of charters*, and the *judicial notice of corporations*; for a charter may have been granted without any *acceptance* of it, or without any organization, or user thereunder, in which case there will be no corporation. The charter of a private corporation, which has been recognized by the constitution of the State, acquires thereby the nature of a *public statute* of which courts are bound to take judicial notice.² Where judicial notice is taken of special acts of the legislature, it is clear that, if a *municipal corporation* is created by such an act, a court of the State will take judicial notice of the *existence of the corporation*; because in such a case the assent of the corporators, that is to say, of the inhabitants of the town or city which is made a corporation, is not, in general, necessary to the taking effect of the statute, but whenever the statute, according to its terms, takes effect they become *ipso facto* incorporated. But where, as is generally the case with private corporations,³ the assent of the corporators is necessary to create the corporation, then the rule must be that a court, although it may take judicial notice of the statute creating a corporation, cannot judicially know the fact of the incorporation, because it cannot judicially know the fact that the persons named therein have accepted the charter and organized under it.⁴

¹ *Dutchess Cotton Man. Co. v. Davis*, 14 Johns. (N. Y.) 238, 245; *s. c.* 7 Am. Dec. 459; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482, 486; *Ewing v. Robeson*, 15 Ind. 26, 29; *Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407.

² *Vance v. Farmers' &c. Bank*, 1 Blackf. (Ind.) 80.

³ *Ante*, § 52, *et seq.*

⁴ *Hammett v. Little Rock &c. R. Co.*, 20 Ark. 204, where the distinction is taken. A number of holdings in that State taking judicial notice of the existence of private corporations, such as banks, can only be upheld on the ground that the statute operated *eo instanti* to create a *public corporation*. See also *post*, § 7706.

§ 7693. **Présumption of Ancient Charter.**—It is well settled, by analogy to the doctrine of ancient grants, that the existence of a corporation may be established by presumptive evidence, on proof of its having been in existence and in the exercise of the franchises claimed for a great length of time.¹ The company of Mercers, to prove its existence as a corporation, produced a series of books containing admissions of freemen and other acts of the company, commencing in the reign of Henry VI., and continuing down to the trial, which books were taken from a chest which had always been in the custody of the clerk of the company. These records were admitted as presumptive evidence that the company had a corporate existence.² Upon the same principle, it is supposed that there existed in the original thirteen States many ancient grants of charters belonging to colonial days, which could not be produced now, and the production of which would be dispensed with.³ But it has been held that this principle cannot be appealed to in Missouri to establish the existence of a corporation which purports to have been organized in that State in 1839. The reason given was that there was then no general statute under which corporations might be organized; consequently no corporation could exist except by special act of the legislature. These acts being printed and preserved, although perhaps not noticed judicially by the courts, are easily accessible as public records of the State, and hence a body of persons claiming to have acquired a corporate existence prior to the passage of the general incorporation laws, could, without difficulty, if their claim were well founded, put their finger upon some act of the legislature empowering them to become incorporated.⁴ But it is held in New England that where the *proprietors of common lands* show a record of their incorporation under an enabling statute forty or fifty years previous to the controversy, it will not be competent for strangers, or the individual proprietors, or their heirs or assigns, to attack the validity of the organi-

¹ Ang. & Ames Corp., ch. I., § 70.

² Douthitt v. Stinson, 63 Mo. 268,

³ Mercers v. Hart, 1 Car. & P. 113. 276.

⁴ *Ibid.*

zation of the corporation, on the ground that the persons who originally claimed title as tenants in common and became incorporated, had not in fact a title.¹

§ 7694. Proof of Corporate Existence by Reputation.— Closely allied to the foregoing are holdings to the effect that the existence of a corporation may be proved by *reputation*, and by its actual use for a length of time, of the powers and privileges of a corporation;² and this, we have seen, is the mode of proof in *criminal cases*.³ And it seems that, in any case where a body professing to be a corporation is sued, proof of its corporate existence by reputation is sufficient; though the better theory is that, on grounds of public policy, the defendant is in such a case estopped from denying its corporate existence.⁴

§ 7695. Proof under Statutes by Showing that the Body Acted as a Corporation.— Statutes have been enacted which still further simplify the mode of proof of corporate existence, by allowing it to be proved by showing that the body whose corporate existence is questioned acted or did business as a corporation.⁵

§ 7696. Proof of User under a Charter.— Proof that a corporation has used or exercised the franchises granted by

¹ Copp v. Lamb, 12 Me. 312; Dolloff v. Hardy, 26 Me. 545, 552; Brackett v. Persons Unknown, 53 Me. 228; Jeffries Neck &c. v. Ipswich, 153 Mass. 42; s. c. 26 N. E. Rep. 239.

² Dillingham v. Snow, 5 Mass. 547; Stockbridge v. West Stockbridge, 12 Mass. 399, 400.

³ Ante, § 7652.

⁴ See the reasoning of Chief Justice Shaw in Narragansett Bank v. Atlantic Silk Co., 3 Met. (Mass.) 282, 289.

⁵ Proof under Civ. Code Cal., § 358, by showing that the body has been acting as a corporation: Lakeside Ditch Co. v. Crane, 80 Cal. 181; s. c.

22 Pac. Rep. 76. See also Oroville &c. R. Co. v. Plumas County, 37 Cal. 354, 361; Pacific Bank v. De Ro, 37 Cal. 538; Dannebroge &c. Min. Co. v. Allment, 26 Cal. 286; People v. Frank, 28 Cal. 507, 520. Proof under Mich. Laws, 1871, 1876, by showing that the company has been doing business under a particular name: Lake Superior Bldg. Co. v. Thompson, 32 Mich. 293. That the act of 1845, in Texas, regulating evidence in regard to corporations, is only applicable to cases in which the corporation, or the assignee of the corporation, is the plaintiff: Reynolds v. Skelton, 2 Tex. 516.

its charter under the name therein designated, may be made in any appropriate way, — by producing the *books of the corporation*,¹ or by producing instruments of writing executed by it as a corporation,² or even by parol. Proof, in any appropriate mode, that the corporation *commenced business*, coupled with the production of a duly authenticated copy of its charter, is sufficient, *prima facie* at least, to show that the conditions on which the charter was to become operative have been performed.³ A favorite and frequent way of proving user by the corporation of its powers has been merely to prove that the party suing the corporation, or being sued by it, has admitted the fact of its existence, by executing to it, or taking from it, the instrument sued on, the same being executed in its corporate name, or otherwise by recognizing the fact of its

¹ *Post*, §§ 7702, 7736. *Reynolds v. Myers*, 51 Vt. 444.

² Thus, it has been held, in an action by a corporation, on a note, that if defendant pleads *null tiel corporation*, the plaintiff must prove incorporation and user under it. But the proof will be held, on appeal, sufficient to sustain a verdict, if the charter was read in evidence, though by the defendant; and if the note in suit was produced and appeared drawn in favor of the plaintiffs by the corporate name. The charter shows *incorporation*, and taking the note shows *user*. *Ramsey v. Peoria &c. Ins. Co.*, 55 Ill. 311. So, on the trial of an issue of *non-assumpsit* in an action against a corporation, a deed of *trust*, purporting to be executed by the corporation under its corporate seal, securing the plaintiff's debt and reciting that the corporation has been organized in pursuance of law, is admissible to prove its legal existence as a corporation. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526. In another case, at the trial of a writ of

entry brought by a corporation, a witness testified that he was its clerk, and that two books which he produced were the records of the corporation kept by him, but these books were not otherwise offered in evidence. The demandant also put in evidence a mortgage deed of the demandant premises from a third person to itself, in which it was described as a corporation, and a subsequent deed executed by the tenant, which recited that the demandant was the holder of that mortgage, and in which he agreed to pay the mortgage debt to "said corporation." It was held that this was sufficient evidence of the corporate existence of the demandant. *Provident Institution for Savings v. Burnham*, 128 Mass. 458.

³ *Lucas v. Bank*, 2 Stew. (Ala.) 147; *Dunning v. New Albany &c. R. Co.*, 2 Ind. 437; *Judah v. American &c. Ins. Co.*, 4 Ind. 333; *All Saints Church v. Lovett*, 1 Hall (N. Y.), 191; *Swartwout v. Michigan &c. R. Co.*, 24 Mich. 389.

being in existence as a corporation.¹ This is another branch of the doctrine already considered,² that a party dealing with a corporation as such becomes *estopped* from disputing its existence. One of the usual modes of proving user under a charter is to prove that the company, subsequently to the passage of the act of incorporation, had an office at a particular place, and there carried on the business for which it was incorporated, its affairs being managed by directors chosen for that purpose from time to time.³ So, in case of a turnpike company, it was sufficient proof of user, to prove the completion of the road of the company, the acceptance of it, as required by its charter, the erection of toll-gates, etc.⁴ In general, proof of user may consist of evidence of the acts of the corporation, showing that they are doing business under their charter,—for example, keeping an open office, having officers acting in the name, and as the agents of the company.⁵ It may be made by showing *acts in pais*: it is not necessary that it should be made by the introduction of matters of record. Accordingly, where, in a suit by a mutual insurance company upon a premium note, evidence in proof of user was offered that they had received, under their charter, applications for policies, and that policies had been issued by them from 1838 to the time of the trial, it was held that this was not error.⁶

§ 7697. User Proved by Proving a Corporation de Facto.

Another way of stating the same principle and reaching the same result is to say a proof of user, under a charter of general enabling statute, is a sufficient mode of proving the existence of a corporation *de facto*, although it may not exist *de jure*,—in other words, by proving the *existence in fact* of a corporation which *might have* lawfully existed under the

¹ Williams v. Bank of Michigan, 7 Wend. (N. Y.) 539.

² Ante, §§ 518, 7647.

³ Utica Ins. Co. v. Tilman, 1 Wend. (N. Y.) 555.

⁴ Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

⁵ Cahill v. Kalamazoo Ins. Co., 2 Dougl. (Mich.) 124, 135; s. c. 43 Am. Dec. 457.

⁶ *Ib. d.*

charter or governing statute.¹ Very slight evidence is generally held sufficient to establish the user necessary to show the existence of a *de facto* corporation. In some jurisdictions it is only necessary to show that the corporation assumed to act as such;² or, in other words, to show a continued user of the franchises of an incorporated and organized company by persons assuming to act as its directors,—this being not only competent evidence of its continued corporate existence, but also that such persons were its legal directors.³

§ 7698. User under a General Law.—In like manner, where a corporation purports to derive its franchises from a general law, proof of its existence, for the purposes of ordinary litigation, is sufficiently made, by showing the existence of a

¹ *Searsburgh v. Cutler*, 6 Vt. 315. See, to this effect generally, *Benesch v. John Hancock Mut. Life Ins. Co.*, 11 N. Y. Supp. 348; *Bank of Manchester v. Allen*, 11 Vt. 302, 307; *Jeffries Neck &c. v. Ipswich*, 153 Mass. 42, 44.

² *Reynolds v. Myers*, 51 Vt. 444.

³ *St. Paul Fire &c. Ins. Co. v. Allis*, 24 Minn. 75. Thus, in a suit by a bank upon a note, proof that the plaintiff is doing business as a bank in the name in which it is sued, that it has a president and other officers, and keeps a discount register, has been held sufficient to establish its *status* as a corporation for the purposes of the suit,—it being regarded as immaterial whether it is an incorporated company or a voluntary association. *Farmers' and Drivers' Bank v. Williamson*, 61 Mo. 259. In an action upon a stock subscription it appeared that, previous to the date of the subscription, directors and officers of the body were chosen. Other acts of user were proved, but were not more definitely fixed as to time than that they were *after* the date of the election of officers, which preceded that of

the subscription only one week. This was held to be sufficient. *Buffalo &c. R. Co. v. Cary*, 26 N. Y. 75. It has been held that taking subscriptions to stock and issuing certificates thereof, electing managers and directors, adopting by-laws, buying a lot, and constructing and leasing a building upon it,—constitute a sufficient user to constitute a *de facto* corporation, which will prevent liability of the members as partners, under a statute authorizing corporations for such business. *Finnegan v. Norenberg*, 52 Minn. 239; *s. c.* 53 N. W. Rep. 1150; 18 L. R. A. 778. Where the corporation has *entered an appearance* to an action in the name by which it was sued, and has served an answer upon the opposite party, proof of user or of the performance by it of corporate acts, is sufficient to establish its existence and identity as a corporation, for the purposes of the suit. *Derrenbacher v. Lehigh Valley R. Co.*, 21 Hun (N. Y.), 612; *s. c.* 59 How. Pr. (N. Y.) 283. Compare *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573; *ante*, § 7645.

general law under which it *might* exist, and by showing the exercise, on its part, of the franchises which it might properly have acquired by a due organization under such general law.¹ On the other hand, carrying on business in a corporate name is not evidence which can be considered for the purpose of establishing the existence of a corporation, where there is no law authorizing the members to file articles of association, or to become incorporated.²

§ 7699. Proving Corporate Existence where Corporation is Organized under General Laws.—The usual mode of proving the existence of a corporation which has been organized under a special charter, by making proof of the *charter* and of *user* thereunder,³ has no direct application in the case of a corporation organized under a general law. In the case of corporations organized under general enabling statutes, the usual course is for the associates to file articles of association, or articles of incorporation, in certain public offices, generally in the office of the recorder of deeds of the county within which the chief office of the corporation is to be established, and a duplicate thereof with the Secretary of State. Some of these statutes provide, in addition, that when these things are done in conformity with law, the Secretary of State shall issue to the co-adventurers a certificate of their incorporation. Where there is no provision, such as that last named, a copy of the articles of association, duly certified by the Secretary of State, is the usual evidence, and in many cases it is prescribed by statute that it shall be *the* evidence. Statutes exist making articles of association, or articles of incorporation, sometimes called the certificate of incorporation, being an instrument filed by the associates to procure their incorporation, when duly certified by the public officer in whose office it is lodged in pursuance of the statute, *prima facie* evidence of their exist-

¹ *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Finnegan v. Noerenberg*, 52 Minn. 239; *s. c.* 18 L. R. A. 778; 53 N. W. Rep. 1150; *Orenshaw v. Ullman*, 113 Mo. 633; *s. c.* 20 S. W. Rep. 1077.

² *Eaton v. Walker*, 76 Mich. 579; *s. c.* 6 L. R. A. 102; 43 N. W. Rep. 638.

³ *Ante*, § 7689.

ence as a corporation.¹ Under general statutes, framed on the model of those of New York, where it is necessary to prove the corporate existence, it may ordinarily be proved by introducing in evidence copies of its articles of association, filed in the office of the Secretary of State, where that mode of organizing a corporation is prescribed by the governing statute; and also by a *record* of the articles of association in the office of the *register of deeds* of the county where the principal place of business of the corporation was established, where the governing statute requires the articles of association to be so recorded.²

§ 7700. **Filing of Articles and Election of Officers.**— Under a general enabling statute, such as that mentioned in the preceding section, the mode of proof, corresponding to the proof of a charter and user thereunder, is proof of an organization by *filing articles of association, or of incorporation*, under the enabling statutes, and of the *election* of the proper corporate officers. Such was the mode under a general statute of New York, which provided (1) that the usual certificate in such cases should be filed in the office of the county clerk, and a duplicate thereof with the Secretary of State; (2) that “when the certificate shall have been filed as aforesaid, and ten per cent of the capital named paid in, the persons who shall have signed and acknowledged the same, and all others who thereafter may be holders of any share or shares of said capital stock, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in such certificate,”³ etc. Under this statute it was held that, although the ten per cent of capital was never paid in, the filing of the certificate, as required by the first section, and an election of officers and proceedings in furtherance of the object of its creation, constituted the body a *de facto* corporation, entitled to carry on its enterprises, have its day in court, and divide

¹ See, for example, Gen. Stats. Wash., § 1499; Knapp &c. Co. v. Strand, 4 Wash. 686.

² As was done, with approval, in Brown v. Corbin, 40 Minn. 508; s. c. 42 N. W. Rep. 481.

³ Laws N. Y. 1852, ch. 228.

its revenue among the holders of the shares of its capital, until the State should interpose and ask that it be dissolved.¹

§ 7701. **Organization in Fact and User thereunder.**—On principles already considered,² other decisions are to the effect that, for the purposes of civil actions, an *organization in fact* and user under it, is sufficient proof of corporate existence, although there may have been irregularities or omissions in the first instance.³ In these cases the principle is applied that a substantial or colorable compliance with the law is the most that can be demanded in a litigation between private parties, where the question arises collaterally, and where the State suffers the assumed corporation to exist.⁴ But, on the other hand, we find expressions of opinion to the effect that there must at least be an organization in good faith, under some existing charter or general law.⁵

§ 7702. **Corporate Books and Records as Evidence of Organization and User.**—The *primary evidence* of the organization of a corporation is to be sought for in its *records*.⁶ When, therefore, the issue is raised by the pleadings whether or not a corporation has been organized under its act of incorporation, or other enabling statute, its book of entries containing the articles of association, signed by the associates, and other record of its proceedings, is properly admitted in evidence

¹ *Eaton v. Aspinwall*, 19 N. Y. 119; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202. See also *Wood v. Coosa & C. R. Co.*, 32 Ga. 273, 291. Compare *Swartwout v. Michigan & C. R. Co.*, 24 Mich. 389.

² *Ante*, § 495, *et seq.*

³ *Marsh v. Astoria Lodge*, 27 Ill. 421.

⁴ *Finnegan v. Noerenberg*, 52 Minn. 239; *s. c.* 53 N. W. Rep. 1150; 18 L. R. A. 778.

⁵ *Welch v. Old Dominion Min. & C. Co.*, 31 N. Y. St. Rep. 916; *s. c.* 10 N. Y. Supp. 174.

⁶ *Narragansett Bank v. Atlantic*

Silk Co., 3 Met. (Mass.) 282; *Buncombe Turnp. Co. v. M'Carson*, 1 Dev. & B. (N. C.) 306; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194; *Vawter v. Franklin College*, 53 Ind. 88; *Grays v. Turnpike Co.*, 4 Rand. (Va.) 578; *Crump v. United States Min. Co.*, 7 Gratt. (Va.) 352; *s. c.* 56 Am. Dec. 116; *Highland Turnp. Co. v. M'Kean*, 10 Johns. (N. Y.) 154, 156; *s. c.* 6 Am. Dec. 324; *Bill v. Fourth Great Western Turnp. Co.*, 14 Johns. (N. Y.) 416; *Reynolds v. Myers*, 51 Vt. 444; but see *Lucas v. Bank*, 2 Stew. (Ala.) 147.

to prove the fact of organization;¹ and an organization may be shown by the *minutes* of the corporation without producing its *lists of subscribers*.² So, the *books of the commissioners*, appointed under a charter to receive subscriptions to the stock of a projected line of railway, are competent evidence to establish the facts recorded therein, relating to the performance of their duties.³

§ 7703. Records Need not Show Acceptance of Charter. —

As already seen,⁴ a body of men cannot be forced to become incorporated for private purposes without their own consent; and therefore it is necessary to the existence of such a corporation that the charter, or other enabling statute, shall have been *accepted* by those named therein in the case of such charter, or by others in the case of a general enabling statute.⁵ But it is not at all necessary that the fact of such an acceptance should be proved by the records of the corporation, — as, for instance, by an *express vote* to that effect entered upon those records. In the case of a special charter, an acceptance will no doubt be presumed in many cases, the same as the acceptance of a deed-poll will be presumed, where it is manifestly beneficial to the grantees. Certainly, after considerable lapse of time, and a continued exercise of the powers granted to the corporation, the presumption becomes irresistible that the charter has been accepted.⁶

¹ Foster v. White Cloud City Co., 32 Mo. 505.

² Crump v. United States Min. Co., 7 Gratt. (Va.) 352; s. c. 56 Am. Dec. 116.

³ Wood v. Coosa &c. R. Co., 32 Ga. 273.

⁴ Ante, § 52.

⁵ A corporation, chartered by a statute which declares that "there is hereby incorporated" a corporation named, without prescribing any conditions precedent, comes into existence on the charter being accepted by the incorporators therein named.

St. Joseph &c. Co. v. Shambaugh, 106 Mo. 557; s. c. 17 S. W. Rep. 581.

⁶ Middlesex Husbandmen v. Davis, 3 Met. (Mass.) 133; Narragansett Bank v. Atlanta Silk Co., 3 Met. (Mass.) 282; Whitmore v. Fourth Cong. Soc., 2 Gray (Mass.), 306; Stone v. Congregational Soc., 14 Vt. 86; Bank v. Ailen, 11 Vt. 302. Thus, the acceptance of a charter by a railroad company is sufficiently proved by showing that the act was passed at the request of the directors designated therein, or by the construction and use by the company of a part of

§ 7704. **Proof by Witnesses under Notice to Produce Corporate Books.**—After notice to a corporation to produce the books of the corporation, containing the records of the organization, the plaintiff may, in case of a refusal by the corporate agents to do so, prove the *de facto* existence of the corporation by witnesses, and that the certificate of incorporation, as required by law, was filed with the proper officers.¹

§ 7705. **Where the Corporation is Unconditionally Incorporated.**—There is a line of early holdings to the effect that where a statute unconditionally incorporates a body, the existence of the corporation is sufficiently proved by the production of the statute declaring it to be such,² in which case, if created by a *public act*, the court will take *judicial notice* of its existence, and of course a plea of *nul tiel corporation* will be bad on demurrer.³ But the writer has submitted the view that this principle can have no just application, except in those cases where, as in the case of municipal or other public corporations, the *assent* of the corporators is not necessary.⁴

§ 7706. **Judicial Notice of the Existence of Corporation.**—The author accordingly conceives the true principle to be that, wherever it is competent for the legislature to create a corporation by an unconditional declaration of the fact that the corporation exists, and the legislature has made such a declaration,—as in the case where a municipal corporation is created by an act of the legislature,—the *judicial notice* which the courts will take of the statute, will carry with it a judicial

the road which it was created to build. St. Joseph &c. Co. v. Shambaugh, 106 Mo. 557; s. c. 17 S. W. Rep. 581.

¹ Dooley v. Cheshire Glass Co., 15 Gray (Mass.), 494.

² Mahony v. Bank, 4 Ark. 620; Vermont Central R. Co. v. Claves, 21 Vt. 30; Fire Department v. Kip, 10 Wend. (N. Y.) 266; Brouwer v. Appleby, 1 Sandf. (N. Y.) 158; United States v. Johns, 4 Dall. (U. S.) 412,

415; Farmers' &c. Bank v. Troy City Bank, 1 Dougl. (Mich.) 457; Southhold v. Horton, 6 Hill (N. Y.), 501; Wood v. Coosa &c. R. Co., 32 Ga. 273. But see Cahill v. Kalamazoo Ins. Co., 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec. 457.

³ Hammett v. Little Rock &c. R. Co., 20 Ark. 204; McKiel v. Real Estate Bank, 4 Ark. 592.

⁴ Ante, § 7692.

knowledge of the fact of the existence of the corporation; but that, as to private corporations, which cannot come into existence except by the *consent* of the persons who are incorporated, their existence is to be established by proof, when properly controverted, like any other fact in issue.¹

§ 7707. Proof by Acts or Admissions by the Opposite Party.

A common way of proving the existence of a corporation is by proving acts of the opposite party which from their very nature *admit* its existence, and in many cases raise an *estoppel* against such party from denying it.² In the absence of documentary evidence of the organization of a corporation, evidence that the defendant was present at the organization of a company as a corporation, was elected and acted as president, and signed the note in suit as such, is *prima facie* proof of the existence and organization of the corporation, as in effect the admission of a party.³ So, where a defendant is sued under a name which implies a corporate existence, the fact that it is a corporation may be inferred from its having issued the obligation sued on under that name, by its president and secretary.⁴

§ 7708. Letters Patent, Certificate of Incorporation, Articles of Association, etc. — It may be stated, as a general rule, that *letters patent* issued by the Governor, as in Pennsylvania,⁵ *articles of incorporation*, sometimes called *certificates of incorporation*, filed in the proper public office or offices,⁶ or the cer-

¹ *Ante*, § 7692; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Ministerial &c. Fund v. Kendrick, 12 Me. 381; Towson v. Havre-de-Grace Bank, 6 Har. & J. (Md.) 47; s. c. 14 Am. Dec. 254.

² *Ante*, §§ 518, 1853, 3453, 3683, 7647.

³ Haynes v. Brown, 36 N. H. 545.

⁴ Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764; s. c. 12 S. E. Rep. 771.

⁵ Dorsey Harvester Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387. That

the validity of such *letters patent* cannot be questioned collaterally, — see Cochran v. Arnold, 58 Pa. St. 399, 405.

⁶ Fresno Canal &c. Co. v. Warner, 72 Cal. 379; s. c. 14 Pac. Rep. 37; 2 Rail. & Corp. L. J. 86; Knapp &c. Co. v. Strand, 4 Wash. 686; s. c. 3 Pac. Rep. 1063; Vanneman v. Young, 52 N. J. L. 403; s. c. 20 Atl. Rep. 53; Bates v. Wilson, 14 Colo. 140; s. c. 24 Pac. Rep. 99; Dannebrog &c. Min. Co. v. Allment, 26 Cal. 286.

tificate of the proper public officer, in the case of corporations created under State laws, generally the *Secretary of State*;¹ and in the case of national banks, of the *Comptroller of the Currency*,² to the effect that the associates have complied with the conditions of the law authorizing them to exist and do business as a corporation, — is *prima facie* evidence of their due incorporation, in connection with additional proof of a user of the franchises conferred by the statute under which they were organized. Under some statutory schemes of incorporation, what are usually called the articles of association, or the articles of incorporation, pass under the name of the *certificate of incorporation*. This is the constating instrument adopted by the incorporators, under the governing statute, and it seems to be called the certificate of incorporation by reason of the fact that when certified by the Secretary of State, or other designated State officer, it becomes the legal evidence of the corporate existence of the associates. Under strict theories, such a document is not admissible in evidence to prove the existence of a corporation, where it is defective for want of conformity to the essential requirements of the governing statute.³ Thus, a certificate of incorporation which provided that the affairs of the corporation should be controlled by its president, vice-president, and attorney, instead of a board of directors or trustees, as required by the governing statute, was not sufficient to create a corporation *de jure*; though one who had signed such certificate, who had conveyed property to the company, and who had acted as one of its officers, was estopped from denying its existence *de facto*.⁴ The governing principle is that, unless the statute empowers the particular officer to determine that the provisions of the law have been complied with, his certificate to that effect is not evidence of

¹ *Ante*, § 220, *et seq.*

² *Mix v. National Bank*, 91 Ill. 20; *s. c.* 33 Am. Rep. 44; *Merchants' &c. Bank v. Cardozo*, 35 N. Y. Super. 101; *First Nat. Bank v. Kidd*, 20 Minn. 234; *First Nat. Bank v. Loyhed*, 28 Minn. 396.

³ *Ante*, § 221; *McCallion v. Hibernia Savings & Loan Society*, 70 Cal. 163; *Bates v. Wilson*, 14 Colo. 140; *s. c.* 24 Pac. Rep. 99.

⁴ *Bates v. Wilson*, 14 Colo. 140, 156; *s. c.* 24 Pac. Rep. 99.

that fact, but the fact must otherwise appear.¹ On the other hand, defects in such certificates of incorporation are frequently overlooked, especially where there is a statute prohibiting corporations, doing business as such in good faith, from being overthrown in collateral proceedings. Where there was such a statute, a certificate of incorporation was held admissible in evidence, although not acknowledged by all the incorporators.²

§ 7709. Conclusiveness of Certificate Issued by Public Official.—A certificate of incorporation, filed according to the provisions of a general corporation law, constitutes *conclusive proof* as to the regularity of the incorporation. If there is any *fraud* in the recitals of the certificate, the corporation may be ousted of its franchise at the suit of the State; or possibly creditors who have been deceived by the fraud may have an action against the guilty parties. But the *de facto* existence acquired by the corporation, under such a certificate, is sufficient to enable it to act as a corporation, and acquire rights and incur liabilities as such, which will be enforced in the judicial courts.³

§ 7710. Certificate of Commissioners that Conditions Precedent have been Performed.—We have had occasion to refer to schemes of incorporation under which commissioners were appointed to superintend the organization of the intended corporation under its charter, acting under a statutory power of attorney.⁴ The better opinion is that where such commissioners are appointed and the statute empowers them to cer-

¹ *Boyce v. Trustees &c. of the M. E. Church*, 46 Md. 359. The authority of this case is questionable; since the author of the opinion, in his reasoning, denies the whole doctrine of *de facto* corporations, and denies the principle that parties can be estopped by their conduct from showing that a pretended corporation is not such *de jure*.

² *Dannebroke &c. Min. Co. v. Allment*, 26 Cal. 286.

³ *Cochran v. Arnold*, 58 Pa. St. 399; overruling *Paterson v. Arnold*, 45 Pa. St. 410; *ante*, §§ 248, 2991.

⁴ *Ante*, § 44. See *Napier v. Poe*, 12 Ga. 170,—as to the powers of such commissioners, and the conclusiveness of their acts; and compare *Mitchell v. Rome R. Co.*, 17 Ga. 574.

tify to the fact of the organization of the corporation, their *certificate is conclusive evidence* of that fact, for every purpose of collateral attack;¹ and that the action by the commissioners can be reviewed only in a proceeding brought by the State directly against the corporation to inquire into the validity of its incorporation.²

§ 7711. Presumptions in Favor of the Regularity of Organization.—Where the organization of a corporation takes place under the superintendence of a board of commissioners, or of a public official, then the ordinary *presumption of right-acting*, which operates in favor of *official action*, comes into play, and carries with it the presumption of the regular and proper organization of the corporation.³ Where the organization is the work of the co-adventurers themselves, under an enabling statute, this presumption of right-acting still exists in some force, though it is not as strong as in the case just mentioned. It has been held, under the New York Manufacturing Act, that a manufacturing corporation will be presumed to have been legally organized, if the question arises in a collateral proceeding, where there is no allegation to the contrary, and where it affirmatively appears that two of the three persons named in the certificate of incorporation as trustees for the first year, were stockholders, and it does not appear that the third was not.⁴ But, assuming that it is nec-

¹ Litchfield Bank v. Church, 29 Conn. 137; Pilbrow v. Pilbrow's Atmospheric &c. Co., 5 C. B. 440; Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520. Compare *ante*, §§ 248, 2991.

² Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520, 535. There is, however, a decision in New York, seemingly opposed to this view, which was rendered at a time when the doctrine prevailed in that State that a plaintiff, suing as a corporation, must prove its corporate existence. This was attempted by proving that the Governor had appointed inspectors,

and by giving in evidence the certificate of the inspectors that the turnpike road which the corporation had been chartered to build was completed, and that its gates were erected. This proof was held insufficient, but why the opinion does not state. Bill v. Fourth Great Western Turnp. Co., 14 Johns. (N. Y.) 416.

³ *Ante*, §§ 248, 249, 2991. Compare *ante*, § 3654.

⁴ Welch v. Importers' &c. Bank, 122 N. Y. 177; s. c. 25 N. E. Rep. 269; 8 Rail. & Corp. L. J. 475; 33 N. Y. St. Rep. 452.

essary, under the issues of a private litigation, to prove the existence of the corporation *prima facie*, there is a limit to this presumption. The mere fact that a company has a *president*, *secretary*, or *treasurer* does not raise a presumption of its incorporation, because voluntary associations may, and constantly do, act through the agency of such officers.¹

§ 7712. Proof of the Existence of a Foreign Corporation.

Although, in the absence of statutory restrictions elsewhere considered,² *foreign corporations* are universally allowed to sue in the domestic tribunals, yet they are not allowed to sue as corporations, and to recover in their corporate capacity, without proving that they are such,—unless the defendant by his contract with them, or in his pleadings, has estopped or disabled himself from denying their corporate existence.³ Something more than what has been stated in the preceding sections is necessary to prove the existence of a foreign corporation, because courts do not take judicial notice of foreign laws, but those laws must be proved as facts.⁴ In order to prove the existence of a foreign corporation, it is therefore necessary to do something more than to prove the papers and proceedings of incorporation, but it is also necessary to make proof of the statute authorizing the incorporation.⁵ In the absence of a local statute providing for the manner of authenticating a copy of the certificate of incorporation of a corporation organized under the laws of another State, a certificate by the original custodian of the document in the State of its origin, under the laws thereof, under his seal of office, is a sufficient authentication. Therefore, a certificate of incorporation of another State, duly acknowledged before a notary public, and authenticated by the certificate of the Secretary of State and by a certificate of a commissioner of the State

¹ Clark v. Jones, 87 Ala. 474; s. c. 6 South. Rep. 362; Cunyus v. Guenther, 96 Ala. 564; s. c. 11 South. Rep. 649.

² Post, § 7928, et seq.

³ Savage v. Russell, 84 Ala. 103;

Bank of Michigan v. Williams, 5 Wend. (N. Y.) 478.

⁴ 1 Thomp. Trials, § 1054.

⁵ Savage v. Russell, 84 Ala. 103; s. c. 4 South. Rep. 325; 20 Am. & Eng. Corp. Cas. 523.

of the forum, was held a good authentication.¹ In the case of a corporation created in a foreign country, the introduction of an examined copy of its charter, as found in the office where such charters are usually kept in the foreign country, is, it seems, sufficient.² But a court which would require evidence of user under a charter in the case of domestic corporations will clearly require the same proof of foreign corporations.³ Where a foreign corporation has entered the domestic State to do business there, and, under the domestic statute, has filed and caused to be recorded a certified copy of its charter, articles of association, or other constating instrument, in the office of the Secretary of State, in pursuance of the domestic statute, a copy of such instrument and of the instrument appointing its local agent, certified by the Secretary of the domestic State as being on record in his office, is *prima facie* evidence of the existence of such corporation, and of its right to transact business in the State.⁴ It may be added that neither a corporation, nor the persons claiming under it, can object that a copy of the certificate filed by its incorporators, pursuant to the governing statute, to procure their incorporation, is not sufficient in form and contents;⁵ on the principle that those who assert the powers of a corporation will not be heard to deny that they are such.⁶

¹ Hammer v. Garfield Min. & Co., 130 U. S. 291.

² Thus, in a suit by a foreign banking corporation in England, the plaintiff claimed to have been incorporated by the King of Spain. The proof was as follows: A witness produced a copy of a charter of the King of Spain, incorporating this bank. The witness stated that he had procured this copy from the office of the Council of Castile, which was the proper place for charters of this kind to be kept, and that he had examined this copy with the original charter. A translation of the charter was proved and put in evidence. National Bank v. De Bernales, 1 Car. & P. 569. See

also Society v. Young, 2 N. H. 310. In an early Maryland case, a bank charter granted by the Governor of a sister State, reciting his authority, under the laws of that State, to make such grants, and authenticated by the seal of the State, was held to be *prima facie* evidence of the legal existence of the bank. Agnew v. Bank of Gettysburg, 2 Har. & G. (Md.) 478.

³ Gaines v. Bank, 12 Ark. 769.

⁴ Knapp & Co. v. Strand, 4 Wash. 686.

⁵ Evans v. Lee, 11 Nev. 194.

⁶ Narragansett Bank v. Atlantic Silk Co., 3 Met. (Mass.) 232.

§ 7713. Proof of Corporate Existence in Criminal Cases.

In criminal prosecutions, when the question arises whether a company is incorporated, for instance, in the case of a prosecution for a *larceny* of the property of an alleged corporation, or for a *forgery* of the bills of an alleged banking corporation, it is only necessary to show that the corporation exists *de facto*,¹ and this may be proved by *general reputation*,²—in other words, by proving by oral testimony that it is a corporation *de facto*, doing business as such. In such a case, proof of a statute chartering a corporation under a particular name, and of the subsequent public exercise of the franchises thereby granted, for many years, by an association under that name, will warrant a finding of the actual existence of the corporation, and of its management and ownership of the property which it employs in exercising such franchises, for the purpose of a criminal proceeding,³—or, indeed, for any other purpose, where the question of its existence as a corporation arises collaterally. There are holdings, but they are destitute of reason, to the effect that it is necessary in a criminal case,—we will say in an indictment for uttering a forged order of a certain corporation,—to go further, and prove not only a *charter*, but an *organization* under the charter.⁴

¹ *People v. Caryl*, 12 Wend. (N. Y.) 547; *People v. Frank*, 28 Cal. 507; *Smith v. State*, 28 Ind. 321. Compare *ante*, § 7652.

² *State v. Thompson*, 23 Kan. 338; *s. c.* 33 Am. Rep. 165; *Reed v. State*, 15 Ohio, 217. See also *People v. Barrie*, 49 Cal. 342; *People v. Davis*, 21 Wend. (N. Y.) 309; *Johnson v. People*, 4 Denio (N. Y.), 364; *People v. Chadwick*, 2 Park. Cr. (N. Y.) 163; *Sasser v. State*, 13 Ohio, 453. And so by statute in Missouri.

³ *Com. v. Bakeman*, 105 Mass. 53.

⁴ *State v. Murphy*, 17 R. I. 698;

s. c. 24 Atl. Rep. 473. In this case the senseless holding was made that, for the purposes of such an indictment, there was not sufficient proof of the existence of a company of the name laid in the indictment, and that it had a president and treasurer,—as though it could make the least possible difference, for such a collateral purpose as the guilt of a felon who had forged an instrument of writing purporting to have been executed by it, whether it were incorporate or unincorporate.

ARTICLE IV. EFFECT OF DISSOLUTION.

SECTION

7720. Effect of dissolution of the corporation.

7721. Insolvency of corporation no defense to actions against it.

SECTION

7722. Dissolution by reason of non-user not pleadable.

7723. What actions abate and what survive.

7724. Effect of dissolution on suits commenced by attachment.

§ 7720. **Effect of Dissolution of the Corporation.**—As already seen,¹ after the charter of a corporation has expired by its own limitation, or after the corporation has been dissolved by a court of competent jurisdiction, its artificial existence is at an end. It is thereafter incapable of executing a conveyance of its lands.² Thereafter it can maintain no action to enforce rights acquired during the life of its charter, unless its capacity in this respect has been continued by the provisions of its charter, or otherwise by statute.³ In the absence of such a statutory reservation, upon the happening of either event, all actions pending against the corporation must *abate*,⁴

¹ *Ante*, § 6718, *et seq.*² *Marysville Invest. Co. v. Munson*, 44 Kan. 491; *s. c.* 24 Pac. Rep. 977.³ *Saltmarsh v. Bank*, 14 Ala. 668; *s. c.* 17 Ala. 761; *Bank of United States v. McLaughlin*, 2 Cranch C. C. (U. S.) 20; *Smith v. Frye*, 5 Cranch C. C. (U. S.) 515; *Miami Exporting Co. v. Gano*, 13 Ohio, 269; *Bank v. Wrenn*, 3 Smedes & M. (Miss.) 791; *Renick v. Bank*, 13 Ohio, 298; *Consolidated Asso. v. Claiborne*, 7 La. An. 318; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625; *Blake v. Portsmouth &c. Railroad*, 39 N. H. 435; *Sturges v. Vanderbilt*, 73 N. Y. 384; *s. c. sub nom. Sturgis v. Drew*, 11 Hun (N. Y.), 136; *Ingraham v. Terry*, 11 Humph. (Tenn.) 572; *Rider v. Nelson &c. Factory*, 7 Leigh (Va.), 154; *s. c.* 30 Am. Dec. 495; *Krutz v. Paola Town Co.*, 20 Kan. 397; *Pendelton v. Russell*, 144 U. S. 640;*Wilcox v. Continental Life Ins. Co.*, 56 Conn. 468; *s. c.* 16 Atl. Rep. 244; *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325, 334; *s. c.* 4 Am. Rep. 80. That the common-law rule that an unqualified dissolution of a corporation extinguishes all rights of action in favor of or against it is not changed by Conn. Gen. Stat., § 1322, specifying the power of receivers,—see *Wilcox v. Continental Life Ins. Co.*, 56 Conn. 468; *s. c.* 16 Atl. Rep. 244. That in an action on a note by a corporation it is no defense that the charter fails to define the period of its duration,—see *East Tenn. Iron Man. Co. v. Gaskell*, 2 Lea (Tenn.), 742.⁴ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281; *National Bank v. Colby*, 21 Wall. (U. S.) 609; *Merrill v. Suffolk Bank*, 31 Me. 57; *s. c.* 50 Am. Dec. 649; *City Ins. Co. v. Commercial Bank*, 63 Ill. 348; *Thornton v. Marginal Freight*

—though statutes providing for the continuation of such actions have generally been enacted.¹ It follows that a judgment rendered against a corporation under such circumstances is voidable, in the sense that it will be *reversed on error*,² or that the *execution* of it will be perpetually *enjoined*.³ But relief cannot be given to a corporation against a decree in equity, on the ground that it had no existence at the time when the decree was rendered, where it is not shown that its existence had not been so prolonged or revived that it would have a standing in court.⁴ So, although a corporation may have been in the possession of its charter and franchises at the time of the rendition of a judgment against it, yet a *scire facias* cannot be maintained upon the judgment if, before the issue of the writ, its charter has been surrendered or forfeited.⁵ Creditors may, however, enforce their claims against any *property* belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for its stockholders, at the time of its dissolution, in any mode permitted by the local laws.⁶ Under

R. Co., 123 Mass. 32; *Read v. Frankfort Bank*, 23 Me. 318; *Whitman v. Cox*, 26 Me. 335; *Greeley v. Smith*, 3 Story (U. S.), 657; *Bonaffe v. Fowler*, 7 Paige (N. Y.), 576; *McCulloch v. Norwood*, 58 N. Y. 562; *Musson v. Richardson*, 11 Rob. (La.) 37, 42; *Life Asso. v. Goode*, 71 Tex. 90; *National Bank v. Colby*, 21 Wall. (U. S.) 609, 614.

¹ *Ante*, § 6734, *et seq.*; *Lumber Co. v. Ward*, 30 W. Va. 43. Some of these statutes continue the corporate existence for a *stated period of time*, during which its corporate name may be used for the purpose of suing to collect its debts, etc. Such was the act of Congress chartering the former Bank of the United States. It had the effect of preserving from abatement all suits pending at the date of its passage. *Bank of United States v. Leathers*, 8 B. Mon. (Ky.) 126. The question

whether actions pending against a corporation at the date of its dissolution ought, under such statutes, to be revived against a receiver, has been already considered (*ante*, § 7135); but a decision may be noted here to the effect that under the statutes of Ohio this is not necessary in a court of the United States. *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539.

² *Musson v. Richardson*, 11 Rob. (La.) 37, 42.

³ *Merrill v. Suffolk Bank*, 31 Me. 57; *Rankin v. Sherwood*, 33 Me. 509. But see *Whitman v. Cox*, 26 Me. 335, 340.

⁴ *Muscatine Turn Verein v. Funck*, 18 Iowa, 469.

⁵ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281.

⁶ *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281, 286, *per Story, J.*; *City Ins. Co. v. Commercial Bank*, 68 Ill.

statutory systems, stockholders also have a standing to sue in equity to wind up the affairs of the corporation.¹ It must also be kept in mind that it is within the power of every business corporation to prevent the results which the rules of the common law attach to a dissolution, by *making an assignment of all its property*, prior to its dissolution, in trust, for the benefit of its creditors.²

§ 7721. Insolvency of Corporation No Defense to Actions against It.—From the foregoing principles, it follows that, in an action by a corporation against an individual, evidence that the corporation has become insolvent is inadmissible; for although such insolvency might be a ground for adjudging the corporate rights forfeited in proceedings against the corporation for that express purpose, yet it cannot be inquired into collaterally in an action brought by the corporation.³ If, therefore, an action has been brought against a corporation to enforce an obligation entered into by it, the plaintiff has the right to have the corporation retained as defendant, notwithstanding it may have become insolvent or may have disposed of its property in such a manner as to render the recovery of its judgment futile, and a motion to substitute an assignee for the corporation will be properly denied unless assented to by the plaintiff.⁴

§ 7722. Dissolution by Reason of Non-user not Pleadable. The dissolution which alone is pleadable under the foregoing principles is an absolute, unqualified dissolution, such as has been denounced by a competent judicial sentence, or such as needs no judicial sentence to announce the fact. The foregoing principles have no application to a dissolution by the

348; *Lindell v. Benton*, 6 Mo. 361; *Thornton v. Marginal Freight R. Co.*, 123 Mass. 32, 34; *Habich v. Folger*, 20 Wall. (U. S.) 1; *ante*, § 6692, *et seq.*

¹ *Krutz v. Paola Town Co.*, 20 Kan. 397; *ante*, § 4550, *et seq.*; and § 6692, *et seq.*

² *Ante*, § 6466; *Sturges v. Vanderbilt*, 73 N. Y. 384; *s. c. sub nom. Sturges v. Drew*, 11 Hun (N. Y.), 136.

³ *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *s. c. 43 Am. Dec.* 457, 464.

⁴ *Hood v. California Wine Co.*, 4 Wash. 88; *s. c. 29 Pac. Rep.* 768.

mere *non-user* of the franchises of the plaintiff corporation; for although such non-user might be a ground upon which the State could vacate the franchises of the corporation, yet this result cannot be accomplished by private individuals in a collateral way, by way of defense to an action brought by the corporation.¹ The very fact of bringing the action is a revival of the corporation if dormant, and a user of its franchises if they have fallen into a state of non-user. Accordingly, where *trustees* of a religious corporation bring an action, *colore officii*, an objection that they were not regularly elected as such trustees cannot be sustained, unless it be shown that proceedings have been instituted against them by the government and carried to judgment of ouster.²

§ 7723. **What Actions Abate and What Survive.** — Assuming, then, that statutes exist preventing the dissolution of a corporation from putting an end to rights of action against it, the question arises whether those rights of action which, under the principles of the common law, *abate on the death of a natural person*, will abate on the dissolution of a corporation. It seems that this question must be answered in the affirmative. For instance, it has been held that an action by a cor-

¹ Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec. 457, 465. See also Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370, 373; Vernon Society v. Hills, 6 Cow. (N. Y.) 23; s. c. 16 Am. Dec. 429.

² Vernon Society v. Hills, 6 Cow. (N. Y.) 23; s. c. 16 Am. Dec. 429. See also the same principle, Penobscot Boom Co. v. Lamson, 16 Me. 224; s. c. 33 Am. Dec. 656; Banks v. Poitiaux, 3 Rand. (Va.) 136; s. c. 15 Am. Dec. 706. Upon the same principle, it is held that the failure of a railroad company to commence the construction of its road within the time limited by its charter, does not, *per se*, work a forfeiture of its fran-

chises without judicial determination, unless it is apparent, from the language of the statute, that the legislature intended that the statute should be self-executing without the aid of any judicial sentence. *Ante*, § 6582; Re Brooklyn Elev. R. Co., 32 N. Y. St. Rep. 1065; s. c. 11 N. Y. Supp. 161. And even where there has been an absolute dissolution, such franchises as exist in perpetuity and as have been assigned by mortgage with the assent, express or implied, of the legislature, if in the nature of real property, survive, according to one view, and exist in perpetuity. *People v. O'Brien*, 11 N. Y. 1; s. c. 19 N. Y. St. Rep. 173; 2 L. R. A. 255; 7 Am. St. Rep. 684; 18 N. E. Rep. 692.

poration for a *libel*, being for a mere personal tort, does not survive the dissolution of the corporation; and that such a right of action does not continue in its receiver, — and this is so, although the libel may have resulted in pecuniary injury to the corporation, and may have diminished the amount of its estate which has passed into the hands of the receiver.¹ But an action brought against a corporation for a *tort* may be continued against its directors and trustees under a statute² providing that, upon the dissolution of a corporation, its directors shall be trustees for its creditors and stockholders, with power to settle up its affairs and distribute its assets among its creditors first and its stockholders next.³ Necessarily, the dissolution of a corporation puts an end to an action to compel the *specific performance* of its contract; but it is said that it has, at the same time, the effect of perfecting a right of action for its breach.⁴

§ 7724. Effect of Dissolution on Suits Commenced by Attachment.— Where a suit is pending against a corporation, in which its property has been *attached*, an annulment of its charter, and the appointment of a *receiver* by a decree of a competent court, will not only abate the suit and dissolve the attachment, but will destroy the attachment *lien*.⁵

¹ Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207; s. c. 51 N. W. Rep. 440; 15 L. R. A. 627.

² 1 Rev. Stat. N. Y. 600, §§ 8, 9.

³ Hepworth v. Union Ferry Co., 41 N. Y. St. Rep. 783; s. c. 16 N. Y. Supp. 692. As to such statutes, see *ante*, § 6739.

⁴ Schleider v. Dielman, 44 La. An. 462; s. c. 10 South. Rep. 934. Compare *ante*, §§ 6753, 6893, *et seq.* A private business corporation duly chartered and organized under the laws of West Virginia, which failed to

wind up its business when the time fixed by its charter for its duration expired, but continued thereafter in its charter name to carry on its corporate business, may be sued in a court of law in its corporate name for a tort committed by it after its charter had expired. Miller v. Coal Co., 31 W. Va. 836; s. c. 13 Am. St. Rep. 903; 8 S. E. Rep. 600.

⁵ Wilcox v. Continental Life Ins. Co., 56 Conn. 468; s. c. 16 Atl. Rep. 244.

CHAPTER CLXXXV.

EVIDENCE IN SUCH ACTIONS.

ART. I. CORPORATE BOOKS AND RECORDS. §§ 7728-7741.

II. OTHER MATTERS OF EVIDENCE. §§ 7746-7750.

ARTICLE I. CORPORATE BOOKS AND RECORDS.

SECTION	SECTION
7728. Corporate books and records admissible against the corporation.	the corporate books are the best evidence.
7729. Admissible between the corporation and its members.	7736. Such records admissible to prove corporate existence.
7730. Admissible in a controversy between members.	7737. Evidence that the books are the books of the corporation.
7731. How far evidence against stockholders.	7738. Secondary evidence of the contents of such books and records.
7732. Exceptions and contrary holdings.	7739. Such books and records <i>prima facie</i> evidence only.
7733. Books of account.	7740. When not evidence as against strangers.
7734. Corporate books and records admissible to prove their acts and proceedings.	7741. Corporate records evidence against receiver of corporation.
7735. Consequences of the rule that	

§ 7728. **Corporate Books and Records Admissible against the Corporation.**—The books and records of a corporation, when shown to have been kept by its proper officer, are admissible in evidence against the corporation, on the footing of being in the nature of admissions or self-disserving instruments.¹ Thus, in an action against a railroad company for a personal injury grounded upon its negligence in suffering its

¹ Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545; St. Louis Gas Light Co. v. St. Louis, 84 Mo. 202; affirming s. c. 11 Mo. App. 55; Howard Ins. Co.

v. Hope Mut. Ins. Co., 22 Conn. 394; Fourth Nat. Bank v. Olney, 63 Mich. 58; s. c. 29 N. W. Rep. 513.

track to get out of repair, *official reports* made by the superintendent of the road to the board of directors of the corporation are competent evidence of the condition of the road.¹ So, the *books of account*, of a *municipal corporation*, kept by the proper officer of the corporation, are *prima facie* evidence of the facts therein stated, in an action against the corporation.² So, in an action against a corporation for use and occupation, if there is an issue as to whether the premises were hired by the corporation through an authorized agent, the books of the defendant containing *votes* passed by them are admissible in evidence for the purpose of proving their *ratification* of the acts of the agent.³ In such a case a *vote* or *resolve* of the defendant authorizing a settlement of the claim of the plaintiff at a stated amount is also admissible in support of its claim.⁴

§ 7729. Admissible between the Corporation and its Members. — The *stockholders* of a corporation are in general strangers to the corporation, and stand in that relation in the law where they contract with it as individuals; but in many cases they are in privity with it in such a sense that the books and

¹ Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545.

² St. Louis Gas Light Co. v. St. Louis, 84 Mo. 202; affirming s. c. 11 Mo. App. 55.

³ Howard Ins. Co. v. Hope Mutual Ins. Co., 22 Conn. 394.

⁴ *Ibid.* In an action against a corporation upon a note executed by its treasurer, where it becomes a material inquiry *whether the treasurer was authorized* to execute it by the board of trustees, the original memoranda or minutes of the proceedings of the trustees, made at the time by one of them by the authority of the board, are competent evidence to prove that they had empowered the treasurer to give such note, especially after the trustee who made the entries was deceased. Hayward v. Pilgrim Soc., 21

Pick. (Mass.) 270. In an action to recover the amount of a subscription for railroad stock that had been *cancelled* by the directors, the minutes of the company, showing that immediately after the election of the new board of directors, they repealed the resolution of their predecessors, were admissible in evidence *against the defendant as a corporator*. The books of the company were evidence against him, unless his relationship to it had terminated, which the court had no right to decide. It was also competent for the company to prove what took place when the first resolutions were adopted, as showing that the action of the board was fraudulent and unauthorized. Bedford R. Co. v. Bowser, 48 Pa. St. 29.

records of the corporation are admissible in an action between the corporation and one of its members, whichever party is plaintiff, and whichever party seeks to avail himself of their use.¹ Let us suppose, for instance, that there is a contest between a corporation and one of its members in which it becomes material to show what were the *rules* of the corporation in a given particular. Here, beyond question, the books and minutes of the corporation, containing evidence of the adoption of such rules, are evidence for, and consequently against, either party.² But it is not to be concluded from this that in every contest between a corporation and one of its members, the *rules* of the corporation can be used for the purpose of disposing of the rights of the member. Take, for example, the case where a single stockholder of a great corporation, like the Western Union Telegraph Company, is suing the corporation for damages for failure properly to transmit and deliver for him a telegraphic message, placed in its hands by him for that purpose. Here it will not be competent for the company to prove, in defense of the action, that its board of directors had adopted a *resolution* that the company would not be liable for mistakes or delays in the transmission or delivery of *unrepeated messages*; and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified. As a single stockholder, especially in so great a corporation, cannot control the board of directors in the rules which they make for the conduct of its business, and as there is no principle, at least none of general recognition by the courts, which will charge him with *notice* of the regulations which its directors may thus make, evidence of such a resolution is not admissible for the purpose of disposing of his rights.³ But here the objection goes to the quality of the evidence, and to the purposes for which it is sought to be introduced, and not to the mere fact that it is sought to be produced in the form of a

¹ *Ante*, § 3657, *et seq.*

² *Abernethy v. Church of the Puritans*, 3 Daly (N. Y.), 1.

³ *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; *s. c.* 21 Am. St. Rep. 662.

corporate record. In other words, in such a case such evidence is not *material* or *relevant* to any issue between the contending parties. So, where the *stockholders* of a corporation have given a bond in their individual capacities for the purpose of securing credit for the corporation at a bank, in which bond they have recited the action of the corporation in securing the loan from the bank, — here, in an action by the bank upon the bond, the *records* of the corporation will be admissible in behalf of the bank and against the stockholders, for the purpose of showing *what the corporation actually did* in the premises, the defendants being estopped to deny its authority or their own to take the action stated.¹

§ 7730. **Admissible in a Controversy between Members.** So, in a controversy between members respecting their rights in the corporation, the books and records of the corporation are, it seems, admissible for the purpose of proving corporate acts and transactions. Thus, where the character of the corporation required two-thirds of the corporators to be present in order to form a *quorum*, the corporate books were evidence that this portion of the corporators did assemble, the controversy being a controversy between members of the corporation in respect to a corporate election.²

§ 7731. **How Far Evidence against Stockholders.** — It is not to be inferred from the foregoing that the books and records of a corporation are evidence in all cases in a contest between the corporation and one of its *stockholders*. Whether they will be so or not will depend upon a number of considerations; and it is to be regretted that the cases exhibit confusion where they should present uniformity. At the outset, it may be observed that where it becomes material to prove *what the corporation did* in a given instance, the best evidence of what it did is to be sought for in its books and records, because that would be the best evidence in an action between it

¹ Fourth Nat. Bank v. Olney, 63 (Pa.) 29; s. c. 8 Am. Dec. 628. See Mich. 58; s. c. 29 N. W. Rep. 513. also Grays v. Turnpike Co., 4 Rand.

² Com. v. Woelper, 3 Serg. & R. (Va.) 578.

and a stranger.¹ But this is restrained by another principle, founded in natural justice, which is that the corporation cannot be permitted, by fixing up its books and records at its own pleasure, to make evidence in its own behalf against strangers, and consequently against its own members where it deals with them as individuals. Therefore, on principle and authority, the books of a corporation are not admissible against one of its members, as evidence of his private contracts and dealings with it.² Still less are they admissible in an action by one not a member of the corporation against a stockholder for the purpose of charging³ the stockholder upon a matter of account between him and his corporation,—as, for instance, to show by the *stock book* of the corporation entries of assessments against the stockholder. But even this must depend upon the nature of the issues between the contending parties. It may be imagined that it might become an issuable fact, in an action between two strangers to a corporation, whether the corporation had made a certain assessment against its stockholders; in which case, on a principle elsewhere stated,⁴ the corporate books would be the best evidence of the fact. But if, between a corporation and one of its stockholders, there is an ordinary dealing as between a merchant and his customer, or as between two merchants, then, in respect of that dealing, they stand as strangers to each other, and the books of account of the corporation are not competent evidence, of themselves, in its behalf to establish its demand against its stockholder, any more than they would be such if it were an unincorporated partnership or an individual. This would be so when it is considered that a mere stockholder is not a member of the corporation in the sense in which a partner is a member of a firm. He is not an agent of it;⁵ he has no direct power of control over its action or over the manner of

¹ *Ante*, § 3657, *et seq.*; *post*, § 7734.

² *Wheeler v. Walker*, 45 N. H. 355; *Hager v. Cleveland*, 36 Md. 476; *Hill v. Manchester &c. Water Works*, 5 Barn. & Adol. 866; *s. c.* 2 Nev. & M. 573. Compare *Chenango Bridge Co.*

v. Lewis, 63 Barb. (N. Y.) 111; *Olney v. Chadsey*, 7 R. I. 224.

³ *Haynes v. Brown*, 36 N. H. 545, 566.

⁴ *Post*, § 7734.

⁵ *Ante*, § 105, *et seq.*

keeping its records, although he has a qualified right to inspect them, which right is enforceable by *mandamus*.¹ It would, therefore, be violative of the principles of natural justice to treat him as if in privity with those records, to charge him with knowledge of their contents, and to make their recitals evidence against him.²

§ 7732. Exceptions and Contrary Holdings.—To the principle of the preceding section there are exceptions and contrary holdings, some of them well, and others ill, founded. We have had occasion to notice that American courts of the highest authority have sanctioned a shocking violation of the principles of natural justice, by holding that the books and records of a private corporation are admissible in evidence *for the purpose of connecting a stranger with it*,—that is, for the purpose of proving that a certain person, sought to be charged with liability as a stockholder or member of it, is such a stockholder or member.³ Under this rule, a number of adventurers can organize a real or pretended corporation, and, by opening a stock-book and inserting thereon the name of one of the judges so holding, charge him with a liability as a stockholder, not only in favor of themselves, but also in favor of their creditors. These holdings are mentioned in this connection for the purpose of showing how careless of justice the judges have been in many cases, and with what trifling consideration they have dismissed the gravest questions.⁴ The true principle is

¹ *Ante*, § 4431.

² Even where the action was against one who was at once a stockholder and a trustee of the corporation, to charge him in respect of money and property of the corporation alleged to have been misappropriated by him, it was held that the books of the corporation were not *per se* competent evidence to establish his liability. *Rudd v. Robinson*, 126 N. Y. 113; *s. c.* 22 Am. St. Rep. 816; 12 L. R. A. 483; 33 Am. & Eng.

Corp. Cas. 301; 9 Rail. & Corp. L. J. 428; 36 N. Y. St. Rep. 500; 26 N. E. Rep. 1046.

³ *Ante*, § 3657; *Turnbull v. Payson*, 95 U. S. 418; *Glenn v. Orr*, 96 N. C. 413; *Hoagland v. Bell*, 36 Barb. (N. Y.) 57. The writer is fortified in his view of these and other like decisions by a learned and forcible presentation of the subject in the *Central Law Journal*, by Hugh D. McCorkle, Esq., of the St. Louis bar: 34 Cent. L. J. 468.

⁴ A recent decision of the kind here

that, before the books of a corporation can be put in evidence against a person charged with liability as one of its members, his *membership must be admitted, or established by evidence aliunde*,—a thing which is not difficult in view of the fact that his relation as a stockholder can be shown by his own conduct,¹ by proving that he acted in a manner consistent alone with that relation, as by attending corporate meetings, serving as a director, and the like. On the other hand, special circumstances may be shown, bringing the particular stockholder into such privity with the record sought to be introduced in evidence against him, as to make it, on a sound and just theory, competent evidence.²

mentioned is to the effect that, in an action brought under a statute to charge certain persons as stockholders for the failure of the corporation to file with a public official an annual statement of its condition, certain *loose scraps of paper*, on which the minutes of corporate meetings had been kept, were admissible in evidence for the purpose of proving that the defendants were stockholders in the corporation. *Congdon v. Winsor*, 17 R. I. 236, Index HH, 59; s. c. 21 Atl. Rep. 540.

¹ *Ante*, § 1877, *et seq.* When it is considered that perjury could not be assigned upon such evidence, and that the clerk or other ministerial agent of the corporation keeping such records could not, upon any known precedent, be made liable in damages to a stranger for such use of them as an instrument of evidence, and that if he could be so made liable, a judgment against him might be worthless,—the wrong of such a decision will readily appear. See *ante*, § 1919, *et seq.*

² Thus, the records kept by the clerk of a railroad corporation of the proceedings of the directors, in *ordering assessments* upon the shares of the

capital stock, may be used as evidence by the corporation in a suit brought by them to recover an assessment upon the shares subscribed for by the defendant, he being one of the original grantees in the charter, and *a director at the time the assessment was ordered*, and having exercised the privileges of a stockholder in virtue of the shares upon which the assessment was made. *White Mountains R. Co. v. Eastman*, 34 N. H. 124, 137. So, it is laid down that the books of a corporation, though not generally evidence against a stranger, are evidence against a corporator who is shown to have been *present at the time of the transactions therein recorded*, and to have assented to the entries therein made. *Graff v. Pittsburgh & C. R. Co.*, 31 Pa. St. 489. On the other hand, one who had subscribed for stock upon the *condition*, expressed in the contract, that it was not to be paid until \$5,000 should be first raised, was held not to be a member of the corporation so as to make the books evidence against him in a suit for calls. *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215; *ante*, § 1332.

§ 7733. **Books of Account.**—It is not necessary to suggest that the *books of account* of a corporation are admissible in evidence against it for the purpose of charging it in favor of one who has had dealings with it, because the books of account of a natural person are so admissible in evidence.¹ On the other hand, the law accords to a private corporation no greater privilege of manufacturing unsworn evidence in its own behalf in the form of book accounts, than it accords to a private individual, and hence the books of a corporation containing entries of dealings between it and its customer are not, in general, evidence in its behalf in an action by it against that customer.² By a natural analogy, the books of account of a trading corporation would be admissible in its favor against its customer under those exceptional circumstances in which the books of account of a tradesman are admissible in his favor. But this subject will not be pursued, because it is a branch of the law of evidence, loaded down with precedent and involved in the greatest confusion and contradiction.

§ 7734. **Corporate Books and Records Admissible to Prove their Acts and Proceedings.**—There is much judicial authority to the general effect that whenever it becomes material, either as against the corporation or in its favor as against a stranger, or as between two strangers to it, to prove *what was done by it*, that is to prove its *acts and transactions*, its

¹ *Roe v. Rawlings*, 7 East, 279, 290; *Higham v. Ridgway*, 10 East, 109; *Doe v. Jones*, 1 Camp. (N. P.) 367; *Case v. Potter*, 8 Johns. (N. Y.) 211.

² *State Bank v. Clark*, 1 Hawks (N. C.), 36; *Philadelphia Bank v. Officer*, 12 Serg. & R. (Pa.) 49; *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256; s. c. 14 Am. Dec. 681; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; s. c. 30 Am. St. Rep. 87; 9 South. Rep. 299. Compare, as to State banks which are *public* corporations, *Crawford v. Branch Bank*, 8 Ala. 79. Upon the question under what circum-

stances the books of account of *bankers*, without special reference to their being incorporated, are admissible evidence for the purpose of charging their depositors, or customers,—see *Union Bank v. Knapp*, 3 Pick. (Mass.) 96; s. c. 15 Am. Dec. 181; *North Bank v. Abbot*, 13 Pick. (Mass.) 465, 471; s. c. 25 Am. Dec. 334; *Amherst Bank v. Root*, 2 Met. (Mass.) 522, 544; *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217, 221; s. c. 41 Am. Dec. 500. On the general subject of the admissibility in evidence of books of account,—see a learned note in 15 Am. Dec. 191.

books and records are admissible in evidence, and are the *best evidence* for that purpose.¹ A limitation of this principle will readily suggest itself, founded upon the great danger of allowing the corporation to prove, in its own behalf, that a certain thing was done, by merely making an unsworn record that it was done; and it is certainly a leading exception to the foregoing rule that entries in the books of a corporation of matters respecting any property or right claimed by the corporation against third parties are not admissible in evidence in its behalf.² The same rule is sometimes stated by saying that "the entries in the books of a corporation relating to other matters of fact than the proceedings of the corporation, are not evidence in their favor, in a controversy between them and any stranger, nor between them and a member of the corporation, holding or claiming adversely to them."³ Great care must be taken to discriminate the cases, which have sometimes been loosely cited to the proposition with which this paragraph sets out. For instance, if such evidence is offered and not objected to, then the only remaining question will concern its probative effect; and certainly the effect of such evidence when once admitted is to prove that the corporation did the act, or took the proceeding which the record states.⁴ It is also necessary to discriminate in respect of the books and records of *municipal corporations*, which, according to long-settled authority, are admissible in evidence against their own members and against strangers.⁵ These stand on a different footing from the records of private corporations, in respect of the fact that they are in the nature of *public records*, and are open freely to the inspection of the public. It is

¹ *Owings v. Speed*, 5 Wheat. (U. S.) 420; *Bill v. Fourth Great Western Turnp. Co.*, 14 Johns. (N. Y.) 416; *Townsend v. First Freewill Baptist Church*, 6 Cush. (Mass.) 279, 282; *Haven v. New Hampshire Asylum*, 13 N. H. 532; *s. c.* 38 Am. Dec. 512.

² *Jones v. Florence &c. University*, 46 Ala. 626; *Philadelphia R. Co. v. Hickman*, 28 Pa. St. 318.

³ *Haynes v. Brown*, 36 N. H. 545, 568.

⁴ See, for illustration, *Cogswell v. Bullock*, 13 Allen (Mass.), 90, where the evidence does not appear to have been objected to.

⁵ *Owings v. Speed*, 5 Wheat. (U. S.) 420; *Warriner v. Giles*, 2 Strange, 954; *Rex v. Mothersell*, 1 Strange, 93; *Gibbon's Case*, 17 How. St. Tr. 810.

probable that the doctrine of this section has come down to us, like several other anomalous doctrines in the law of private corporations, by a species of inheritance from the law relating to English municipal corporations, and that its origin will be found in rules which were adopted as applicable to corporations at a time when nearly all corporations were of a municipal or public character. Surely the doctrine that a number of private individuals can make evidence in their own favor, to subserve their own interests and to affect prejudicially the rights of strangers, by merely meeting together and directing their clerk or secretary to write down in a book an unsworn statement to the effect that an act took place, could not have been the product of an enlightened period of jurisprudence; or, if the product of such a period, it must have been made with reference to bodies of a more public character than the ordinary close business corporations which exist in the United States. Again, it is necessary to make a discrimination in respect of cases governed by the provisions of statutes. Thus, whether, under the principles of the common law, a corporation could prove, in an action against one of its members to collect an assessment laid upon his shares, that the assessment had been duly made by its directors, by producing its records, showing a resolution of its board to that effect,—yet there is less room for doubt under a statute making the records of a corporation or copies thereof authenticated by the signatures of its president and secretary under its seal, competent evidence in any action or proceeding to which such a corporation is a party.¹ There are, for example, statutes in England and in this country providing that the *stock-books* of companies and corporations shall be *prima facie* evidence that those whose names are entered thereon are stockholders; and decisions under such statutes will have to be carefully excluded when dealing with the question upon principle.²

¹ So held, under such a statute, in *Guadalupe &c. Stock Asso. v. West*, 76 Tex. 461; s. c. 13 S. W. Rep. 307.

² Among such decisions are the following: *Bain v. Whitehaven &c.*

R. Co., 3 H. L. Cas. 22; *Birkenhead v. Brownrigg*, 4 Exch. 425; *Pittsburgh &c. R. Co. v. Applegate*, 21 W. Va. 172; *Mudgett v. Horrell*, 33 Cal. 25.

§ 7735. **Consequences of the Rule that the Corporate Books are the Best Evidence.** — A necessary consequence of the rule that the corporate books and records are the best evidence of the acts and transactions of the corporation, is to exclude *secondary evidence* of such acts and doings, where the books and records are capable of being produced.¹ Thus, the *by-laws* of a corporation could not be proved by the oral testimony of an officer of the corporation, but the proper corporate book containing them must be produced.² A consequence of this rule is to make *unsworn* preferable to *sworn* testimony, and to conclude the rights of parties by records which may have been concocted for the very purpose of the action, the facts of which are not fortified by sworn testimony; so that in cases of a willful falsehood being perpetrated in the administration of justice, there can be no indictment for perjury, nor, upon any known precedent, any action for damages, — though it is believed that, on the principles of the common law, such an action might lie. It is submitted by the writer that a rule of evidence which allows any sort of record, even a collection of scraps of paper,³ which the managers of a private business corporation may concoct for themselves in conclave, to be admitted without the aid of any sworn testimony to prove their acts and proceedings, and which prevents proof of those acts and proceedings by the testimony of a sworn witness, who knows the fact, is an absurd and dangerous rule.

§ 7736. **Such Records Admissible to Prove Corporate Existence.** — A leading illustration of the rule that the books and records of a corporation are admissible for the purpose of showing its acts and proceedings, is found in the rule that they are admissible for the purpose of showing, *prima facie*, at least, that an organization has taken place in compliance with the charter or governing statute.⁴ Upon the same principle, it

¹ *Haven v. New Hampshire Asylum*,
13 N. H. 532; s. c. 38 Am. Dec. 512.

² *Ante*, § 7732.

³ *Lumbard v. Aldrich*, 8 N. H. 31;
s. c. 28 Am. Dec. 381.

⁴ *Ryder v. Alton &c. R. Co.*, 13 Ill.

has been held that the minutes of the *meeting of the subscribers* to the stock of a proposed corporation are, when identified or shown to be correct or authoritatively made, admissible in an action to enforce a subscription, for the purpose of showing that, in the incorporation of a company under a *modified charter* and under a *different name*, there was no material change or departure from the original character and purposes of the corporation intended to be formed.¹ Such evidence is competent, under any theory, *against the corporation*.² A more doubtful question is whether in case a number of individuals alleging themselves to be a corporation, are suing for the enforcement of rights which they can only possess in virtue of being such, and are asserting some special franchise or privilege which is against common right, they can prove the fact of their organization as a corporation, it being properly in issue, by producing their own books and records. For reasons stated in the preceding paragraph, it is believed that they cannot, on principle, except in cases where other proof is not available to them; and that they ought not to be allowed to make the proof by means of their records without re-enforcing those records by the *suppletory oath* of a competent witness, except in cases where the lapse of time, or other circumstances might prevent them from doing so. Nevertheless, it has been held that where a plaintiff, claiming to be a navigation company, brings an action to enforce the payment of tolls, its books are competent to prove the fact of its organization as a corporation.³ Notwithstanding this, and other like decisions, it is difficult to see upon what principle the books of a pretended corporation can be held to be admissible in evidence to prove the fact of its organization as such, where the issue is between the pre-

¹ *Semple v. Glenn*, 91 Ala. 245; *s. c.* 9 South. Rep. 265.

² *Foster v. White Cloud City Co.*, 32 Mo. 505.

³ The court reasoned thus: "By the organization of a company we understand the meeting of individuals claiming to be corporators and their

action in choosing officers and servants. If the books themselves were not evidence of these facts it would be difficult after a lapse of time to establish them in any other mode." *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *s. c.* 44 Am. Dec. 472, 476.

tended corporation and a third person, and the question of its legal existence is properly in issue. If a body of men on meeting and making a record which recites and shows that they are organized as a corporation, can make themselves a corporation, then there can be no limit to the facility with which men may organize themselves into corporations without complying with the law. It is difficult to justify a principle upon which men can thus be allowed to manufacture evidence for themselves, except where such evidence must be admitted on a principle of necessity, as where the existence of a corporation is called into question after a great lapse of time so that it would be impracticable to corroborate the statements of its records by living witnesses, and in other possible cases that might be imagined. Outside of such exceptional states of fact, there is no more propriety in admitting the records of a private corporation in its own behalf without a *suppletory oath*, than there would be in admitting the records of a partnership or an individual.

§ 7737. Evidence that the Books are the Books of the Corporation. — Whilst the general rule is that corporation books are evidence of the proceedings of the corporation, yet such books do not generally prove themselves, and do not carry within themselves intrinsic evidence of their own authenticity. It must be made to appear, *prima facie* at least, that they are the corporation books, that they have been kept as such, and that the entries made therein were made by the proper acting officer for that purpose.¹ This cannot be made to appear by the mere *certificate* of the secretary of the corporation, unless there is a statute making such a certificate evidence for that purpose. An *exemplified copy* made and certified to by the secretary of a private corporation is not evidence; but it is necessary to show, by the oath of a competent witness, even if a copy could be produced, that it is a copy, and that it is really a record of the corporation.² The

¹ Whitman v. Granite Church, 24 Me. 236.

² That the *certificate of the secretary* of a corporation does not authenticate

ordinary evidence of the authentication of a book or record of a corporation, for the purpose of introducing it in evidence in a judicial proceeding, is the *oath of a competent witness* to the effect that the book or record is produced by the proper custodian of the records of the corporation, or of that portion of them to which the book or record belongs, and that the book or record is the book or record of the corporation, kept by its proper officer, or by a clerk under the direction of its proper officer. It must be continually borne in mind that, as a general rule, the entries in such a book do not prove their own authenticity. They do not, for instance, prove that the person who made them was the proper officer of the corporation to make them, although they may recite that fact.¹

§ 7738. Secondary Evidence of the Contents of Such Books and Records. — There seems to be nothing on the subject of the admission of secondary evidence of the books and records of private corporations, in case the originals cannot be produced, which relates specially to the law of corporations. The well-known rule is that before secondary evidence of the con-

a copy of its records so as to make them admissible in a court of justice, was held in *Hallowell &c. Bank v. Hamlin*, 14 Mass. 178, 180.

¹ When, therefore, the whole evidence which was adduced to authenticate a certain book, which had been offered in evidence as the book of a corporation, was the fact that the book was in the handwriting of A. B., who appeared, from the entries in the book, but in no other way, to have been *secretary* to the board of trustees, it was held that the book had not been properly authenticated, and that it was erroneous to admit it in evidence. *Highland Turnpike Co. v. M'Kean*, 10 Johns. (N. Y.) 154; *s. c.* 6 Am. Dec. 324. Compare *Jackson v. Walsh*, 3 Johns. (N. Y.) 226. Read, in this connection, *Rex v. Mother-sell*, 1 Strange, 93; *Rex v. Martin*,

Ca mp. 100. That the records of *municipal* and other *public* corporations are admissible as *original evidence* on the footing of being *official records* kept in *public offices*, — see *St. Louis Gaslight Co. v. St. Louis*, 12 Mo. App. 573; *s. c.* affirmed, 86 Mo. 495. That the records of a *State bank* are within the same rule, — see *Crawford v. Branch Bank*, 8 Ala. 79. That the records of an incorporated *stock exchange* are not, — see *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 608; *s. c.* 30 Am. St. Rep. 87. That an *examined copy* of the books of a *private incorporated bank* are not evidence unless corroborated, — see *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256; *s. c.* 14 Am. Dec. 681; *Philadelphia Bank v. Officer*, 12 Serg. & R. (Pa.) 48.

tents of any private writing will be admitted, the proponent of the evidence must show that he cannot produce the original in a reasonable time and with reasonable diligence.¹ It should constantly be kept in mind that the books of private corporations are not *privileged* from being introduced in evidence in aid of justice, even in cases to which the corporation is not a party, unless the particular entries are privileged under applicatory legal principles,—as, for instance, the originals or copies of telegrams preserved by a telegraph company after they have been transmitted.² On the contrary, a corporation

¹ Bowick v. Miller, 21 Or. 25; s. c. 26 Pac. Rep. 861; Wiseman v. Northern Pac. R. Co., 20 Or. 425; s. c. 26 Pac. Rep. 273; 23 Am. St. Rep. 135; Howe v. Fleming, 123 Ind. 262; Potts v. State, 26 Tex. App. 663. The following brief but valuable note upon this subject is transcribed from 23 Am. St. Rep. 140: "Before secondary evidence of the contents of a written instrument can be received, it is necessary to prove the existence and genuineness of the original: Oliver v. Persons, 30 Ga. 391; s. c. 76 Am. Dec. 657; Calhoun v. Calhoun, 81 Ga. 91; Stocking v. St. Paul Trust Co., 39 Minn. 410; Gunther v. Bennett, 72 Md. 384; that the original is lost or destroyed: Bell v. Byerson, 11 Iowa, 233; s. c. 77 Am. Dec. 142; Fresno Canal Co. v. Dunbar, 80 Cal. 530; Coffing v. Carnahan, 122 Ind. 427; Smith v. Brown, 151 Mass. 338; Lyons v. Van Gorder, 77 Iowa, 600; Woods v. Burke, 67 Mich. 674; or without the jurisdiction of the court: Knickerbocker v. Wilcox, 83 Mich. 200; s. c. 21 Am. St. Rep. 595; Woods v. Burke, 67 Mich. 674; Harvey v. Edens, 69 Tex. 420; or that it is in the possession of the adverse party who refuses to produce it: Jones v. Robinson, 11 Ark. 504; s. c. 54 Am. Dec. 212; Johnson v. Johnson, 70 Mich. 65; Gafford v. American Mortg. & Co., 77 Iowa,

736; and that the party himself used diligence to procure the original, but is unable to do so: Com. v. Jeffries, 7 Allen (Mass.), 548; s. c. 83 Am. Dec. 712; Tanner v. Hall, 89 Ala. 628; Burks v. Bragg, 89 Ala. 204; Coffing v. Carnahan, 122 Ind. 427; Powell v. Wallace, 44 Kan. 656; Shouler v. Bonander, 80 Mich. 531. See also Georgia & C. R. Co. v. Strickland, 80 Ga. 776; s. c. 12 Am. St. Rep. 282, and note."

² As to the extent to which telegraphic dispatches are privileged from being produced in evidence of their existence,—see Thomp. Elect., § 493; State v. Litchfield, 58 Me. 267; Ex parte Brown, 72 Mo. 83; s. c. 37 Am. Rep. 426; National Bank v. National Bank, 7 W. Va. 544; Re Waddell, 8 Jur. (N. S.) 181, pt. 2; Re Ince, 20 L. T. (N. S.) 421; Ex parte Brown, 7 Mo. App. 484; Woods v. Miller, 55 Iowa, 168; s. c. 39 Am. Rep. 170. As to the sufficiency of the description of such dispatches under a *subpoena duces tecum*,—see Ex parte Brown, 7 Mo. App. 484; United States v. Babcock, 3 Dill. (U. S.) 567; Ex parte Brown, 72 Mo. 83; s. c. 37 Am. Rep. 426, 431. That such communications are not privileged,—see Com. v. Jeffries, 7 Allen (Mass.), 548; s. c. 83 Am. Dec. 712; National Bank v. National Bank, 7 W. Va. 544; Heins-

has no privilege to conceal the truth which is not accorded to natural persons, nor as much; because the privilege accorded to a natural person against self-incrimination does not, in general, extend to corporations, which can be prosecuted criminally in a very limited class of cases, and then the punishment extends only to a pecuniary fine or to a revocation of their franchises.¹ Nor is it necessary that the corporation, whose books are admitted in evidence, should be a party to the action, or that its officers, who are the custodians of such books, should be joined as a party to the action for the purposes of discovery;² but the officers of a corporation may be compelled to produce its books and records by the ordinary *subpœna duces tecum* in a suit to which the corporation is not a party.³ It has been held in New York, under a stat-

lee v. Freedman, 2 Pars. Sel. Cas. (Pa.) 274. It is constantly to be borne in mind that the privilege against the production of a *telegraphic message*, if there is a privilege, is the privilege of the parties to the message, the sender and the addressee, and not the privilege of the corporation, except as the agent of such parties. Considered as a principal the corporation has no rights against the production of such documents. The mere fact that if such documents were not privileged from production in courts of justice, the commercial profits of the telegraph company might be diminished, is an argument against the production of them to which no judge would listen.

¹ *Ante*, § 6418, *et seq.*

² As to *discovery and joining officers* of a corporation for that purpose,—see *ante*, § 7409. *et seq.*

³ *Wertheim v. Continental & Co.*, 21 Blatchf. (U. S.) 246. *Contra*, *Boorman v. Atlantic & C. R. Co.*, 17 Hun (N. Y.), 555; *Central Nat. Bank v. White*, 37 N. Y. Super. 297. In the view of other courts, the statute affords ample means of compelling a

corporation to produce its books under a *subpœna duces tecum*, in like manner as in the case of a natural person. N. Y. Code Civ. Proc., § 868; *Central & C. R. Co. v. Twenty-third Street R. Co.*, 53 How. Pr. (N. Y.) 45. On the contrary, it has been laid down in New York that, even in case of an action in which a corporation is a party, the production of its books cannot be enforced by *subpœna duces tecum*, served on its officers; it can only be effected by way of *discovery* under the provisions of the statutes (2 Rev. Stats. New York, 199; Wait's New York Code of Procedure, 1871, § 388; Throop's Code, 1877, § 803): *La Farge v. La Farge Ins. Co.*, 14 How. Pr. (N. Y.) 26; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *s. c.* 18 Abb. Pr. (N. Y.) 266; and the exercise of this power is left to the discretion of the court. As to the books of a corporation, not a party to the action, no such power of enforcing an examination or production of them on a trial between other parties is afforded; nor can its agents or officers, in their individual capacity, be compelled to discover or produce the books of a

ute¹ enacting a substitute for discovery in equity, that the agents of a corporation will not be compelled to discover its books, although the petition for discovery alleges that the corporation is fictitious;² but it is believed that the decision proceeds upon grounds which are entirely fallacious.³

§ 7739. Such Books and Records Prima Facie Evidence only.—It should be constantly borne in mind that while the books and records of a private corporation, in cases where they are admissible in evidence, are *prima facie* evidence of the fact which they recite,⁴ yet they are *prima facie* evidence only.⁵

§ 7740. When not Evidence as against Strangers.—The general rule is believed to be that, except for the purpose of proving *what the corporation did*,⁶ or what action its corpo-

corporation over which they have not an absolute control and right of disposition, at their own will and discretion. *Morgan v. Morgan*, 16 Abb. Pr. (N. S.) (N. Y.) 291, 295. See *Opdyke v. Marble*, *supra*. Accordingly, a motion for an attachment against the chief officers of a foundling hospital, to compel them to produce, upon the hearing before a referee of an action for *divorce*, the books of the hospital, for the purpose of disclosing the supposed fact that the defendant had left an infant with such hospital, the result of an illicit sexual intercourse with a third person, was denied. *Morgan v. Morgan*, *supra*. Whether these decisions are law in that State at the present time, the writer does not undertake to say. 1 Thomp. Trials, 182.

¹ N. Y. Code Civ. Proc., § 388.

² *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *s. c.* 18 Abb. Pr. (N. Y.) 266.

³ See 1 Thomp. Trials, § 747.

⁴ Thus, an entry in the *minutes of a meeting* of a corporation or of its

board of directors, that a certain proposition was adopted, is *prima facie* evidence that it received the number of votes necessary to legally adopt it. *Heintzelman v. Druids' Relief Asso.*, 38 Minn. 138.

⁵ This is especially so where such evidence is sought to be used against third persons to charge them as *stockholders* of the corporation. Here it is held that if the books can be received as affirmative evidence that a particular person was a stockholder, such presumption may be rebutted by *parol testimony* showing that he never accepted, but that he refused to accept stock in the company. *Mudgett v. Horrell*, 33 Cal. 25; *Fox's Case*, 3 De Gex, J. & S. 465. But it has been held that parol evidence will not be heard to show that a person had, at a certain time, by transferring his shares, ceased to be a member: the books of the corporation only would be looked to upon such a question. *Stanley v. Stanley*, 26 Me. 191.

⁶ *Ante*, § 7734.

rators took in *effecting its organization*,¹ its books and records are not evidence as against a stranger,² or as against a stockholder holding adversely to it.³ It is believed that a little careful reflection will make clear the proper distinction which obtains in this relation. They are evidence, in any form of proceeding and against any party, for the purpose of showing that the corporation passed the vote recited, adopted the resolution recorded, or enacted the by-laws spread out upon its minutes, — whenever, under the frame of the issues, it becomes material or relevant to show that fact, and always subject to contradiction, by proving that the record is a false one. But where it is sought to introduce such records for the purpose of disposing of the rights of strangers to the corporation, or even of its own members in their private dealings with it, or where they hold adversely to it, then those records cannot be so used, because the law ascribes no such force to them. A closely analogous rule exists with reference to the circumstances under which the *record of a judgment* may be admitted in evidence in an action between strangers to that record. Such a record cannot be admitted against a stranger to the proceeding for the purpose of charging or binding him with the legal consequences ascribed to the judgment. But in many cases arising between two parties who are strangers to the judgment, the fact that *it was rendered* may be a *relevant fact* for the purpose of proving some other fact, a link in a chain of circumstantial evidence, in which case the fact that such a judgment was rendered is evidence, provable, of course, only by the record itself or an exemplified transcript of it.⁴

¹ *Ante*, § 7736.

² *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; *s. c.* 30 Am. St. Rep. 87; 9 South. Rep. 299. See, generally, on this subject, *ante*, § 1918.

³ *Haynes v. Brown*, 36 N. H. 545, 566; *Hill v. Manchester &c. Water Works Co.*, 2 Barn. & Adol. 544; *s. c.* 2 Nev. & M. 573; *Marriage v. Lawrence*, 3 Barn. & Ald. 142; *Brett v. Beales*, 1 Moo. & M. 416; *London v.*

Lynn, 1 H. Black. 206, 214, note *c*; *Jermain v. Worth*, 5 Denio (N. Y.), 342.

⁴ 2 Black Judgm., § 604. The records of judgments are generally offered in evidence for the purpose of raising an *estoppel* against the party against whom the judgment was rendered, and of affording *conclusive proof* of the facts established by the judgment. When so offered (*Koontz v.*

But where it is sought to use the records of a private corporation, as evidence of the facts which they recite, for the purpose of *concluding*, or even *influencing* the rights of third parties who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments when offered for a similar purpose, on the principle that they are *res inter alios acta*, — or in plainer language, upon the principle that the rights of A. cannot be concluded or displaced by the fact that C., D., E. and F. met together in conclave, in the room of a board of directors of a private corporation, and there adopted a certain resolution, or passed a certain vote, or enacted a certain by-law intended to have that effect.¹ The sound rule, then, is that the records of a private corporation cannot be used in evidence for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers any way. They merely have the effect of admis-

Kaufman, 31 Mo. App. 397) as against the objection of a party who was a stranger to the record of the judgment, they are not admissible, because they are said to be *res inter alios acta*. Griffith v. Gillum, 31 Mo. App. 33. But this statement of the general principle governing the admission and exclusion of such a record, falls far short of showing that there may not be other cases where it will be competent to introduce it in controversies between entire strangers to it, for the purpose of proving the fact that such a judicial act was done, or that such a judgment was rendered; since there are many cases where, in judicial controversies between A. and B., it may become material and relevant to prove that a certain transaction was had, or that a certain act was done between B. and C.

¹ We have many illustrations of this principle. For instance, the resolutions adopted by the members

of a private corporation are not evidence of the truth of the matters therein recited or declared, as against persons not members of the corporation. Redding v. Godwin, 44 Minn. 355; s. c. 32 Am. & Eng. Corp. Cas. 635; 46 N. W. Rep. 563. So, the minutes of a board of directors of a corporation are not competent testimony against a stranger to the corporation, for the purpose of proving that he made a certain settlement with a committee of the corporation. Cape Girardeau &c. R. Co. v. Kimmel, 58 Mo. 83. So, in an action against a corporation on a promissory note, it is not competent for the corporation to introduce the record of a meeting of its board of directors, containing recitals of negotiations with the agent of the payee of the note prior to its execution, for the purpose of proving its usurious character. Heffner v. Brownell, 82 Iowa, 104; s. c. 47 N. W. Rep. 979.

sions against the corporation, or of admissions against members of the corporation, in suits against other members.¹ As between members of the corporation, they are evidence of corporate acts therein recorded; but they cannot be used in an action against a stranger to connect him with the corporation,² unless made so by an act of the legislature.³ Nor can they be used in evidence in suits by the corporation against its members, for the purpose of proving, on behalf of the corporation, entries which are in its interest. If the contrary were the rule, a corporation might manufacture evidence in its own favor, and those who were its guilty agents in so doing would not be subject to the penalties of perjury. Nor are such books evidence to prove private agreements of the stockholders.⁴ Upon the same basis of reasoning, the records of a corporation are not evidence of the truth of the facts therein recited, *as between a member of the corporation, and a stranger*,⁵ or *between two strangers*.⁶

§ 7741. Corporate Records Evidence against Receiver of Corporation.—If the *receiver* of a corporation brings an action against a third party, to collect a debt alleged to be due to the corporation, he will stand as the representative of the corporation, in such a sense that the books of the corporation will be evidence in favor of such third party, and against the receiver, — as, for instance, to show that an unauthorized alteration, by the cashier of the corporation, of

¹ *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29; *s. c.* 8 Am. Dec. 628; *Wheeler v. Walker*, 45 N. H. 355; *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

² 1 Greenl. Ev., § 493; *Ang. & A. Corp.*, § 679; *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215; *Mudgett v. Horrell*, 33 Cal. 25; *Fox's Case*, 3 De Gex, J. & S. 465.

³ *Bristol Canal Co. v. Amos*, 1 Maule & S. 569.

⁴ *Haynes v. Brown*, 36 N. H. 545; *Black v. Shreve*, 13 N. J. Eq. 455.

⁵ *Jackson v. Donally*, 3 Johns. (N. Y.) 226; *Haynes v. Brown*, 36 N. H. 545. Compare *Brett v. Beales*, 1 Moody & M. 416.

⁶ *Jermain v. North*, 5 Denio (N. Y.), 342. That *subscription papers* in custody of a private corporation, for whatever purposes made, cannot be admitted in evidence to affect the rights of a stranger to the corporation, without proof of the genuineness of the signatures, — see *Rockford & C. R. Co. v. Shunick*, 65 Ill. 223.

the note on which the suit is brought by the receiver, was subsequently ratified by the corporation.¹

ARTICLE II. OTHER MATTERS OF EVIDENCE.

SECTION

7746. Presumptions respecting corporations.

7747. Parol evidence of corporate acts.

7748. Illustrations of the foregoing.

SECTION

7749. Effect of by-laws as evidence.

7750. Evidence of customs of private corporations.

§ 7746. **Presumptions Respecting Corporations.**—In an action by a corporation for an injury to its property, as for instance, by a steamboat company for damages to its boat, it is not necessary for the plaintiff, the *general issue* being pleaded, to prove that it possesses, under its charter, the *power to hold the property* in question; but such power, being incidental to a corporation of that character, is *presumed*, especially against a mere wrong-doer claiming no title in himself, and setting up none in anyone else.² From the forego-

¹ Wyckoff *v.* Johnson, 2 S. Dak. 91; s. c. 48 N. W. Rep. 837. Upon the question, to what extent the receiver of a corporation is its representative, and to what extent he acts in right of its creditors, see *ante*, § 6939, *et seq.*

² New Haven Steamboat Co. *v.* Vanderbilt, 16 Conn. 420. *Presumption of the power of a corporation to take and convey land* when the question arises in deraigning a chain of title: Stoker *v.* Schwab, 56 N. Y. Super. 122; s. c. 16 N. Y. St. Rep. 885; 1 N. Y. Supp. 425. See, also, *ante*, § 5967. Where the plaintiff brought an action against a railroad company for an injury received in consequence of her foot being caught between one of its rails and a plank at a *highway crossing*, so that she was struck by a passing train, and her complaint alleged that the crossing belonged to the defendant, and the answer did not deny the fact of ownership, — it was held that there

was no presumption that the highway authorities and not the railway company maintained the crossing. Spooner *v.* Delaware & C. R. Co., 115 N. Y. 22; s. c. 21 N. E. Rep. 696; 23 N. Y. St. Rep. 554. Under a statute (New York Laws 1864, ch. 582, § 3), providing that any railroad company, whose main route does not exceed *fifteen miles*, may elect *seven* of its stockholders as a board of directors, where there is no proof of the length of the road except that furnished by the articles of association, which state that the total length of the road and its branches is thirty-five miles, it will be presumed, where the original number of directors was reduced to seven, that the length of the main route is not greater than fifteen miles. Beardsley *v.* Johnson, 30 N. Y. St. Rep. 691. Circumstances under which there is a *prima facie* presumption that a corporation, purchasing a railroad property at a foreclosure

ing it follows that, in a suit by a corporation, the *burden of proof* of the defendant's averment that an act of the plaintiff was *ultra vires*, is upon the defendant.¹

§ 7747. **Parol Evidence of Corporate Acts.**—The old law was that a corporation *could not speak, or even whisper, except by its corporate seal*;² but, unless the charter or governing statute otherwise provides, the modern law is that, in the absence of record evidence, the acts of corporations, equally with the acts of individuals, may be proved by parol evidence; and that, in the absence of direct evidence, such acts may be proved by evidence of facts and circumstances, from which they may fairly be inferred.³ But if there is a *statute* pointing out the mode of proving the acts of a corporation in a given particular, that, of course, must be followed, or there must be some legal excuse shown for not following it.⁴ So, if there is a *record* kept by the corporation, that, according to most judicial conceptions,⁵ is the *best evidence of what was done* by the corporation—especially where it purports to give the action of the corporation in detail as it occurred;⁶ assuming, of course, that, within principles already considered,⁷ the party against whom the record is offered, sustains such a relation to the corporation as to be affected by it. If the *minutes* of the proceedings of corporations are *lost*, or cannot be produced, then it is competent to give parol evidence of

sale, becomes liable for the performance of all *covenants running with the land*, including that of *paying rent* under a prior lease: *Frank v. New York &c. R. Co.*, 122 N. Y. 197; *s. c.* 33 N. Y. St. Rep. 235; 8 Rail. & Corp. L. J. 470; 25 N. E. Rep. 332.

¹ *Star Brick Co. v. Ridsdale*, 36 N. J. L. 229.

² *Ante*, § 5044, note 2, p. 3766.

³ *Moss v. Averell*, 10 N. Y. 449. See, to substantially the same effect, *Southern Hotel Co. v. Newman*, 30 Mo. 118; *Langsdale v. Bonton*, 12

Ind. 467; *Fort Worth Pub. Co. v. Hitson*, 80 Tex. 216; *s. c.* 14 S. W. Rep. 843; *Davis Mill Co. v. Bennett*, 39 Mo. App. 460. See also *St. Mary's Church v. Cagger*, 6 Barb. (N. Y.) 576, 579; *Edgerly v. Emerson*, 23 N. H. 555, 565; *s. c.* 55 Am. Dec. 207.

⁴ *Indianapolis &c. R. Co. v. Jewett*, 16 Ind. 273.

⁵ *Ante*, § 7734.

⁶ *Davis Mill Co. v. Bennett*, 39 Mo. App. 460.

⁷ *Ante*, § 7731, *et seq.*; § 7740.

their contents;¹ and on a like principle, it is competent under such circumstances, to prove by parol what was done. And it has been held that the fact that the clerk kept a separate memorandum of the transactions, which was preserved, does not preclude the parol evidence.² Moreover, *omissions* in the corporate minutes may sometimes be supplied by parol testimony.³ For reasons which are technically strong, though not strong in principle, the acts of an *unincorporated association* are provable by parol, although they may keep a record;⁴ but the writer is of opinion, for reasons already stated,⁵ that the record of a private corporation should be of no more legal verity than that of an unincorporated association, as neither is kept under any public official sanction, or under the obligation of an oath, or even under a settled liability for damages in case of its being false. The writer, as referee, once went over the record of an extensive corporation which was, almost from beginning to end, systematically false, doctored and concocted with false reports, fictitious resolutions, fictitious declarations of dividends, and fraudulent book-keeping, for the purpose of deceiving the public into the purchase of its shares, which purpose was successful.

§ 7748. **Illustrations of the Foregoing.**— Accordingly, in a suit upon a premium note given by a member of a mutual insurance company, in consideration of the issuing to him of a policy, it has been held proper to admit *parol evidence* that the persons by whom the policy purported to be executed as president and secretary of the corporation were at the time acting in such official capacities.⁶

¹ *Ante*, § 7738.

² *Dix v. Akers*, 30 Ind. 431.

³ *Vicksburg &c. R. Co. v. Ouachita*, 11 La. An. 649.

⁴ Thus, in an action against the members of an unincorporated association, oral evidence that the members at a meeting passed a vote authorizing the act of one of their number, upon which the action was founded, is competent to show that the others were liable with him; and

the fact that one who acted as clerk has since destroyed the informal minutes which he had taken for the purpose of preparing a record, does not preclude the plaintiff from showing that such a vote was passed. *Newell v. Borden*, 128 Mass. 31.

⁵ *Ante*, § 7734. And see *ante*, § 1919, *et seq.*

⁶ *Cahill v. Kalamazoo Ins. Co.*, 2 Dougl. (Mich.) 124; s. c. 43 Am. Dec. 457, 460, opinion by Finch, J.

So, in an *indictment for trespass* in cutting down a tree on the land of a church corporation, parol evidence is admissible to show who were the acting trustees of the church, both at the time of the commission of the alleged trespass, and at the time of the trial.¹ So in a suit by a corporation on a contract of subscription to its capital stock, it was held competent for the defendant to show, by parol testimony, in the absence of record evidence, that the subscription list upon which his name appeared had been annulled and abandoned, and that another subscription had subsequently been opened and made the basis of the organization of the company by the stockholders.²

§ 7749. Effect of By-laws as Evidence.—The by-laws of a corporation or society often become *relevant evidence*, even in actions between it and third persons, as, for instance, where it becomes material to show that its directors, in making a certain contract which the corporation is seeking to enforce, acted within the scope of their authorization;³ and they would be, under such circumstances, none the less admissible because the other contracting party did not know of their existence. But it must be kept in mind that unless *strangers* are notified of the existence and character of the by-laws of private corporations, their rights are not affected by them.⁴

¹ *White v. State*, 69 Ind. 273.

² *Southern Hotel Co. v. Newman*, 30 Mo. 118. Where one of three persons, who had been created a corporation to construct a ditch, dug it, and was paid by the other two, and the corporation had been sued for damages caused by the construction,—it was held that there was evidence that the construction was a corporate act. *Imboden v. Etowah &c. Battle Branch Mining Co.*, 70 Ga. 86, 109.

³ Such is thought to be the meaning of *Eigenman v. Rockport Building &c. Asso.*, 79 Ind. 41.

⁴ *Ante*, § 942. Thus, in a case where the question under consideration was the effect of a by-law of a mutual fire insurance company, it

was said by Eastman, J.: "A by-law is not a limitation and restriction of the power which is lodged by the charter of a company in the board of directors; and it can have no higher effect in this respect than *instructions*, or a general *regulation*, adopted by the directors themselves, as a convenient guide in ordinary cases." *Campbell v. Merchants' &c. Fire Ins. Co.*, 37 N. H. 35; s. c. 72 Am. Dec. 324. That the *by-laws* of a corporation, whether private or municipal, will not be noticed by the courts *judicially*, but must be proved, unless there is a statute changing the rule: *Haven v. New Hampshire Asylum*, 13 N. H. 532; s. c. 38 Am. Dec. 512; *Lucas v. San Francisco*, 7 Cal. 463, 474.

§ 7750. Evidence of Customs of Private Corporations. —

The testimony of freight conductors on a railroad, that they had, contrary to the rule of the company, themselves ridden on freight trains without passes, and had permitted former employés of the railroad company so to ride, is, in the absence of knowledge of such facts on the part of the officers of the company, insufficient to establish a custom which will render it liable to a former employé who is hurt while so riding.¹

¹ *Powers v. Boston &c. R. Co.*, 153 Mass. 188; *s. c.* 26 N. E. Rep. 446. A usage of a Masonic mutual benefit association, constituting a part of the contract with each of its members, that Masonic questions shall be decided by Masonic tribunals, with respect to whether the members are Masons or not, as required by the by-

laws of the association, has been held as conclusive on the association as though it provided in terms that the question of being or continuing to be a Mason in good standing should be decided by the Masonic officers. *Connelly v. Masonic Mut. Ben. Asso.*, 58 Conn. 552; *s. c.* 18 Am. St. Rep. 296; 9 L. R. A. 428; 20 Atl. Rep. 671.

CHAPTER CLXXXVI.

VARIOUS MATTERS OF PRACTICE IN SUCH ACTIONS.

SECTION	SECTION
7754. Arbitration by corporations.	against the property of corporations.
7755. Disqualification of a judge who is a member of a corporation litigant.	7759. Corporations may enforce mechanics' liens.
7756. Disqualification of jurors by reason of membership in corporations.	7760. Who may appeal from judgments against corporations.
7757. Disqualification of a juror by reason of being related to a shareholder.	7761. Questions which may be considered on such appeals.
7758. Enforcement of mechanics' liens	7762. <i>Status</i> as suitors of corporations owned by the State.

§ 7754. **Arbitration by Corporations.**—There is no question of the power of a corporation to submit a demand against it, or a demand which it may have against another, to the decision of arbitrators, although no such power is expressly conferred by its charter or governing statute; since such a power is a necessary incident of the *power to sue and be sued*.¹ It is

¹ Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 89; Baltes v. Bass Foundry &c. Works, 129 Ind. 185; s. c. 26 N. E. Rep. 59; Lyons v. National Bank, 19 Blatchf. (U. S.) 279; Brady v. Brooklyn, 1 Barb. (N. Y.) 584; Attorney-General v. Clements, 1 Turn. & R. 58. Such a power has been frequently ascribed to *municipal corporations*. Shawneetown v. Baker, 85 Ill. 563; Boston v. Brazer, 11 Mass. 447; Dix v. Dummerston, 19 Vt. 262; Brady v. Brooklyn, 1 Barb. (N. Y.) 584; Kane v. Fond du Lac, 40 Wis. 495; Paret v. Bayonne, 39 N. J. L. 559; Remington v. Harrison County

Court, 12 Bush (Ky.), 148; Walnut v. Rankin, 70 Iowa, 65; Buckland v. Conway, 16 Mass. 396; Smith v. Philadelphia, 13 Phila. (Pa.) 177; 1 Beach Pub. Corp., § 642; citing the above authorities, and also Re Arbitration between Eldon and Ferguson Townships, 6 Upper Can. L. J. 270. A statute empowering "all persons" to submit controversies to arbitration, includes municipal corporations: Springfield v. Walker, 42 Ohio St. 543. It has been held that the *selectmen of a town* have no power, by virtue of their offices, to submit to arbitration the question regarding the settlement

believed to be within the power of an *attorney* of a corporation intrusted with the management of a legal controversy, between it and another party, to submit the controversy to the decision of arbitrators, under his *general retainer*, and without a special authorization thereto in the form of a resolution of the directors or otherwise.¹ If an *agent* of a corporation has repeatedly submitted to arbitration, controversies between it and other parties, his power to do so in a particular case may be *inferred* from such *course of action*.² Where the *directors* of a corporation entered on its books a proposal to arbitrate a disputed claim, and also a request that the claimant join with its secretary in selecting the arbitrators, it was held that the secretary had power to exclude a submission in behalf of the corporation under its seal.³ The *directors of a national bank*

of a pauper, which involves the right or liability of the town. *Griswold v. North Stonington*, 5 Conn. 367,—the court proceeding upon the ground that the town selectmen acted under a special and limited authority. But in Vermont, the selectmen of a town are held to have the power to submit to arbitration any such claim against the town as they are, by the statute, authorized to audit and adjust, and the town will be bound by an award made in pursuance of the submission. *Dix v. Dummerston*, 19 Vt. 262. This was by analogy to a previous holding of the same court that an agent, specially appointed by the vote of a town to compromise a claim against it for damages occasioned by the laying out of a highway, had authority to submit the claim to arbitration, and that the town was bound by the award. *Schoff v. Bloomfield*, 8 Vt. 472. So, where the selectmen of a town were empowered to lay out any new street, lane, or alley, whenever, in their opinion, the safety or convenience of the inhabitants of the town might require it, and they made an agree-

ment with parties damaged by such an improvement, to submit the matter to arbitration, it was held that they possessed this power *virtute officii*. *Boston v. Brazer*, 11 Mass. 447. In another jurisdiction it is held that this power must be exercised by an ordinance or a resolution of the corporate council (*Shawneetown v. Baker*, 85 Ill. 563); but still another court has held that the common council may intrust the selection of arbitrators to the city attorney. *Kane v. Fond du Lac*, 40 Wis. 495.

¹ *Paret v. Bayonne*, 39 N. J. L. 559; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83 (where counsel agreed to the submission which the court upheld).

² *Wood v. Auburn &c. R. Co.*, 8 N. Y. 160.

³ *Madison Ins. Co. v. Griffin*, 3 Ind. 277. See the following cases of submissions by corporations: *Indiana Central R. Co. v. Bradley*, 7 Ind. 49. Submission to *referees* under a statute of Maine upheld: *Fryeburg Canal v. Frye*, 5 Me. 38; and see also *Hersey v. Packard*, 56 Me. 395, 406.

in liquidation, no others having been elected to wind up its affairs, have power to submit a claim against it to arbitration; and where, in such a case, an attempt was subsequently made by a body claiming to be the board of directors, to revoke the submission, the court inquired into the question whether the newer directors were such *de jure*, and finding that they were not, sustained the submission.¹

§ 7755. **Disqualification of a Judge Who is a Member of a Corporation Litigant.**—*Witnesses* at common law were *disqualified* from testifying when they were members of a corporation which was a party to the action; but this disqualification has been generally removed by statutes permitting parties to testify. The principles of the common law are not so strict in *disqualifying a judge*, by reason of his interest in the controversy or his relationship to a party, where no provision has been made for the substitution of a disinterested

¹ Richards v. Attleborough Nat. Bank, 148 Mass. 187; s. c. 19 N. E. Rep. 353; 1 L. R. A. 781; 5 Rail. & Corp. L. J. 347. The charter of a gas-light company provided that, at the expiration of a certain time, the city might purchase the gas-works at a price to be fixed by an arbitration between the city and the company. It was held that the obligation to appoint arbitrators *would not be specifically enforced in equity*,—the court examining and citing the following cases: King v. Howard, 27 Mo. 21, 25; Street v. Rigby, 6 Ves. 815; Hug v. Van Burkleo, 58 Mo. 202; Milnes v. Gery, 14 Ves. 400; Blundell v. Bret-targh, 17 Ves. 232, 241; Agar v. Mack-lew, 2 Sim. & Stu. 418; Wilks v. Davis, 3 Meriv. 507; Gourley v. Somerset, 19 Ves. 429; Tobey v. County of Bristol, 3 Story (U. S.), 800; Norfleet v. Southall, 3 Murph. (N. C.) 189; Hop-kins v. Gilman, 22 Wis. 476; Greason v. Keteltas, 17 N. Y. 476; distinguish-ing Tscheider v. Biddle, 4 Dill. (U. S.)

55; Strohmaier v. Zeppenfeld, 3 Mo. App. 429; Biddle v. Ramsey, 52 Mo. 153; Gregory v. Mighell, 18 Ves. 528; Arnot v. Alexander, 44 Mo. 25, 27; s. c. 100 Am. Dec. 252; Jackson v. Jackson, 1 Sm. & Giff. 184; Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Giff. 119; Kelso v. Kelly, 1 Daly (N. Y.), 419; Hall v. Warren, 9 Ves. 605. But it was held that the remedy of the city was by *mandamus*; or that the State could have proceeded by *quo warranto* and forfeited the charter of the company, by reason of its willful refusal to comply with one of the conditions on which it accepted it, and thus taken back to itself the franchise and conferred it upon the city. St. Louis v. St. Louis Gaslight Co., 70 Mo. 69, 114, 115; citing to the last point, Union Pac. R. Co. v. Hall, 91 U. S. 343; People v. Manhattan Gas Works, 45 Barb. (N. Y.) 136; United States v. Union Pac. R. Co., 3 Dill. (U. S.) 524.

judge to sit in his place. On the contrary, judicial officers are frequently obliged, from the necessity of the case, to sit in causes where near relatives are parties,—as where the law has made no provision for the trial of the cause before another judge.¹ Nor does the maxim of common law, “that no man can be a judge in his own cause” apply to *quasi* judicial officers, such as a *commissioner* appointed under a special statute to award damages for property taken in laying out a highway.² It may be therefore assumed that the fact that *the judge is a stockholder* in a corporation which is a party to a litigation depending in his court, will not absolutely disqualify him from sitting, in the absence of a statute prescribing such a disqualification; though a judge always will, under such circumstances, recuse himself when he can do so without breaking the quorum of the court, or when his place can be supplied by another judge. In respect of *municipal corporations*, it is believed that no such disqualification exists; but, on the other hand, that it is the constant practice for judges of the courts of a State sitting within our large cities, who are inhabitants and tax-payers of those cities, to sit in controversies between the city and other parties.³

§ 7756. Disqualification of Jurors by Reason of Membership in Corporations.—The rule of the common law, estab-

¹ *Matter of Leefe*, 2 Barb. Ch. (N. Y.) 39; *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360, where a brother of Chancellor Kent was personally interested.

² *Matter of Southern Boulevard*, 3 Abb. Pr. (N. S.) (N. Y.) 447. Compare *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Paige v. Fazackerly*, 36 Barb. (N. Y.) 392; *Matter of Ryers*, 72 N. Y. 1; s. c. 28 Am. Rep. 83; *Edwards v. Russell* 21 Wend. (N. Y.) 63; *Oakley v. Aspinwall*, 3 N. Y. 547.

³ It is stated by Mr. Beach, in his work on Public Corporations, at § 1289, that a resident tax-payer is not com-

petent to sit as a juror, and he adds that “presumably the same disqualification extends to a judge.” Most of the cases cited by him support his proposition in respect of *jurors*; but the law is believed to be the reverse in respect of a *judge*. A judge is not disqualified to sit at the trial of a case instituted by persons composing a committee of a corporation, *e. g.*, an incorporated association of members of the bar, prosecuting a member for professional misconduct,—by reason of the fact that the judge is an *honorary member of the corporation*. *Bowman's Case*, 67 Mo. 146.

lished by Lord Mansfield,¹ and generally followed in this country,² where not changed by statute, as it frequently has been,³ excludes from the jury the *inhabitants of a town or city* which is a party to the action.⁴ The same rule excludes from

¹ Hesketh v. Braddock, 3 Burr. 1847. See also Day v. Savadge, Hob. 85. Compare Martin v. Reg., 12 Irish L. 399.

² Wood v. Stoddard, 2 Johns. (N. Y.) 194; Garrison v. Portland, 2 Or. 123; Boston v. Tileston, 11 Mass. 468; Hawkes v. Kennebeck Co., 7 Mass. 461; Watson v. Tripp, 11 R. I. 98; s. c. 23 Am. Rep. 420; 15 Am. L. Reg. 282; Alexandria v. Brockett, 1 Cranch C. O. (U. S.) 505; Diveny v. Elmira, 51 N. Y. 506; Hawes v. Gustin, 2 Allen (Mass.), 402; State v. Williams, 30 Me. 484; Dively v. Cedar Falls, 21 Iowa, 565; Cramer v. Burlington, 42 Iowa, 315; Kendall v. Albia, 73 Iowa, 241; s. c. 34 N. W. Rep. 833; Ford v. Umatilla County, 15 Or. 313; s. c. 16 Pac. Rep. 33; Davenport Gas Company v. Davenport, 13 Iowa, 229; Gibson v. Wyandotte, 20 Kan. 156; Eberle v. St. Louis Public Schools, 11 Mo. 247; Fine v. St. Louis Public Schools, 30 Mo. 166; Columbus v. Goetchius, 7 Ga. 139; Russell v. Hamilton, 3 Ill. 56; Bailey v. Trumbull, 31 Conn. 581; Hearn v. Greensburgh, 51 Ind. 119; Johnson v. Americus, 46 Ga. 80; Rose v. St. Charles, 49 Mo. 509; Fulweiler v. St. Louis, 61 Mo. 479. But *contra*, see Middletown v. Ames, 7 Vt. 166; Omaha v. Olmstead, 5 Neb. 446; s. c. 16 Am. L. Reg. 356; Kemper v. Louisville, 14 Bush (Ky.), 87. Member of City Council disqualified, if city a party: Boston v. Baldwin, 139 Mass. 315. *Cases not within the rule*: Phillips v. State, 29 Ga. 105; Phipps v. Mansfield, 62 Ga. 209. Holder of municipal bonds, incompetent where municipality is a

party: Jefferson County v. Lewis, 20 Fla. 980.

³ New York Code Rem. Just., § 1179; 1 Bright. Purd. (Penn.) Dig., p. 837, § 73; Gen. Stat. Mass. 1860, ch. 132, § 30; Gen. Stat. R. I. 1872, p. 434, § 32; Bush's Dig. Fla., ch. 104, § 25; R. S. S. C. 1873, p. 53, § 27; Comp. L. Mich. 1871, § 6015; R. S. Me. 1871, ch. 82, § 76; Rev. N. J. 1877, p. 530, § 39; Comp. L. Mich. 1871, §§ 460, 3329; R. S. Ill. 1880, ch. 24, § 174; *Id.*, ch. 139, § 47; *Id.*, ch. 34, § 32; R. S. La. 1876, § 2134; Supp. to Ga. Code of 1873, § 409; R. S. W. Va. 1879, ch. 33, § 63; R. S. Wis. 1878, § 2850; Stat. at Large, Minn. 1873, p. 217, § 5; Gen. Stat. Neb., § 1873, p. 232, § 5; R. S. Mo. 1879, 2801; Comp. L. Kan. 1879, § 1391. Such statutes have been held *not unconstitutional*, as invading the right of trial by an impartial jury. Com. v. Reed, 1 Gray (Mass.), 472. See also Com. v. Worcester, 3 Pick. (Mass.) 462; Com. v. Ryan, 5 Mass. 90; State v. Wells, 46 Iowa, 662. Construction of such statutes: Baltimore & c. R. Co. v. Pittsburgh & c. R. Co., 17 W. Va. 812; Doyal v. State, 70 Ga. 134. One who would find for the city if the evidence was equally balanced is disqualified. Omaha v. Cane, 15 Neb. 657.

⁴ A city defendant has *no right of challenge* on the ground that, though a resident, the venire-man is not a tax-payer. Hollenbeck v. Marshalltown, 62 Iowa, 21. Nor on the ground that he *is* a tax-payer. Conklin v. Keokuk, 73 Iowa, 343; s. c. 35 N. W. Rep. 444. But it is a good ground of challenge by the party adverse to the

the jury box a *member of a private corporation* which is a party to a suit, or immediately interested in the question to be tried.¹ Thus, in an action between the trustees of two religious societies, involving the right of possession of lands, the members of each society are, by reason of interest, incompetent as jurors.² But the rule does not disqualify a juror who has been active in forming a company, but who has never been a shareholder in it.³ And it is no objection that the juror is an officer or stockholder in *another corporation, organized for a similar purpose* to that of the corporation which is a party to the suit.⁴ Nor, according to the better opinion, does the fact that the venire-man and the opposite party to the suit are members in the same *benevolent organization*, such as the *Masonic Fraternity*, disqualify.⁵ Nor, in an action by a grand lodge of this order, are members of subordinate lodges disqualified by reason of interest in the suit.⁶ So a *church member* is not incompetent as a juror in a case to which a church of his denomination is a party.⁷ But if the church is such an exalted one that its tenets are above the law of the land, and if belief in those tenets renders it unconscientious for him to enforce the human as against the divine law, the venire-man

city. *Kendall v. Albia*, 73 Iowa, 241; s. c. 34 N. W. Rep. 833; and see note to same.

¹ *Respublica v. Richards*, 1 Yeates (Pa.), 480; *Silvis v. Ely*, 3 Watts & S. (Pa.) 420; *Fleeson v. Savage*, S. M. Co., 3 Nev. 157. Compare *Williams v. Smith*, 6 Cow. (N. Y.) 166; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Page v. Contoocook Valley R. Co.*, 21 N. H. 438. So, of a juror who has given his note to a railway company to aid it in building its road. *Michigan &c. R. Co. v. Barnes*, 40 Mich. 383.

² *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.

³ *Portland &c. Ferry Co. v. Pratt*, 2 Allen (N. B.), 17. Compare *Williams v. Smith*, 6 Cow. (N. Y.) 166;

Com. v. Boston &c. R. Co., 3 Cush. (Mass.) 25.

⁴ *Craig v. Fenn*, 1 Car. & Marsh. 43; *Miller v. Wild Cat Gravel R. Co.*, 52 Ind. 51. No objection that a party and a juror are both *stockholders*, in the same corporation, it not being interested in the suit: *Brittain v. Allen*, 2 Dev. L. (N. C.) 120. On a trial of an indictment for passing counterfeit money, it is no objection that a juror is a *director* in the bank whose money was counterfeited. *Billis v. State*, 2 McCord (S. C.), 12.

⁵ *Purple v. Horton*, 13 Wend. (N. Y.) 9, 234; s. c. 27 Am. Dec. 167. *Contra*, *Brittain v. Allen*, 2 Dev. L. (N. C.) 120.

⁶ *Burdine v. Grand Lodge*, 37 Ala. 478.

⁷ *Barton v. Erickson*, 14 Neb. 164.

will be disqualified, — especially in the case where the venire-man is a member of the *Mormon church*, and the accused is on trial for bigamy, and the divine law, as graciously revealed to the saints of that church, commands *polygamy*, while the human law is so wicked as to condemn it.¹ On the trial of a criminal action for unlawfully *selling intoxicating liquors*, members of a *social club*, apparently organized for the purpose of getting liquor for their own use, — are not, for that reason, subject to a challenge by the defendant.²

§ 7757. **Disqualification of a Juror by Reason of being Related to a Shareholder.** — The rule which disqualifies a venire-man who is related to a party to the record within certain degrees,³ operates to disqualify one who is related to a beneficial party, though not a party to the record, — as where a corporation is a party, and a juror is related to a member or shareholder of it.⁴

§ 7758. **Enforcement of Mechanics' Liens against the Property of Corporations.** — There is very little in the law of mechanics' liens that is special to the law of corporations, except the question *what corporate property is public* in the sense of being exempt from such liens. Mechanics' liens, it is well known, cannot, in general, be established against the property of *municipal corporations*.⁵ This rule extends in some

¹ United States v. Miles, 2 Utah, 19; s. c. 103 U. S. 304.

² Boldt v. State (Wis.), 35 N. W. Rep. 935.

³ 1 Thomp. Trials, § 62.

⁴ Co. Litt. 157 a; Quinebaug Bank v. Leavens, 20 Conn. 87; s. c. 50 Am. Dec. 272; Georgia Railroad v. Hart, 60 Ga. 550; Young v. Marine Ins. Co., 1 Cranch C. C. (U. S.) 452.

⁵ Leonard v. Brooklyn, 71 N. Y. 498; s. c. 27 Am. Rep. 80; Abercrombie v. Ely, 60 Mo. 23. See Phillips on Mechanics' Liens, secs. 179, 179 a, and 180, for illustrations. Also a learned note by Robertson

Howard, Esq., in 25 Fed. Rep. 175. The following cases, cited by Mr. Howard, may be examined in illustration of the doctrine that property devoted to public use, whether held by a public or private corporation, will not be taken in execution. Wilson v. Commissioners, 7 Watts & S. (Pa.) 197; Williams v. Controllers, 18 Pa. St. 275; Poillon v. New York, 47 N. Y. 666; Charnock v. Colfax Township, 51 Iowa, 70; s. c. 33 Am. Rep. 116; Lewis v. Chickasaw County, 50 Iowa, 234; Whiting v. Story County, 54 Iowa, 81; s. c. 37 Am. Rep. 189; 6 N. W. Rep. 137; Board of Education

cases to the property of *private corporations* devoted by their charters or governing statutes to *public uses*, as, for example, to *public bridges*,¹ and *railroads*,² though in some States an *entire railroad* may be sold to enforce a mechanic's lien.³ The mechanics' lien laws of others have been held to include *railways*,⁴ and many States have extended their mechanics' lien laws to *railroad property*.⁶ On the same principle, it has been held in Pennsylvania that a *water supply company* is a public corporation, in the sense of being exempt from mechanics' liens.⁶ In dealing with this question, it is to be borne in mind that it is the *use* to which the property is devoted,

v. Neidenberger, 78 Ill. 58; *Bouton v. McDonough Co.*, 84 Ill. 384, 396; *State v. Tiedermann*, 10 Fed. Rep. 20; *Frank v. Board of Chosen Freeholders*, 39 N. J. L. 347; *Ripley v. Gage County*, 3 Neb. 397.

¹ *Loring v. Small*, 50 Iowa, 271; *s. c.* 32 Am. Rep. 136 (county bridge); *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; *s. c.* 52 Am. Rep. 67; *Purtell v. Chicago &c. Bolt Co.*, 74 Wis. 132; *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465.

² *Dunn v. North Mo. R. Co.*, 24 Mo. 493; *Graham v. Mt. Sterling Coalroad Co.*, 14 Bush (Ky.), 425; *s. c.* 29 Am. Dec. 412; *Abercrombie v. Ely*, 60 Mo. 23; *Buncombe County v. Tommey*, 115 U. S. 122; *Ireland v. Atchison &c. R. Co.*, 79 Mo. 572.

³ *Graham v. Mt. Sterling Coalroad Co.*, 14 Bush (Ky.), 425; *s. c.* 29 Am. Dec. 412; *Ireland v. Atchison &c. R. Co.*, 79 Mo. 572.

⁴ *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. Rep. 470.

⁵ *Brown v. Buck*, 54 Ark. 453; *Brooks v. Railway Co.*, 101 U. S. 443.

⁶ *Foster v. Fowler*, 60 Pa. St. 27; *Guest v. Lower Merion Water Co.*, 142 Pa. St. 610; *s. c.* 12 L. R. A. 324; 21 Atl. Rep. 1001; *Wilkinson v. Hoffman*, 61 Wis. 637; *s. c.* 21

N. W. Rep. 816 (water-works belonging to a city). Compare *Eufaula Water Co. v. Addyston &c. Co.*, 89 Ala. 552; and *Harrison &c. Iron Co. v. Council Bluffs &c. Water Works Co.*, 25 Fed. Rep. 170. Upon the general question of the *exemption from execution* for debt of all corporate property devoted to *public uses*, — see *Bayard's Appeal*, 72 Pa. St. 453; *Philadelphia &c. R. Co's Appeal*, 70 Pa. St. 355; and two *nisi prius* decisions: *Flagg v. Farnsworth*, 12 W. N. C. (Pa.) 500; *Second Nat. Bank v. Manufacturing Co.*, 13 W. N. C. (Pa.) 174. Under a statute giving to a materialman a mechanic's lien upon real estate and also upon the "building, erection, or improvement" into which his materials go, it is held that he cannot establish a lien against the *rolling stock* of a railway company, because such rolling stock is neither real estate nor *appurtenant thereto*. The rolling stock of a railway, on the contrary, is held to be personal property, and hence not the subject of a mechanic's lien under such a statute. *Neilson v. Iowa &c. R. Co.*, 51 Iowa, 184; *s. c.* 33 App. Rep. 121. Enforcing special *contractors' lien* on railroad property under Iowa statute: *Sandval v. Ford*, 55 Iowa, 461.

and not the character of the corporation which owns it, which determines the question. For instance, the property of a *municipal corporation*, not devoted to public uses, may be the subject of a mechanic's lien.¹ And so may the property of an *educational institution* incorporated by the State,² though there is not wanting opposing authority on this question.³ A company incorporated to transact a *general storage and elevator business*, including the right to issue warehouse receipts, to advance money, etc., is not a public corporation, though subject to public regulation.⁴ Its real estate, devoted to the exercise of its franchises, is not exempt from mechanics' liens.⁵

¹ *Brinckerhoff v. Board of Education*, 37 How. Pr. (N. Y.) 520.

² *Thomas v. Industrial University*, 71 Ill. 310; *Board of Education v. Greenebaum*, 39 Ill. 609. A mechanic's lien was enforced against a public school house in *Morse v. School Dist.*, 3 Allen (Mass.), 307.

³ *Patterson v. Pennsylvania Reform School*, 92 Pa. St. 229.

⁴ *Ante*, § 5530.

⁵ *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248. Cases turning on the question of the *power of the agent or agents of the corporation to make the contract under which the work was done* or materials furnished, for which the mechanics' lien was claimed: *Gortemiller v. Rosengarn*, 103 Ind. 414; *Hearne v. Chillicothe & C. R. Co.*, 53 Mo. 324; *Morse v. School Dist.*, 3 Allen (Mass.), 307; *McMahon v. Tenth Ward School Officers*, 12 Abb. Pr. (N. Y.) 129. Judgment against individuals personally and mechanics' liens foreclosed on property alleged to be owned by them as a joint-stock company, not within the Georgia statute of "illegality": *Mosely v. Jones*, 66 Ga. 466; *s. c.* 9 Am. Corp. Cas. 53. Statutes have been enacted

in favor of the *laboring classes*, giving to employes of corporations the first lien for their *wages*, cutting off all other liens. Such a statute in Indiana (Rev. Stats. Ind. 1881, § 5286, *et seq.*) uses the word "employes" in designating the beneficiaries of the statute. It is held not to include a *contractor* who contracts with a telegraph corporation to do the specified work of putting up certain lines of wire on poles. *Vane v. Newcombe*, 132 U. S. 220; *s. c.* 33 L. ed. 310; 10 Sup. Ct. Rep. 60. For the construction of similar statutes, see *ante*, § 3144, *et seq.* It is scarcely necessary to suggest here that a mechanic's lien, being purely a creature of statute, cannot be acquired, except by taking the steps pointed out by the statute, and within the period of time there named. Therefore, a *contractor* cannot acquire a *mechanic's lien* under a statute (Laws Ind. 1883, or 40 Elliott Supp., §§ 1688, 1690) against the property of a telegraph company upon which he has expended labor or materials, unless he complies with the statute, by describing in his notice of lien the lot or land on which the structure stands, on which he claims a lien. *Vane v. Newcombe*,

§ 7759. Corporations may Enforce Mechanics' Liens.—

A corporation, being a mere collection of natural persons, and being, under a principle of interpretation, a "*person*," within the meaning of statutes using that word, when it can be as well applied to corporations as to individuals,¹—there is no difficulty in holding that statutes giving *mechanics' liens* for labor done or materials used in the erection of buildings, etc., extends to cases where labor is done and materials are furnished by incorporated companies.² Thus, a corporation may have the benefit of a mechanic's lien created in favor of "any machinist."³ Certainly, there is no reason why the benefit of such a lien should be extended to a partnership, and denied to the same body of individuals, if for certain reasons they should become incorporated under a general enabling act. This conclusion is clearer where there is a statute enacting that the word "*person*" shall include corporations.⁴ There is a doubtful decision to the effect that a private business corporation, created by articles of associa-

132 U. S. 220; s. c. 10 Sup. Ct. Rep. 60. Where several adventurers agreed to organize a corporation and one of them, by an arrangement with the others, purchased land in his own name and erected a building thereon, all of which became the property of the corporation after its organization,—it was held that he was not entitled to a *mechanic's lien* upon the property on account of the improvements made thereon by him, because they were not made under any contract with the owner of the land, as required by the Iowa statute; but that he was entitled to judgment against the corporation for the expenditures made by him for its use and benefit. Littleton Sav. Bank v. Osceola Land Co., 76 Iowa, 660; s. c. 39 N.W. Rep. 201. The *possessory lien*, which one who does work on the personal property of another delivered into his possession for that purpose,

may exercise against it until his compensation is paid, cannot be exercised against *telegraph poles and wires* by a contractor who has strung the wires; because a line of telegraph is *real, and not personal, property*. Vane v. Newcombe, 132 U. S. 220; s. c. 10 Sup. Ct. Rep. 60; Bankers' &c. Tel. Co. v. Bankers' &c. Tel. Co., 27 Fed. Rep. 536. If there were such a lien, the contractor would waive it by proceeding, though unsuccessfully, under a statute relating to mechanics' liens. Vane v. Newcombe, *supra*.

¹ *Ante*, §§ 11, 5689, 7366; *post*, §§ 7790, 7804, 7900, 8059.

² Loudon v. Coleman, 59 Ga. 653; Doane v. Clinton, 2 Utah, 417; Stout v. McLachlin, 38 Kan. 120; Fagan v. Boyle Ice Machine Co., 65 Tex. 324.

³ *Ibid.*; construing Ga. Code, § 1966.

⁴ Fagan v. Boyle Ice Machine Co., 65 Tex. 324.

tion under a general enabling statute, cannot have a mechanic's lien for doing something in excess of the powers which they have taken to themselves in their articles. The articles described the objects for which the corporation was created, to be manufacturing and selling lumber, and it was held that the corporation could not have a mechanic's lien for labor performed in the construction of a building.¹ But this decision proceeded partly upon the principle that the remedy given by statutes creating mechanics' liens, is an extraordinary one, "in derogation of common law and ought to be *strictly construed*."²

§ 7760. Who may Appeal from Judgments against Corporations.—In an action against an insolvent corporation, under a statute of Minnesota,³ a *creditor*, who has become a party and proved his claim, may appeal from an order directing a *sale* of the property, as well as an order confirming such sale.⁴ *Separate creditors* of an insolvent corporation, who have a *common interest* in the reversal or modification of a decree as to the mode of payment of their claims, and who are all aggrieved in the same way and by the same portion of the decree, may *join in prosecuting an appeal* therefrom.⁵ Elsewhere we have had occasion to consider the statute of New York permitting the examination of parties and its application to corporations.⁶ It has been held in that State that a defendant corporation is the party aggrieved by, and can therefore properly appeal from,

¹ Dalles Lumber &c. Co. v. Wasco Woollen Man. Co., 3 Or. 527.

² See Kendall v. McFarland, 4 Or. 292, 328, where this interpretation is repeated, citing the preceding case. It may be suggested here that many courts construe mechanics' liens *remedially* and *beneficially*, as the legislature in enacting them manifestly intended. There is authority for the proposition that mechanics' lien laws do not extend to *municipal corporations*, so as to give the right to such a corporation to establish and

enforce such a lien for municipal charges, unless specially authorized by statute. Mauch Chunk v. Shortz, 61 Pa. St. 399; Yates v. Meadville, 56 Pa. St. 21; Philadelphia v. Greble, 38 Pa. St. 339.

³ Minn. Gen. Stat. 1878, ch. 76.

⁴ Hospes v. Northwestern Man. &c. Co., 41 Minn. 256; s. c. 43 N. W. Rep. 180.

⁵ Re California Mut. L. Ins. Co., 81 Cal. 364; s. c. 22 Pac. Rep. 869.

⁶ Ante, § 7412.

an order requiring its chairman to be examined, for the purpose of enabling plaintiff to frame his complaint.¹ Where an action was brought by the board of managers of a corporation in its corporate name, and a body claiming to be the successors of such board moved to dismiss the action, and their motion was sustained, it was held that the *old board* should have been allowed to appeal, in order that the appellate court might finally decide which of the two boards was legally constituted.²

§ 7761. Questions Which may be Considered on Such Appeals.—In an action against an insolvent corporation under a Minnesota statute,³ where an appeal is prosecuted by a creditor, who has become a party and proved his claim, from an order confirming a sale of the property of the corporation, the appellate court may consider both the legality of the sale and the adequacy of the price.⁴ Mere *discretionary action* is not

¹ *Sherman v. Beacon Const. Co.*, 11 N. Y. Supp. 369.

² *Louisville Industrial School v. Louisville*, 88 Ky. 584; *s. c.* 11 Ky. L. Rep. 109; 11 S. W. Rep. 603. *Notice of appeal how served*: Under Iowa Code, § 1254: *Jamison v. Burlington & C. R. Co.*, 69 Iowa, 670; *s. c.* 29 N. W. Rep. 774. Under California Code Civ. Proc., § 940: *Pacific Coast R. Co. v. Superior Court*, 79 Cal. 103; *s. c.* 21 Pac. Rep. 609. *Bond or undertaking for appeal*: want of seal thereon cured by *ratification*: *Campbell v. Pope*, 96 Mo. 468; *s. c.* 10 S. W. Rep. 187; *ante*, §§ 5295, 5296. Mississippi statute dispensing with seal: *Laws of Miss.* 1868, ch. 61, p. 92. That undertaking may be executed by *surety company*: *Travis v. Travis*, 48 Hun (N. Y.), 343; *s. c.* 15 N. Y. St. Rep. 874. Such undertaking a nullity unless *approved by a judge*, indorsed thereon before filing: *Ibid.* *Voluntary dissolution, proceedings for not appealable*: *Cady v. Centerville & C. Co.*, 48 Mich. 133. *Summary proceedings by banking corporations under early statutes of Ala-*

bama—appeals in: *Logwood v. Huntsville Bank, Minor* (Ala.), 23; *Andrews v. Branch Bank*, 10 Ala. 375; *Curry v. Bank of Mobile*, 8 Port. (Ala.) 360; *Sayre v. Bank of Mobile*, 9 Port. (Ala.) 423; *Ford v. Bank of Mobile*, 9 Port. (Ala.) 471. Other decisions under these statutes are: *Ford v. Branch Bank*, 6 Ala. 286; *Crawford v. Planters' & C. Bank*, 6 Ala. 289; *Leigh v. State Bank*, 10 Ala. 339; *Jemison v. Planters' & C. Bank*, 17 Ala. 754; *Stanley v. Bank of Mobile*, 23 Ala. 652; *M'Walker v. Branch Bank*, 3 Ala. 153; *Huntington v. Branch Bank*, 3 Ala. 186; *Crawford v. Planters' & C. Bank*, 4 Ala. 313; *Ticknor v. Branch Bank*, 3 Ala. 135; *Branch Bank v. Jones*, 5 Ala. 487; *Sale v. Branch Bank*, 1 Ala. 425; *Roberts v. State Bank*, 9 Port. (Ala.) 312; *Murphy v. Branch Bank*, 5 Ala. 421; *Alexander v. Branch Bank*, 5 Ala. 465.

³ Gen. Stats. Minn. 1878, ch. 76.

⁴ *Hospes v. Northwestern Man. & Car Co.*, 41 Minn. 256; *s. c.* 43 N. W. Rep. 180.

reviewable on appeal; therefore, where a court, acting under a statute,¹ had granted the petition of a corporation to *change its corporate name*, against the objection of another corporation, made on the ground that the name sought to be assumed by the petitioner so nearly resembles its own as to lead to confusion and result in injury to the objector, the appeal presented nothing for review, and was accordingly dismissed. The court proceeded upon the ground that the statute, by authorizing the court to grant the order where it appears "that there is no reasonable objection to such corporation changing its name," put the granting or refusal of it within the discretion of the court, which discretion was not reviewable on appeal unless plainly abused.²

§ 7762. **Status as Suitors of Corporations Owned by the State.**—Corporations organized for private purposes and owned by the State, such as banks under some of the former systems, are *private corporations*, and stand as such before the court in all matters of litigation, and are not allowed to exercise any of the *sovereign privileges* of the State. The doctrine is that when a State goes into a private business, it casts off its sovereignty *pro hac vice*, and the corporation through which it acts stands on the footing of any similar corporation.³ The former *State Bank of Arkansas*, for instance, bringing a bill for an injunction was required to *verify the allegations* of its bill, and to *give bond*, like other suitors, and was not allowed to prosecute its suit under cover of privileges belonging alone to the State, by uniting the State as a complainant.⁴

¹ Laws N. Y. 1870, ch. 322.

² *Ante*, § 1133. Compare *ante*,

³ *Re United States Mercantile Re-* § 5384.

porting Co., 115 N. Y. 176; s. c. 24 N. Y. St. Rep. 548; 21 N. E. Rep.

⁴ *Ex parte State and State Bank*, 15 Ark. 263.

1034. Compare *ante*, § 287, *et seq.*

CHAPTER CLXXXVII.

INJUNCTIONS IN SUCH ACTIONS.

SECTION

7767. Scope of this chapter.

7768. Restraining *ultra vires* acts of corporations injurious to private right.

7769. Injunctions against breaches of contracts.

7770. Enjoining a corporation from breaking the contracts of its stockholders.

7771. Enjoining corporations from committing trespasses upon property.

7772. Enjoining the unlawful appropriation of private property for public purposes.

7773. Whether such an injunction ought to be denied on the ground of adequate remedy at law.

7774. Enjoining the *ultra vires* acts of corporations injurious to public right.

7775. Such jurisdiction supported upon the ground of trust.

SECTION

7776. Injunctions to restrain invasions of corporate franchises.

7777. When not necessary to establish the franchise in a trial at law.

7778. To enjoin State railroad commissioners from establishing rates and charges.

7779. To enjoin State railroad commissioners from enforcing unreasonable rates.

7780. Whether a bill for an injunction against railway commissioners is a suit against the State.

7781. At the suit of private persons to compel corporations to perform their public duties.

7782. Injunctions against strikes, boycotts, and other combinations among workmen.

7783. Other decisions illustrating the use of injunctions in the case of corporations.

7784. Cases where such injunctions not granted.

§ 7767. **Scope of This Chapter.**—We have already had occasion to consider the use of the remedy in equity by injunction in many relations, to protect rights in corporations. It is proposed to collect in this chapter a number of additional decisions which have come under the eye of the author, and to present them without much claim to logical sequence or to completion.

§ 7768. **Restraining Ultra Vires Acts of Corporations Injurious to Private Right.**—There is no doubt whatever, either in England or America, of the jurisdiction of courts of

equity to restrain, by injunction, the *ultra vires acts of corporations injurious to private right*, in cases where the complainant has no adequate remedy at law.¹

§ 7769. Injunctions against Breaches of Contracts.—Injunctions sometimes take the form of *restraining a party from committing a threatened breach of a contract* into which he has entered, and especially in the case where the party is *insolvent*, so that an action at law for damages would not afford the other party to the contract an adequate reparation of the injury. This is an indirect way of compelling the *specific performance* of a contract. "An injunction," says Prof. Pomeroy, "restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practicable mode of enforcement which its terms permit."² The exercise of the jurisdiction to enforce the

¹ The jurisdiction was recognized by Lord Hardwicke as early as 1752. *Fishmongers' Co. v. East India Co.*, 1 Dick. 163. In 1815 it was again recognized by Lord Eldon as applicable to the case of corporations exceeding or abusing their powers. *Agar v. Regent's Canal Co.*, *Cooper's Cas.* 77. It has been applied in numerous modern cases in England. *River Dun Nav. Co. v. North Midland R. Co.*, 1 Eng. R. Cas. 135; *London &c. R. Co. v. Cooper*, 2 *Id.* 312; *Blakemore v. Glamorganshire Canal Nav. Co.*, 1 Myl. & K. 154; *Coats v. Clarence R. Co.*, 1 Russ. & M. 181; *Dawson v. Paver*, 5 Hare, 415; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436, 437; *Ware v. Regents' Canal Co.*,

3 De Gex & J. 212; *Brown v. Monmouth &c. Canal Co.*, 13 Beav. 32. See also *Alpena v. Kelley*, 97 Mich. 550; s. c. 56 N. W. Rep. 941. In his celebrated opinion in the collection of cases known as the "Granger Cases," the late Chief Justice Ryan, of Wisconsin, collected and examined a large number of decisions supporting the existence of this jurisdiction; and he stated the nature and growth of the jurisdiction at great length, and illustrated it with a variety of precedents. *Attorney-General v. Railroad Companies*, 35 Wis. 425, 528-533.

² 3 Pomeroy Eq. Jur., 2d ed., § 1341; *Chicago &c. Gaslight Co. v. Lake*, 130 Ill. 42, 60; quoting the above language.

specific performance of a contract rests largely in the sound legal *discretion* of the chancellor, in view of the terms of the contract and all the surrounding circumstances;¹ and an injunction to restrain a breach of the contract is governed by the same principle.² It is a further principle, with regard to the remedy to compel the *specific performance* of a contract, that the *plaintiff* must not only show that he has *complied with its terms*, so far as they can be complied with at the commencement of the suit, but that he is able, ready, and willing to do those other future acts which the contract stipulates for as a part of its performance.³ Applying this principle, it was held that a *gaslight company*, which had entered into a contract with a town to supply it with gas upon condition that it should commence furnishing gas within one year, and which had acquired from a railway company a provisional lease, for the term of two years, of premises to be used as its gas works, the company having an option at the end of the term to take the plant for its own exclusive use, and the gas company, after the time limited in its contract for commencing to furnish the town with gas, had undertaken to lay its mains, pipes, etc., in the streets of the town, which the town authorities had prevented,—could not maintain a suit in equity to enjoin the town from preventing it from so proceeding.⁴

¹ McCabe v. Crosier, 69 Ill. 501; Bowman v. Cunningham, 78 Ill. 48; Chicago &c. R. Co. v. Reno, 113 Ill. 39; Chicago &c. Gaslight Co. v. Lake, 130 Ill. 42, 60.

² Chicago &c. Gaslight Co. v. Lake, *supra*.

³ 1 Pomeroy Spe. Perf., § 330; Chicago &c. Gaslight Co. v. Lake, 130 Ill. 42, 61.

⁴ Chicago &c. Gaslight Co. v. Lake, *supra*. But in Alabama no jurisdiction exists to enforce *specific performance* of a contract for *personal services* made with a foreign corporation, or to prevent its breach by process of *injunction* against resident defendants, where the bill fails to aver with

sufficient certainty that the contract was made in Alabama, or was to be performed within its jurisdiction. Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498; s. c. 3 Am. St. Rep. 758, 760. The court cite: Sayre v. Elyton Land Co., 73 Ala. 85; Galpin v. Page, 18 Wall. (U. S.) 350; Camden &c. Co. v. Swede Iron Co., 32 N. J. L. 15. The court reason that *jurisdiction over non-residents* is entirely of statutory creation and regulation, and, on an examination of the statutes of that State conferring and regulating such jurisdiction, it is found that it does not exist in the particular above named.

§ 7770. **Enjoining a Corporation from Breaking the Contracts of its Stockholders.** — We have already had occasion, several times, to note the principle that a corporation is a distinct person from each and all of its stockholders.¹ It has been said that a corporation is not affected, in the most remote degree, by the contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and that it is not bound to discharge any personal obligation assumed by its stockholders.² Applying this principle, where a manufacturing corporation had sold its business to its principal stockholders, and they, in turn, had sold it to a third person and had made an agreement with their vendee that they would not enter into the same business, directly or indirectly, which agreement was not, however, signed by the corporation, — it was held that the corporation was not bound by it, and that an injunction would not be granted to restrain the corporation from engaging in the business in violation of the agreement.³ But in a case which bears a strong resemblance to this, a corporation was enjoined from engaging in a certain publishing business, at a place named, where one of its largest stockholders, previously to the formation of the corporation, had covenanted not to engage in the business, and where it appeared that all of the stockholders of the corporation were, before its formation, aware of this covenant, and that one of the objects of organizing the corporation was to enable the stockholder to evade it.⁴

¹ *Ante*, § 1071, *et seq.*; § 4471, *et seq.*

² *American Preservers' Co. v. Norris*, 43 Fed. Rep. 711, 714, *per* Thayer, J., citing *Pullman Palace Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587; *s. c.* 6 Sup. Ct. Rep. 194; *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; *s. c.* 13 Am. St. Rep. 23; 6 South. Rep. 41, and citations; *Davis & Co. Wheel Co. v. Davis & Co. Wagon Co.*, 20 Fed. Rep. 699, 700.

³ *American Preservers' Co. v. Norris*, 43 Fed. Rep. 711, 714.

⁴ *Beal v. Chase*, 31 Mich. 490. The same question was before the Supreme Court of Alabama in a case where a *partnership* had sold out its business, with the agreement not to enter into the same business at a particular place, and where the members of the partnership, in conjunction with a third person, had *afterwards* organized a corporation at that place, and had entered into that business. In the absence of any allegation of fraud on the part of the stockholders or the corporation, the court held that

§ 7771. Enjoining Corporations from Committing Trespasses upon Property.—The rule is thus stated by Mr. Justice Story: “If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country.”¹ Equity will, accordingly, restrain a corpo-

a *preliminary injunction* ought not to have been granted, but remanded the cause with leave to amend the bill. The court, in a very clear opinion by Mr. Justice McClellan, laid down two propositions: (1) that a stockholder is a separate person in law from his corporation; and (2) that the corporation is not bound by the contracts of its stockholders made in its behalf, in the absence of a ratification or an acceptance of the benefits accruing to it from such contracts. But the learned justice also conceded the principle that where individuals attempt to take refuge under the cloak of a corporate organization to escape their contracts, equity will not permit them to do so. He said: “In those cases where ‘associates combine together to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention,’ and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice

require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done, although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation, and participated in the effort to avoid it.” *Moore &c. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; *s. c.* 6 South. Rep. 41; 13 Am. St. Rep. 23, 26.

¹ 2 Story Eq. Jur. 928; quoted with approval in *Port of Mobile v. Louisville &c. R. Co.*, 84 Ala. 115, 124; *s. c.* 5 Am. St. Rep. 342, 350. Mr. Justice Somerville, in giving the opinion of the court in this case, further says: “The chancery court of England had come up to this advanced view of the law as early as the day of Lord Hardwicke (*Coulson v. White*, 3 Atk. 21), and this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject: *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *s. c.* 11 Am. Dec. 484; *Lyon v. Hunt*, 11 Ala. 295; *s. c.* 46

poration from entering upon land and committing irreparable injury, where a permission to enter has been granted upon the express condition that such injury should not be inflicted.¹

§ 7772. Enjoining the Unlawful Appropriation of Private Property for Public Purposes.—It is a general principle of equity jurisprudence, well settled both in England and in America, that, where a corporation is permitted, by its charter or by statute, to take the land of private persons for its

Am. Dec. 216; *Scudder v. Trenton &c. Co.*, 1 N. J. Eq. 694; *s. c.* 23 Am. Dec. 756; *Poindexter v. Henderson*, Walker (Miss.), 176; *s. c.* 12 Am. Dec. 550; *Burnley v. Cook*, 13 Tex. 586; *s. c.* 65 Am. Dec. 79; *White v. Flannigan*, 1 Md. 525; *s. c.* 54 Am. Dec. 668. The case of *Osborn v. United States Bank*, 9 Wheat. (U. S.) 738, is a familiar and high authority, emanating from one of the greatest judges, for the position that where a trespass, or a series of trespasses, *operate in effect to destroy or seriously impair the exercise of a franchise*, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction; and in *Broadway Stage Co. v. American Society*, 15 Abb. Fr. (N. S.) (N. Y.) 51, it was expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise; and the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty. *Moses v. Mobile*, 52 Ala. 198." In the same case it was also said: "It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is

accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character, either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind. Citing *Montgomery &c. R. Co. v. Walton*, 14 Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right." *Port of Mobile v. Louisville &c. R. Co.*, 84 Ala. 115, 123; *s. c.* 5 Am. St. Rep. 342, 350, opinion by Somerville, J. In the exercise of this jurisdiction, it has been held that, though the court will not restrain an action of trespass by a party through whose estate a canal is being cut, for deviating from the line prescribed by the company's act of Parliament, because the land-owner has laid by and rested on his legal rights, yet if he files a bill to restrain the company from *deviating*, and then moves to commit them, the court will not do so without a *trial by a jury* in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Co.*, Coop. Cas. 77.

¹ *Unangst's Appeal*, 55 Pa. St. 128.

uses, upon making compensation therefor, or upon other conditions, and it proceeds to take the land and to erect its works thereon, without making such compensation, or without fully complying with such conditions, equity will restrain it from proceeding until such compensation is made, and such conditions are complied with.¹

§ 7773. Whether Such an Injunction ought to be Denied on the Ground of Adequate Remedy at Law.—There are decisions to the effect that injunctions against corporations, seeking, under pretended statutory authority, to take private property for public use, will be denied on the ground of the land-owner having an adequate remedy at law.² It is believed that these decisions are all misconceived. There is really no adequate and safe remedy at law. Even if the corporation is solvent to-day, it may be insolvent to-morrow; and the history of corporate management and wreckage makes it more probable that it will be insolvent than solvent before a judgment for damages can be recovered and collected. Experience proves that such corporations are generally solvent for the purpose of litigating, through the aid of able and astute lawyers, to the last hour of delay afforded by the technicali-

¹ Rankin v. East & West India Dock &c. R. Co., 12 Beav. 298; Railway Co. v. Lawrence, 38 Ohio St. 41; s. c. 43 Am. Rep. 419; Cincinnati &c. Street Railway v. Cumminsville, 14 Ohio St. 523, 524; Crawford v. Delaware, 7 Ohio St. 459. It has been held that a railroad company which is organized for a purpose which is strictly private,—as to connect a coal mine belonging to its incorporators with another railroad,—will be enjoined from appropriating the land of a private owner, under the operation of a statute charging the courts with the duty, where an injury is alleged to have been caused by a corporation claiming right or franchise to do an act by which an injury is produced,

to inquire and ascertain whether the right or franchise claimed by the corporation is actually possessed. Edge-wood R. Co's App., 79 Pa. St. 257, 268, 271. The jurisdiction is nothing more than that which is constantly exercised in the English and in other American courts to restrain the doing of *ultra vires* acts, by public or private corporations, which are contrary to private right.

² See Smith v. Goodknight, 121 Ind. 312; s. c. 23 N. E. Rep. 148, where an injunction was denied on this ground against a gravel road company to restrain it from taking gravel from a gravel pit of the land-owner.

ties of legal procedure, by the unrestrained right of appeal, and by the crowded condition of the dockets of the appellate courts. It has also become the fashion for railroad corporations, desiring to extend their lines, to create and own *dummy* or *catspaw corporations* for the purpose of building such roads, which, when built, are leased to the former corporation for long terms of years. The dummy or catspaw corporation is literally created and owned by the dominant corporation, and exists only through the period of the building of the road, for the purpose of building it, and then passes out of existence and becomes insolvent. Of what value is the remedy afforded by an action at law for damages against such a corporation, which the dominant corporation can always stave off until the servient corporation passes out of existence? Not only should the catspaw corporation be restrained from taking possession of land until the damages shall have been assessed and paid, but the dominant corporation should be held responsible for any wrongs done to land-owners or others by the catspaw corporation, which are not included in such assessments. This just view was taken by the Supreme Court of Illinois;¹ but the Supreme Court of Kansas, in an untenable decision, took the opposite view.² The true theory which underlies the right to an injunction in such cases is that which we shall next proceed to discuss, — that a court of equity will grant an injunction to restrain a corporation from the commission of *ultra vires* acts injurious either to public or private right.

§ 7774. Enjoining the Ultra Vires Acts of Corporations, Injurious to Public Right. — An *information in equity* may be brought by the *Attorney-General* on behalf of the public, to restrain a corporation from the doing of *ultra vires* acts injurious to public right. An examination of the cases supporting this jurisdiction will show that the jurisdiction is exercised

¹ Kankakee R. Co. v. Horan, 131 Ill. 288; s. c. 41 Am. & Eng. R. Cas. 13.

² Atchison &c. R. Co. v. Davis, 31 Kan. 645; s. c. 25 Am. & Eng. R.

Cas. 305. See a suggestive paper on this subject read by Hon. J. M. Avery before the Texas Bar Association, and republished in 27 Am. Law Rev. 361.

sometimes on the ground of *nuisance*, sometimes on the ground of *trust*, and in particular cases perhaps on both grounds.¹ Proceeding on the ground of *trust*, such informations lie in the case of trusts for *charitable purposes*, where the beneficiaries are so numerous and indefinite that a breach of the trust cannot be effectively redressed except by suit in behalf of the public.² Proceeding on the ground of *nuisance*, such informations lie to restrain public nuisances which affect or endanger the public safety or convenience, and which require immediate judicial interposition, such as *obstructions of highways* or of *navigable waters*.³ Upon this principle, injunctions are granted to restrain railway companies from unlawfully interfering with the *public highway*;⁴ to restrain street railway

¹ Attorney-General v. Great Northern R. Co., 1 Drew. & Sm. 154; Attorney-General v. Mid-Kent &c. R. Co., L. R. 3 Ch. App. 100; Attorney-General v. Great Northern R. Co., 4 De Gex & Sm. 75; Attorney-General v. Liverpool, 1 Mylne & Cr. 171; Attorney-General v. Litchfield, 13 Sim. 547; Attorney-General v. Norwich, 2 Mylne & Cr. 406; Attorney-General v. Chicago &c. R. Co., 35 Wis. 425; Auckland v. Westminster Local Board, L. R. 7 Ch. App. 597; Frewin v. Lewis, 4 Mylne & Cr. 249, 254; State v. Saline County Court, 51 Mo. 350; s. c. 11 Am. Rep. 454; People v. Third Avenue R. Co., 45 Barb. (N. Y.) 63; Attorney-General v. Aspinall, 2 Mylne & Cr. 613; Attorney-General v. Poole, 4 Mylne & Cr. 17; Attorney-General v. Dublin, 1 Bligh (N. R.), 312; Stockport District Water Works v. Manchester, 9 Jur. (N. S.) 266; Attorney-General v. Commissioners, L. R. 10 Eq. 152; People v. Lowber, 7 Abb. Pr. (N. Y.) 158; People v. New York, 10 Abb. Pr. (N. Y.) 144; People v. New York, 32 Barb. (N. Y.) 102; Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91, 100; s. c. 88 Am. Dec. 534 (doctrine recognized).

² Parker v. May, 5 Cush. (Mass.) 336; Jackson v. Phillips, 14 Allen (Mass.), 539, 579; Attorney-General v. Garrison, 101 Mass. 223. See Gen. Stats. Mass. 1860, ch. 14, § 20; Pub. Stat. Mass. 1882, ch. 17, § 6.

³ District Attorney v. Lynn &c. R. Co., 16 Gray (Mass.), 242; Attorney-General v. Cambridge, 16 Gray (Mass.), 247; Attorney-General v. Boston Wharf Co., 12 Gray (Mass.), 553; Rowe v. Granite Bridge Co., 21 Pick. (Mass.) 344. But it has been held that such an information cannot be maintained against a *private trading corporation*, where the acts complained of are not shown to have injured or endangered any of the rights of the public, or of any individual or other corporation, and where the only objection to them is that they are not authorized by its act of incorporation, and are, therefore, against public policy. Attorney-General v. Tudor Ice Co., 104 Mass. 239; s. c. 6 Am. Rep. 227.

⁴ Attorney-General v. Great Northern R. Co., 4 De Gex & Sm. 75; Davis v. New York, 2 Duer (N. Y.), 663. Such injunctions are also sometimes granted on the ground that the threat-

companies from making unauthorized extensions of their lines, the same being a public nuisance;¹ to restrain *municipal corporations* from making unlawful issues of their bonds;² to restrain *public corporations* from misapplying their funds in other particulars;³ to restrain railroad companies from exacting *illegal tolls*;⁴ to prevent a newly-organized corporation from commencing business until it has paid the *license tax* due the State;⁵ to restrain a *railway company* from carrying on the business of *coal merchants*;⁶ to restrain acts of inferior courts or boards, on the ground of *public nuisance*.⁷ But an information does not lie, at the suit of the Attorney-General, to restrain the *ultra vires* acts of a corporation, where the *public rights* are not injuriously affected thereby.⁸

ened unlawful appropriation of the highway will interfere with the easement therein of abutting owners: *Ward v. Ohio River R. Co.*, 35 W. Va. 481; s. c. 14 S. E. Rep. 142.

¹ *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63.

² *State v. Saline County Court*, 51 Mo. 350; s. c. 11 Am. Rep. 454; *State v. Callaway County Court*, 51 Mo. 395.

³ *Attorney-General v. Liverpool*, 1 Mylne & Cr. 171, 210 (overruling *Pechel v. Fowler*, 1 Anst. 549); *Attorney-General v. Litchfield*, 3 Sim. 547; *Attorney-General v. Norwich*, 2 Mylne & Cr. 406.

⁴ *Attorney-General v. Chicago & C. R. Co.*, 35 Wis. 425, 523, 524.

⁵ *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270; s. c. 19 Am. St. Rep. 394; 13 N. J. Law Jour. 113; 29 Am. & Eng. Corp. Cas. 589; 19 Atl. Rep. 733.

⁶ *Attorney-General v. Great Northern R. Co.*, 1 Drew. & Sm. 154, 161.

⁷ *Attorney-General v. Forbes*, 2 Mylne & Cr. 123, 133; *Frewin v. Lewis*, 4 Mylne & Cr. 249; s. c. 9 Sim. 66, 69. See also *Wiggin v. New York*, 9 Paige (N. Y.), 16, 20, 21; *Hill v. Reardon*, 2 Sim. & Stu. 431, 439, note

1. Also, at the suit of *private persons*, to restrain *nuisances* by *quasi-public corporations*. *Box v. Allen*, 1 Dick. 49; *Kerrison v. Sparrow*, Coop. Cas. 305; *Curtis v. Cropley*, 3 Jur. 171. That equity will not try the question of nuisance or no nuisance, see *Semple v. London & C. R. Co.*, 1 Railw. Cas. (Eng.) 120, 133.

⁸ *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; s. c. 6 Am. Rep. 227. The grounds on which this jurisdiction rests were explained at length by Lord Cottenham in *Frewin v. Lewis*, 4 Myl. & Cr. 249, 254. This jurisdiction was exercised to restrain a local board of works from interfering with the erection of certain buildings which the plaintiff proposed to erect, in *Auckland v. Westminster Local Board*, L. R. 7 Ch. 597. The principles on which *mandatory injunctions* are granted in England on information of the Attorney-General, at the relation of private parties, to restrain corporations from acting in excess of their powers, so as to commit injuries upon the relator, were explained by Lord Cairns, L. J., in *Attorney-General v. Mid-Kent & C. R. Co.*, L. R. 3 Ch. 100, 103; and by

§ 7775. **Such Jurisdiction Supported upon the Ground of Trust.**—We have already had occasion to note the principle that injunctions will lie at the suit of minority stockholders to restrain the directors or trustees of corporations from making applications of the corporate funds which are not authorized by the charter, governing statute, articles of association, or other constating instrument; and that this jurisdiction refers itself to the well-known power of a court of equity of superintending the execution of trusts.¹ An analogous doctrine supports, on the ground of trust, the jurisdiction of courts of chancery on informations brought by the Attorney-General on behalf of the public to restrain *ultra vires* acts of corporations injurious to public right. Thus, it has been reasoned in the English Court of Chancery that when it is ascertained that a borough fund of a corporation is a *trust fund*,² then, since the Court of Chancery has jurisdiction to

Rolf, L. J., in the same case: *Ibid.* 104. Other English cases where this jurisdiction has been exercised are: *Attorney-General v Brown*, 3 Swanst. 65; *Attorney-General v Great Northern R. Co.*, 1 Drew. & Sm. 154, 161. The grounds of extending this jurisdiction to cases of public injuries are learnedly and cogently set forth in the opinion of Mr. Chief Justice Ryan, in that celebrated collection of cases in Wisconsin, known as the "Granger Cases": *Attorney-General v. Chicago &c. R. Co.*, 35 Wis. 425, 532, 533. The learned Chief Justice pointed out that the grounds of jurisdiction were none the less clear because it has the effect to turn the writ of injunction into a *quasi-prerogative writ*. *Ibid.* 550. In the same decision the objection that this extension of the jurisdiction operated to impair the right of trial by jury was also forcibly met and shown to be untenable: *Ibid.* 550, 551. Nor was it an objection to such an information that it failed to aver any *specific injury* to the plaintiff from the

acts complained of, where the injury flowing from those acts—exacting illegal tolls—was an inference or presumption of law. *Ibid.* 552. Nor, on an application by the Attorney-General of New York for an injunction against a corporation to restrain a violation of law, is it necessary to show specifically that the commission of the act would produce injury to the relator under section 219 of the Code: *People v. Metropolitan Bank*, 7 How. Pr. (N. Y.) 144. That an action is not maintainable by a stockholder to prevent, by an injunction and receiver, the usurpation of corporate powers, but must be brought by the Attorney-General,—see *People v. Erie R. Co.*, 36 How. Pr. (N. Y.) 129. That injunctions are void and need not be obeyed, unless the statutory *notice* has been given,—see *New York v. Starin*, 56 N. Y. Super. 153; *s. c.* 2 N. Y. Supp. 346; 16 N. Y. St. Rep. 882.

¹ *Ante*, § 4518, *et seq.*

² As was held in *Attorney-General v. Aspinall*, 2 Mylne & Cr. 613, 618.

prevent breaches of trust, it will follow that it has jurisdiction to restrain a misapplication by the corporate authorities of such a fund, although the same may have been raised by a rate or tax.¹ In one case Lord Eldon supported the jurisdiction of the Court of Chancery to restrain the *ultra vires* acts of the commissioners for paving, lighting and cleansing an incorporated town, on the ground that the fund which had been placed by the act of Parliament at their disposal for a certain purpose presented the case of a gift or grant for *charitable uses*, within the terms of the statute of Elizabeth.² But, although the jurisdiction in England to control, in this manner, the trustees of parishes and other public and *quasi*-public corporations, appears to be well settled,³ and although the jurisdiction might not be rested upon that statute in America, but would be generally rested on the broad ground of the power of a court of equity to deal with trusts, the existence of the jurisdiction is equally beneficial and scarcely less doubtful.

§ 7776. Injunctions to Restrain Invasions of Corporate Franchises.—Injunctions will be granted to restrain the invasion of franchises granted to corporations where the corporation would be without an adequate remedy at law in the sense already considered,⁴—as, for instance, to protect a *turnpike company* in its exclusive privilege of erecting toll gates and receiving tolls upon a common highway;⁵ or to protect the grantee of an exclusive right to the navigation of a river, to whom the right had been granted in consideration of improving the navigation and putting a boat thereon within a stated period of time.⁶ Speaking with reference to this subject it has been said by Chancellor Kent: “The equity jurisdiction

¹ Attorney-General v. Poole, 4 Mylne & Cr. 17.

² Stat. 43 Eliz., ch. 4; Attorney-General v. Brown, 1 Swanst. 265, 306.

³ Attorney-General v. Pearson, 2 Coll. 581. Compare Attorney-General v. Compton, 1 Young & Coll. 417; Attorney-General v. Cullum, 1 Young & Coll. 411.

⁴ Osborn v. Bank of United States, 9 Wheat. (U. S.) 738.

⁵ Croton Turnpike Co. v. Ryder, 1 Johns. Ch. 611; *ante*, §§ 5304, 5404.

⁶ Moor v. Veazie, 31 Me. 360. See also Bush v. Western, Finch's Prec. in Chan. 530; Whitechurch v. Hide, 2 Atk. 391; Livingston v. Van Ingen, 9 Johns. (N. Y.) 507.

in such a case is extremely benign and salutary. Without it the party would be exposed to constant and ruinous litigation, as well as to have his right excessively impaired by frauds and evasion.”¹ Upon the same subject the Supreme Court of Alabama have also said: “The jurisdiction of a court of equity to protect a franchise of this kind [the right of a railway company to load and unload in the public streets of a city] from unlawful invasion or disturbance, is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the *prevention of irreparable injury*, or such as cannot be adequately estimated in damages at law; at other times, the avoidance of a *multiplicity of suits*, and again the abatement of annoyance in the nature of a legal *nuisance*. Another controlling reason for interference by equity in such cases is, that the public at large have an interest in the protection of such a privilege, as well as the parties particularly interested.”² But this jurisdiction will not be exercised where the direct purpose of the injunction is to restrain the so-called *legislative acts of a municipal corporation*, — that is, to restrain the *passage of an ordinance*, which, if carried out, will operate as an invasion of a franchise previously granted to a private corporation. Thus, an injunction will not be granted, at the suit of a *gas company*, to restrain the council of a city from passing an ordinance allowing other gas companies to lay pipes in its streets, because the city has already granted an exclusive privilege to complainant gas company to lay and maintain pipes in its streets.³ While so holding, the court, speaking through Mr. Justice McClellan, say: “If an individual or private corporation had granted a franchise like that

¹ Croton Turnpike Co. v. Ryder, 1 Johns. Ch. (N. Y.) 611, 616.

² Mobile v. Louisville &c. R. Co., 84 Ala. 115, 123; s. c. 5 Am. St. Rep. 342, 349; citing Stage Co. v. American

Society, 15 Abb. Pr. (N. Y.) (N. Y.) 51.

³ Montgomery Gaslight Co. v. Montgomery, 87 Ala. 245, 257; s. c. 6 South. Rep. 113; 4 L. R. A. 616.

involved here, and was about to repudiate the grant and make other contracts with respect to its subject-matter, which would cast a cloud on the title held under the first grant; or, if in this case, the city had already passed an ordinance granting the privilege to private parties, who were threatening to exercise it to the injury of the original grantee;—in either of these cases unquestionably a court of equity would enjoin the threatened action.”¹

§ 7777. When not Necessary to Establish the Franchise in a Trial at Law.—Where the grant of a franchise is disputed and the right to its exercise doubtful, then the rule of equity procedure is that the party claiming an injunction for its protection must first establish his right in a trial at law. But where the plaintiff shows a clear and undisputed right granted by statute, and shows that he is in the possession and exercise of the right at the commencement of the action, he may claim an injunction without going to the idle expense and delay of establishing his right at law.² Speaking with reference to this question, the Supreme Court of Alabama have said: “The party aggrieved is not required to establish his right at law before he is permitted to invoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and contract which is in writing. Its construction is for the court, and not for the jury.”³ Speaking with reference to the same question, the Supreme Judicial Court of Maine have also said: “If the complainant relies on a private grant and there is a denial of the right claimed, he must first establish his claim at law. But in those cases where there has been a long continued and

¹ *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 257; s. c. 6 South Rep. 113; 4 L. R. A. 616; citing *Birmingham &c. R. Co. v. Birmingham Street R. Co.*, 79 Ala. 465; s. c. 53 Am. Rep. 615; 2 High Inj., § 902, *et seq.*

² *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. (N. Y.) 611.

³ *Mobile v. Louisville &c. R. Co.*, 84 Ala. 115; s. c. 5 Am. St. Rep. 342, 349.

uninterrupted possession and enjoyment of the right, an injunction may issue without a trial at law. Where a State has the right to make the grant, and it has been made, and the required conditions have been performed, it has been held to be equivalent to a determination at law that the right exists. Unless it be a matter of doubt whether the act complained of is a nuisance, the only object of a trial at law would be to test the constitutionality of the grant from the State. . . . The principle to be derived from the authorities seems to be this: Where the statute right does not appear to be in doubt and the act complained of is clearly a violation of it, the power of injunction may be properly exercised; but where there is doubt as to the statute right, or it is uncertain whether the acts complained of amount to a nuisance, an injunction should not be decreed until the rights become ascertained at law. And it has been holden that where the acts complained of are or may be destructive of the rights of the complainant, an injunction may be granted.”¹

§ 7778. **To Enjoin State Railroad Commissioners from Establishing Rates and Charges.**—Assuming that the statute creating a State Board of Railroad Commissioners and requiring them to establish schedules of rates and charges for the different railways within the State, is valid under the constitution of the United States,—a subject already considered,²—an injunction will not be granted to restrain such commissioners from proceeding under the statute to fix such rates, because to do so would be to control their *discretionary action*.³ The rule that the discretionary action of public officers will not be controlled or interfered with by *mandamus*⁴ is equally applicable to the writ of *injunction*.⁵

¹ *Moor v. Veazie*, 31 Me. 360, 377; distinguishing *Ingraham v. Dunnell*, 5 Metc. (Mass.) 118, and *Porter v. Witham*, 17 Me. 292.

² *Ante*, § 5530, *et seq.*

³ *Reagan v. Farmers' Loan & Co.*, 154 U. S. 362; *McWhorter v. Pensacola & C. R. Co.*, 24 Fla. 417; *s. c.*

12 Am. St. Rep. 220; 5 South. Rep. 129; 2 L. R. A. 504.

⁴ *Wood v. Strother*, 76 Cal. 545; *s. c.* 9 Am. St. Rep. 249, 257, 258; *Towle v. State*, 3 Fla. 202; *High Ext. Rem.*, §§ 42, 80.

⁵ *McWhorter v. Pensacola & C. R. Co.*, 24 Fla. 417. The injunction in the

§ 7779. **To Enjoin State Railroad Commissioners from Enforcing Unreasonable Rates.** — In the leading Federal case on this subject, in which the doctrine of preceding cases may be said to have culminated after some modifications of opinion, and in which the court was at last fortunately unanimous, it was held that a citizen of another State, who feels himself aggrieved and injured by the rates prescribed by a State railway commission, may seek his remedy in equity against such commissioners in the Circuit Court of the United States within the State of such commission, and may have an injunction against the enforcement of such rates as are found to be unreasonable and unjust in the sense of being confiscatory, — that is, in the sense of depriving the railroad company of the means to pay its fixed charges, and to pay to its stockholders a reasonable remuneration for their investments.¹

§ 7780. **Whether a Bill for an Injunction against Railway Commissioners is a Suit against the State.** — The Federal doctrine is that a bill in equity, in a court of the United States, by a citizen of another State, to enjoin the railway commissioners of the State in which the suit is brought, from the enforcement of unreasonable rates of charges against the railroad company, is not a suit against the State, within the constitutional rule which excludes Federal jurisdiction in such cases.² It has been reasoned by the Supreme Court of Florida,

particular case which was awarded by the court below and set aside on appeal, prohibited the railroad commissioners from “promulgating as binding upon the complainant the rates for transportation of freight and passengers heretofore prescribed by the defendants for the complainant, or other rates substantially the same as said rates, and from procuring or permitting the institution of any suits against the complainant for any alleged charges by the complainant in excess of the said rates heretofore fixed, or in excess of any other rates

which may be fixed by the defendants for the complainant substantially the same as the said rates.” *McWhorter v. Pensacola &c. R. Co.*, *supra*.

¹ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. See also *Reagan v. Mercantile Trust Co.*, 154 U. S. 413 and 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420.

² *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. See also *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420.

that where the statute provides that railroad commissioners shall make and fix reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business within the State, and shall, as soon as practicable, furnish each company with a schedule of such charges, — a suit to enjoin such commissioners from enforcing such charges, on the ground that they are unreasonable and unjust, is not, in itself, a suit against the State; but the court further reasoned, with reference to the case before them, that as the statute provides a penalty for the violation of such rates as fixed, and directs the commissioners to sue in the name of the State to recover the penalty, if the bill for an injunction also prays that they be enjoined from instituting such suit, it becomes, in effect, an action against the State, and cannot be maintained.¹

§ 7781. At the Suit of Private Persons to Compel Corporations to Perform their Public Duties. — In the absence of a *special injury* done to him, or of a special right of action conferred by *statute*, the general rule is that a private person cannot maintain a suit in equity, the purpose of which is to compel a corporation to perform its *public duties*. The reason is that if one individual may interpose, any other may, and

¹ McWhorter v. Pensacola &c. R. Co., 24 Fla. 417; s. c. 5 South. Rep. 129; 12 Am. St. Rep. 220; 2 L. R. A. 504. It was at one time held in the Supreme Court of the United States that the court would look only to the *record* to determine whether or not the action was an *action against the State*: Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; Davis v. Gray, 16 Wall. (U. S.) 203. But in subsequent cases the court discovered that this test was too narrow: Louisiana v. Jumel, 107 U. S. 711; Cunningham v. Macon &c. R. Co., 109 U. S. 446; Hagood v. Southern, 117 U. S. 52; Re Ayers, 123 U. S. 443; Virginia Coupon Cases, 114 U. S. 269. See

New Hampshire v. Louisiana, 108 U. S. 76; State v. Burke, 33 La. An. 498; Weston v. Dane, 51 Me. 461; Marshall v. Clark, 22 Tex. 23; Houston &c. R. Co. v. Randolph, 24 Tex. 317; Printup v. Cherokee R. Co., 45 Ga. 365; Hosner v. De Young, 1 Tex. 764. In round terms, the rule is that a sovereign State cannot be sued without its own consent, and then only in the mode and in the tribunal pointed out by that consent, which must be unequivocally expressed; and that what cannot be done directly, cannot be done indirectly in the form of actions against its officers: Moore v. Tate, 87 Tenn. 725; s. c. 10 Am. St. Rep. 712, 724, note.

as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife.¹ The doctrine is analogous to that relating to bills in equity by private persons for injunctions against public nuisances,—the rule being that such actions cannot be maintained unless the complainant shows a *particular injury* to himself distinct from that which he suffers in common with the rest of the public.² When, therefore, the *slack-water navigation* of the Lehigh Coal & Navigation Company maintained, by means of pumps, locks, and other devices, was destroyed by a flood, it was held that a bill in equity could not be maintained by another corporation, to enjoin the former corporation *from neglecting to repair* and put in operation their navigation; and that the complainants had no right to a decree compensating them for any damages suffered as an incident to the non-repairing.³

¹ Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91, 99; s. c. 88 Am. Dec. 534.

² Bigelow v. Hartford Bridge Co., 14 Conn. 565; s. c. 36 Am. Dec. 502.

³ Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91, 99; s. c. 88 Am. Dec. 534. On analogous grounds, a *mandamus* was denied by Lord Ellenborough, in the Court of King's Bench, to a brewery company, to assess damages against a dock company for polluting the waters of a public navigable river, from which the brewery company had been accustomed to draw water by pumps, wherewith to brew their beer. Lord Ellenborough was of opinion that a private proprietor cannot have such a right in the waters of a public navigable river as would give him a right to compensation for the deterioration of the same by a company proceeding under an act of Parliament. The injury, if any, was to all the king's subjects, and that was the subject-matter of indictment, and not of action. Otherwise, every person who had

before used the water of the river might equally claim compensation, for which there was no pretense. And by the same rule, if the salubrity of the air in Bristol were impaired in consequence of the docks, every inhabitant of the place might as well claim compensation. For general injuries, common to all the subjects, the remedy is by indictment; and suppose that is taken away by the act (which was admitted), then the act has taken away the only remedy which the law would have given for this general injury. *Rex v. Bristol Dock Co.*, 12 East, 429, 432. Analogous decisions denying private right of action for the redress of injuries common to the whole public—many of them so unjust that their doctrines have been measurably discarded in modern times,—are: *Rose v. Miles*, 4 Maule & S. 101; *Ivison v. Moor*, 1 Lord Raym. 486; *Earle's Case*, Carth. 173; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Greasly v. Codling*, 2 Bing. 263.

§ 7782. **Injunctions against Strikes, Boycotts, and Other Combinations among Workmen.**—Within the last few years the powers of courts of equity have been called into play to an extent hitherto unprecedented, at the suits of employers of labor, individual and corporate, to restrain strikes, boycotts, and other combinations and conspiracies among their employés, injurious to the property and business of the complainants.¹ The use of the injunction in such cases is vindicated upon the ground that equity exercises this species of jurisdiction for the *protection of property and business* against irreparable injury, threatened by persons who are insolvent, and who, by reason of their numbers, cannot be impleaded in proceedings at law, without a multiplicity of actions. An extended discussion of this subject cannot be regarded as germane to a work on corporations; but, briefly stated, it may be said that injunctions have been granted to restrain striking employés from intimidating other employés, so as to induce them to quit their employment, or to prevent persons from engaging in the employment of the plaintiffs;² to restrain

¹ *Cœur d'Alene Consolidated Mining Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260; *s. c.* 19 L. R. A. 382; *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135; *s. c.* 12 L. R. A. 193 (where there is an extensive note on the subject); *State v. Glidden*, 55 Conn. 46; *s. c.* 3 Am. St. Rep. 23; *Sherry v. Perkins*, 147 Mass. 212; *s. c.* 9 Am. St. Rep. 689; *Murdock v. Walker*, 152 Pa. St. 565; *s. c.* 34 Am. St. Rep. 678; *Barr v. Essex Trades' Council (N. J. Eq.)*, 30 Atl. Rep. 881; *Continental Ins. Co. v. Board of Underwriters*, 67 Fed. Rep. 310; *Longshore Printing & Co. v. Howell*, 26 Or. 527; *s. c.* 38 Pac. Rep. 547 (where the injunction was refused on the ground that the injury did not appear to be irreparable); *Wick China Co. v. Brown*, 164 Pa. St. 449; *s. c.* 35 W. N. C. 330;

25 Pitts. L. J. (N. S.) 151; 30 Atl. Rep. 261; *Reynolds v. Everett*, 144 N. Y. 189; *s. c.* 63 N. Y. St. Rep. 89; 39 N. E. Rep. 72 (where a permanent injunction was refused because the strike had ceased, and the injury did not appear to be irreparable); *Farmers' Loan & Co. v. Northern Pac. R. Co.*, 60 Fed. Rep. 803; *Arthur v. Oakes*, 63 Fed. Rep. 310 (appeal in the preceding case); *California R. Co. v. Rutherford*, 62 Fed. Rep. 796; *United States v. Elliott*, 64 Fed. Rep. 27; *United States v. Debs*, 64 Fed. Rep. 724; *Re Debs*, 158 U. S. 564. See also *Davis v. Foreman* [1894], 3 Ch. 654 (where an injunction was refused to restrain an employé from quitting his employment).

² *Cœur d'Alene & Co. Min. Co. v. Miners' Union*, 51 Fed. Rep. 260; *s. c.* 19 L. R. A. 382; *Wick China Co. v. Brown*, 164 Pa. St. 449.

persons from gathering in crowds at the plaintiff's place of business and interfering with his workmen;¹ to restrain the continuation of a so-called "boycot" against a newspaper;² in courts of the United States, under the Act of Congress of July 2, 1890,³ to restrain striking railway employés from interrupting the operations of *interstate commerce*;⁴ to restrain railway employés, while continuing in their employment, from refusing to perform their duties, when such refusal interferes with the transmission of the mails and with the operations of commerce between the States;⁵ to restrain the employés of the receivers of a railway, appointed by a court of the United States, from entering into combinations or conspiracies for the purpose of crippling the property in the hands of the receivers, and embarrassing the operation of the railroads under their management, either by disabling the engines, cars, etc., or by interfering with their possession; or by actually obstructing their control and management of the property; or by using force, threats, or other wrongful methods against the receivers, their agents, or employés remaining in their service; or by using like methods to cause their employés to quit their service; or by preventing or deterring others from entering their service in the place of those leaving it; but not to enjoin them from merely quitting the service singly or in a body, for the purpose of securing better wages or better terms of employment.⁶ The Federal doctrine

¹ *Murdock v. Walker*, 152 Pa. St. 595; *s. c.* 34 Am. St. Rep. 678; *Sherry v. Perkins*, 147 Mass. 212; *s. c.* 9 Am. St. Rep. 689.

² *Barr v. Essex Trades' Council*, (N. J. Eq.) 30 Atl. Rep. 881.

³ 26 U. S. Stat. 209.

⁴ *United States v. Elliott*, 62 Fed. Rep. 801; and 64 Fed. Rep. 27; *United States v. Debs*, 64 Fed. Rep. 724; *s. c.* 27 Chicago Leg. News, 139. See also *Re Debs*, 158 U. S. 564; *Toledo &c. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 746; *s. c.* 19 L. R. A. 387, 395; *United States v. Workmen's Amalgamated Council*, 54 Fed. Rep.

994; *s. c.* 26 L. R. A. 158; *Thomas v. Cincinnati &c. R. Co.*, 62 Fed. Rep. 803; *United States v. Debs*, 63 Fed. Rep. 436; *Re Charge to Grand Jury*, 62 Fed. Rep. 828; *Re Grand Jury*, 62 Fed. Rep. 834; *Re Grand Jury*, 62 Fed. Rep. 840; *United States v. Cassidy*, 67 Fed. Rep. 698. Compare *United States v. Patterson*, 55 Fed. Rep. 605, where this use of the injunction is disapproved by Mr. Circuit Judge Putnam.

⁵ *Southern California R. Co. v. Rutherford*, 62 Fed. Rep. 796.

⁶ *Arthur v. Oakes*, 63 Fed. Rep. 310; *s. c.* 25 L. R. A. 414; modifying

on this subject may be said to have culminated in a decision of the Supreme Court of the United States, which must remain for all time the leading Federal case on this subject, in which the court unanimously affirmed the proposition that the United States may, by a bill in equity in its own courts, restrain the striking employés of railway companies from interfering with the operations of interstate commerce, and with the transportation of the United States mails, and may punish them for contempt, without trial by jury, for disobeying such restraining orders. The court proceeds upon the view that the United States has jurisdiction over every foot of soil within its territory, and that it is entitled to exert its authority directly upon each citizen,—a principle unquestionably sound and of the very greatest importance. The jurisdiction to grant an injunction in such cases is upheld upon the settled doctrine of the English Court of Chancery, that an injunction would be granted at the suit of the Attorney-General to restrain purprestures of public highways and navigations. The opinion of the court, delivered by Mr. Justice Brewer, is a very learned and conclusive presentation of the subject, and is, throughout, clear and strong.¹

§ 7783. Other Decisions Illustrating the Use of Injunctions in the Case of Corporations.—Injunctions have been granted in England to restrain the prosecution of corporate work, at the suit of

s. c. sub nom. Farmers' Loan & Co. *v.* Northern Pac. R. Co., 60 Fed. Rep. 803.

¹ The leading Federal case, so far decided, relating to the extent of the power to enjoin striking employés, is *Arthur v. Oakes*, 63 Fed. Rep. 310; *s. c.* 25 L. R. A. 414, decided by the United States Court of Appeals, in a very learned and well-considered opinion by Mr. Justice Harlan in 1894; modifying an injunctive order previously granted by Mr. Circuit Judge Jenkins, in the same case, reported under the name of *Farmers' Loan & Co. v. Northern Pac. R. Co.*,

60 Fed. Rep. 803. The opinion of Mr. District Judge Philips in *United States v. Elliott*, 64 Fed. Rep. 27,—a case growing out of the Debs conspiracy,—is likewise learned, clear, and persuasive. Some of the cases above referred to incidentally decide that the act of Congress "to legalize the incorporation of National Trades Unions" (24 U. S. Stat. 567), does not operate to restrain the exercise of the jurisdiction here spoken of: *Arthur v. Oakes*, 63 Fed. Rep. 310; *s. c.* 25 L. R. A. 414; *Farmers' Loan & Co. v. Northern Pac. R. Co.*, 60 Fed. Rep. 803.

shareholders, on the ground that the corporation has *not sufficient funds* to complete the work, and that the undertaking is likely to prove abortive;¹ to *restrain breaches of trust* on the part of a trustee at the suit of a private corporation;² to enjoin a *disproportionate issue of shares* upon a reorganization after a foreclosure;³ to enjoin the *infringement of a patented invention*, the managing officers of the corporation being joined as defendants, in order that *contempt proceedings* may go against them;⁴ to *remove the name* of the plaintiff from a *register of shareholders*—that is “to rectify the register”;⁵ at the suit of *judgment creditors*, to enjoin the corporation and its managing officers from making a *fraudulent disposition of its property*, or from disposing of it to *prefer certain creditors*,⁶ and for the appointment of a *receiver*—but not at the suit of a *general creditor*;⁷ and to enjoin a *fraudulent scheme*, by which the assets of a railroad company are turned over to a rival company.⁸

§ 7784. Cases where Such Injunctions not Granted.—An injunction will not be granted, at the suit of a *tax-payer*, to enjoin a railroad company from receiving State aid without complying with the conditions under which such aid has been granted, since this is a question which can only be raised by the public authorities;⁹ nor to *restrain* the prosecution of an *action at law* against the plaintiff

¹ *Agar v. Regent's Canal Co.*, MS., cited by Lord Eldon in *King's Lynn v. Pemberton*, 1 Swanst. 243, 250; *s. c.*, on another point, *Coop. Cas.* 77. But Lord Eldon refused to extend this principle so as to restrain a corporation from prosecuting work on its own land, upon the ground that an injury would ensue to the complainants *provided they should complete the work*; since this would involve the absurdity of asking the court to interfere on the ground that they had not funds to complete the work, when no injury could accrue to the complainant until the work should be completed. *King's Lynn v. Pemberton*, 1 Swanst. 243, 251.

² *Aspen v. Rucker*, 10 Colo. 184; *s. c.* 15 Pac. Rep. 791. Or at the suit of a public corporation: *Denver v.*

Kent, 1 Colo. 336. See also *Georgetown v. Glaze*, 3 Colo. 230.

³ *Lincoln Nat. Bank v. Portland*, 82 Me. 99; *s. c.* 7 Rail. & Corp. L. J. 297; 19 Atl. Rep. 102.

⁴ *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. Rep. 123, opinion by Thayer, J.

⁵ *Routh v. Webster*, 10 Beav. 561; *Taylor v. Hughes*, 2 Jones & Lat. 24; *Shorthridge v. Bosanquet*, 16 Beav. 84; *Compare Bullock v. Chapman*, 2 De Gex & Sm. 211; *ante*, § 1446.

⁶ *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. Rep. 204; *s. c.* 8 Rail. & Corp. L. J., 457.

⁷ *Erie R. Co. v. Wilkesbarre Coal &c. Co.*, 9 Phila. (Pa.) 262; *ante*, § 6877.

⁸ *Langdon v. Branch*, 37 Fed. Rep. 449.

⁹ *Jones v. Macon &c. R. Co.*, 39 Ga. 138.

corporation, on any other ground than would operate to restrain it in the case of an individual;¹ nor to decide between rival boards of *directors* or *trustees*;² nor to *restrain directors* from exercising the duties of their offices, on the ground that they have been improperly appointed;³ nor to *remove directors* from their offices;⁴ nor, at the suit of a private corporation, to restrain "*legislative action*," on the part of *municipal corporations*, such as the passing of a void ordinance; since if void it will be harmless.⁵

¹ *American Water Works v. Vener*, 18 N. Y. Supp. 379. Nor to enjoin a municipal corporation from suing for infractions of ordinances before a justice of the peace, from whose decision an appeal lies: *Devron v. Municipality No. One*, 4 La. An. 11.

² *Nolde's Appeal* (Pa.), 15 Atl. Rep. 777 (not off. rep.); *ante*, §§ 764, 766.

³ *Hattersley v. Shelburne*, 10 Week. Rep. 881. See also, *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. Div. 1. It should be stated, however, that in this case the question was decided upon the merits, which necessarily involved the assumption of jurisdiction in the court. Where a *salary* is attached to the office, courts of equity will not, as a general rule, enjoin the payment of the salary to the incumbent pending a contest. *Field v. Com.*, 32 Pa. St. 478; *Re Ramshay*, 18 Ad. & El. (N. S.) 173; *s. c.* 83 Eng. C. L. 173, 174; *Reg. v. Darlington Free Grammar School*, 6 Ad.

8 El. (N. S.) 682. So, a bill in equity praying for an injunction will not lie to determine which of two parties is entitled to the office of school director. *Gilroy's Appeal*, 100 Pa. St. 5. Neither will an injunction be granted to restrain *borough officers* from entering upon their official duties under the appointment of a town council alleged to be illegal, though they have not exercised or attempted to exercise the duties of such offices. *Updegraff v. Crans*, 47 Pa. St. 103.

⁴ *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. Div. 1; *ante*, § 764.

⁵ *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *s. c.* 24 Am. Rep. 756. That the general doctrine is in conformity with this decision, see *Dill. Mun. Corp.*, §§ 1, 318; 2 High Inj, § 1246; *Chicago v. Evans*, 24 Ill. 52; *Smith v. McCarthy*, 56 Pa. St. 359; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 257; *s. c.* 6 South. Rep. 113; 4 L. R. A. 616.

CHAPTER CLXXXVIII.

ATTACHMENTS AGAINST CORPORATIONS.*

SECTION

7790. Corporations are "persons" within the attachment laws.
 7791. Corporations not attachable in actions against shareholders.
 7792. Grounds of attachment against corporations.
 7793. Lien of attachments against corporations.
 7794. Attachments not leviable after appointment of receiver.

SECTION

7795. Attaching creditors entitled to preference in distribution.
 7796. Attachments by directors.
 7797. What property attachable.
 7798. Bond for attachment.
 7799. Liability to attachment of corporations formed by the concurrent legislation of different States.

§ 7790. Corporations are "Persons" within the Attachment Laws.—Where the term "persons" is used in a statute, corporations will be included in this designation, when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes, unless the language of the statute indicates that the term was employed in a more limited sense, or the subject-matter of the act points to this conclusion.¹ Upon this analogy, the view now universally adopted is that corporations, both *foreign* and

¹ United States *v.* Amedy, 11 Wheat. (U. S.) 392; United States *v.* State Bank, 6 Pet. (U. S.) 29; Beaton *v.* Farmers' Bank, 12 Pet. (U. S.) 102, 134; Planters' &c. Bank *v.* Andrews, 8 Port. (Ala.) 404; Baltimore &c. R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655; *s. c.* 65 Am. Dec. 254; Bank *v.* Merchants' Bank, 1 Rob. (Va.) 573; Western Union Tel. Co. *v.* Richmond, 26 Gratt. (Va.) 1, 20; Peo-

ple *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243; McIntire *v.* Preston, 10 Ill. 49; *s. c.* 48 Am. Dec. 321; State *v.* Woram, 6 Hill (N. Y.), 33; *s. c.* 40 Am. Dec. 378; Ahern *v.* National Steamship Co., 8 Abb. Pr. (N. s.) (N. Y.) 283; Cary *v.* Marston, 56 Barb. (N. Y.) 27; United States Tel. Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46; *ante*, §§ 11, 7364, 7366; *post*, §§ 7804, 8059.

* As to proceedings against *foreign* corporations by attachment, see *post*, § 8059, *et seq.*

domestic, are “persons” within the meaning of statutes giving remedies by attachment and garnishment.¹ The words “debtor” and “creditor” employed in a statute giving the remedy by attachment are justly held to have been intended by the legislature to be employed in their largest sense, so as to include all persons, individual or corporate, capable of being debtors or creditors.² Therefore, a statute which provides for this remedy against the property of absent *debtors*, includes within its terms *foreign corporations* when debtors, unless they are expressly excepted therefrom.³

§ 7791. Corporations not Attachable in Actions against Shareholders.—The remedy by attachment, although in this country statutory, is a *legal*, and *not an equitable remedy*; and we have seen that, under the principles of the common law, a corporation is a distinct person from that of each of its stockholders.⁴ It follows, from this principle, that an attachment cannot be levied upon the property of the corporation, in an *action against a shareholder*; for the shareholder does not possess such a certain and distinct individual property in the tangible property of the corporation as to make his interest therein attachable. “The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can

¹ *Bray v. Wallingford*, 20 Conn. 416, 418; *Knox v. Protection Ins. Co.*, 9 Conn. 430; s. c. 25 Am. Dec. 33; *Mineral Point R. Co. v. Keep*, 22 Ill. 9; s. c. 74 Am. Dec. 124, 128; *Baltimore & C. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254; *Bushel v. Com. Ins. Co.*, 15 Serg. & R. (Pa.) 173; *South Carolina R. Co. v. McDonald*, 5 Ga. 531. Compare *Burns v. Provincial Ins. Co.*, 35 Barb. (N. Y.) 525; s. c. 13 Abb. Pr. (N. Y.) 425. So, it is a “person” within the meaning of statutes relating to the assessment and collection of *taxes*. *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 382; s. c. 8 Am. Dec. 243.

See also *Rex v. Gardner*, 1 Cowp. 79; s. c. 2 Inst. 703.

² *Union Bank v. United States Bank*, 4 Humph. (Tenn.) 369; *South Carolina R. Co. v. McDonald*, 5 Ga. 531. That foreign corporations are *liable to attachment in Louisiana*, see *Martin v. Branch Bank*, 14 La. 415; *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326. See also *Planters' & Bank v. Andrews*, 8 Port. (Ala.) 404.

³ *Bushel v. Com. Ins. Co.*, 15 Serg. & R. (Pa.) 173. That the *right of a foreign corporation to a sheriff's deed*, conveying land, is attachable, — see *Wright v. Douglass*, 2 N. Y. 373.

⁴ *Ante*, § 1071, *et seq.*; § 4471, *et seq.*

dispose of any part of them.”¹ If, therefore, an attachment is sued out in a proceeding in which the *stockholders* are made *parties*, but the corporation not, and is levied upon the effects of the corporation, no *lien* is acquired by virtue of the levy.²

§ 7792. **Grounds of Attachment against Corporations.**—Such being the principle upon which corporations are subject to the attachment laws, the grounds of attachment against them will be the same as against individuals, unless the statute governing the remedy makes a distinction. To illustrate, in Arkansas an attachment will lie against a corporation which has *shipped out of the State* a material part of its *property* without leaving enough therein to pay its debts.³ In Ohio, according to a decision of the State Circuit Court, the property of a corporation may be attached on the ground of *intent to defraud creditors*, where it has been placed in the hands of a *receiver* appointed by an order which is *void* because made before an order dissolving the corporation,—especially after motion to vacate the attachment on the ground of such void appointment.⁴ To this statement there are *exceptions*, in the case of national banks,⁵ and perhaps in the case of other corporations which are not allowed to *prefer their creditors*.

§ 7793. **Lien of Attachments against Corporations.**—Unless there is a statute, such as the late Federal bankruptcy act, dissolving attachments levied upon the property of corporations within a prescribed period before their assets pass into the hands of an assignee, receiver, or other trustee for the purpose of a general distribution among their creditors, the attaching creditor will acquire, by virtue of his levy, the same *lien* upon the assets levied upon, and with it the same *right of preference*, which he would acquire if his debtor were

¹ *Williamson v. Smoot*, 7 Mart. (La.) 31; *s. c.* 12 Am. Dec. 494; citing Civ. Code La., art. 11.

² *Lillard v. Porter*, 2 Head (Tenn.), 177.

³ *Simon v. Sevier Asso.*, 54 Ark. 58; *s. c.* 14 S. W. Rep. 1101.

⁴ *Bacon v. Northwestern Stove Co.*, 5 Ohio C. C. 289.

⁵ *Ante*, § 7274, *et seq.*

a natural person. Nor will the subsequent appointment of a *receiver*, or other official liquidator, divest this lien.¹ Nor does the operation of the doctrine that the assets of a corporation are a *trust fund* for its creditors change this rule, even in a case where, at the time when the creditor sued out his attachment, he knew that the corporation was generally insolvent.² This is more especially true where the proceeding for a general liquidation takes place in a *foreign jurisdiction*.³

§ 7794. **Attachments not Leivable after Appointment of Receiver.**—But after the property of the corporation has passed into the hands of a *domestic receiver, assignee, or other trustee*, official or voluntary, under a valid appointment, for the purpose of a general liquidation and ratable distribution among its creditors, then it cannot be attached; for one creditor will not be allowed, by this process, to get an advantage over other creditors while the property is thus undergoing administration for the benefit of all; and, besides, in some cases, as in that of a statutory receiver, the *legal title* may have passed out of the corporation and into the receiver, assignee, or other trustee;⁴ and moreover the property is *in custodia legis*;⁵ and in some jurisdictions the *comity* of States has ex-

¹ Breene v. Merchants' & Mech. Bank, 11 Colo. 97; s. c. 17 Pac. Rep. 280; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; s. c. 38 Am. Rep. 518; White & c. Man. Co. v. Pettes Importing Co., 30 Fed. Rep. 864.

² White & c. Man. Co. v. Pettes Importing Co., 30 Fed. Rep. 864.

³ When, therefore, real estate, situated in the State of Illinois, belonging to a banking corporation of the State of Rhode Island, was attached by a creditor of the corporation, it was held that a decree of a court in Rhode Island, finding the bank insolvent, appointing a receiver, and restraining it from further transacting business, afforded no ground for quashing the writ of attachment, as the bank was liable to be sued in

Illinois to reach property held by it. City Ins. Co. v. Commercial Bank, 68 Ill. 348. The Illinois court reasoned that even if the bank had forfeited its charter under the laws of Rhode Island, the obligation of its contracts survived, and its property, not in the hands of a *bona fide purchaser*, might be subjected to the payment of its debts, by suit commenced by attachment, there being nothing in the comity existing between States rendering it improper on the ground that by local laws its effects are in the hands of a receiver. City Ins. Co. v. Commercial Bank, 68 Ill. 348.

⁴ Ante, § 6898.

⁵ Wiswall v. Sampson, 14 How. (U. S.) 52; Edwards v. Norton, 55 Tex. 405, 410; Hackley v. Swigert, 5

tended this principle so far as to hold that the property of a *foreign corporation*, situated within the domestic jurisdiction, cannot be seized by attachment by its creditors, after the appointment of a receiver or other judicial assignee for the purpose of a general administration in the foreign jurisdiction;¹ though, as we have already seen,² many States refuse to extend their comity so far.³

§ 7795. **Attaching Creditors Entitled to Preference in Distribution.**— Unless there is a statute, such as the late bankruptcy law, dissolving previous attachments and vacating the liens thereof, the *lien* of a valid levy, and the *preference* thereby acquired, are preserved when thereafter the property passes into the hands of a court of equity by its receiver, or into the hands of any other assignee or liquidator, private or official, for the purposes of a general liquidation; and the attaching creditors will obtain preferences according to their respective *priorities* as established by the date of their respective levies. This principle, which is well understood by the profession, was clearly stated by Mr. Justice Bailey in a modern case: “The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceeding, establish a *specific lien* upon the property seized by attachment or execution. Such lien, when perfected, will doubtless entitle the creditor acquiring it, to a

B. Monr. (Ky.) 86; s. c. 41 Am. Dec. 256; *Robinson v. Atlantic & C. R. Co.*, 66 Pa. St. 160; *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1; s. c. 26 Am. St. Rep. 776; *ante*, § 6931.

¹ *Thomas v. Merchants' Bank*, 9 Paige (N. Y.), 216. Compare *ante*, § 7334.

² *Ante*, §§ 7338, 7344.

³ It has been held that the levy of an attachment upon the property of a corporation of which a receiver has been appointed by another court

in the same State is void, although the suit in which he was appointed is subsequently dismissed, provided that, before such dismissal, another receiver has been appointed by a valid order, and the property has undergone administration in his hands, and has been sold under direction of the court appointing him. *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1; s. c. 26 Am. St. Rep. 776; 16 S. W. Rep. 647.

preference over other unsecured creditors. After the aid of a court of equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive; and it will proceed, in administering the insolvent estate, upon the maxim that equality is equity. After that jurisdiction has attached, ordinarily, no creditor can pursue a legal remedy, at least in such way as to obtain for himself a preference. But the court of equity is bound to respect legal rights and preferences already acquired, and to make distribution accordingly.¹

§ 7796. **Attachments by Directors.**— The doctrine that the assets of a corporation are a trust fund for all its creditors,² and that its directors, as the custodians and trustees of this fund, are bound, in the event of insolvency or of anticipated insolvency, to deal with it for the equal benefit of all the creditors, and are prohibited from so dealing with it as to *secure preferences to themselves as creditors* over other creditors,³ operates, of course, to prevent them from obtaining such preferences by the abuse of legal process. They cannot, for instance, obtain such preference by causing the corporation to *confess judgments in their favor*.⁴ Obviously they will not, for the same reason, be allowed to get such a preference *by attachment*. The inequity of allowing such a preference is obvious; since they themselves create the conditions which give ground of attachment, and will ordinarily have knowledge of the existence of those conditions prior to any other creditor.⁵

¹ *Roseboom v. Whittaker*, 132 Ill. 81, 89; *s. c. sub nom. Roseboom v. Warner*, 23 N. E. Rep. 339.

² *Ante*, §§ 1569, 2951.

³ *Ante*, § 6503, *et. seq.*; *Beach v. Miller*, 130 Ill. 162; *s. c.* 17 Am. St. Rep. 291.

⁴ *Roseboom v. Whittaker*, 132 Ill. 81; *s. c. sub nom. Roseboom v. Warner*, 23 N. E. Rep. 339.

⁵ Under a statute of New York (1 Rev. Stat. N. Y., ch. 18, tit. 4, § 4) for-

bidding a corporation or its officers, when it has refused payment of its debts, "to *assign or transfer* any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt," a trustee of such a corporation cannot, as a creditor, maintain an attachment against its property, even though he has not been active as a trustee, and his co-trustees have conspired to

§ 7797. **What Property Attachable.** — Whatever property is *leviable under an execution* may, as a general rule, be seized under an attachment, provided the conditions exist which entitle the creditor to resort to this remedy; and on the other hand, whatever property of a corporation is not liable to be applied to the claims of an individual creditor, is not liable to seizure under his attachment.¹ As a general rule, whatever property would be attachable, if owned by an individual, is attachable if owned by a corporation. But to this rule there are distinct exceptions relating to *property affected with a public interest*, or held charged with a trust for public purposes. The property held by a *municipal corporation* for the purpose of discharging its public trusts,—such as its *public buildings*, the buildings and properties of its *fire department*, etc., are not seizable upon attachment or execution, — a principle which we need not elaborate, because we are

defraud him" and other creditors. *Throop v. Hatch Lithographic Co.*, 11 N. Y. Supp. 532; *Kingsley v. First Nat. Bank*, 31 Hun (N. Y.), 329. To the contrary effect, see *Hill v. Knickerbocker Electric Light & Co.*, 45 N. Y. St. Rep. 761; *s. c.* 18 N. Y. Supp. 813. A decision is found in one jurisdiction to the effect that an officer of a corporation, who is also its creditor, may attach its property for the collection of his debt, though he knows of its failing circumstances, provided he is in no way responsible therefor, and though he knows that his attachment will precipitate a crisis in its affairs; and that his attachment will be good against subsequent attaching creditors and mortgagees. *Rollins v. Shaver Wagon & Co.*, 80 Iowa, 380, 385; *s. c.* 20 Am. St. Rep. 427. This case is in line with other decisions of the same court, elsewhere criticised (*ante*, § 6498), upholding the right of the directors of a corporation to *prefer themselves* as creditors. *Warfield & Co. v. Marshall County Canning Co.*, 72

Iowa, 666; *s. c.* 2 Am. St. Rep. 263; *Garrett v. Burlington Plough Co.*, 70 Iowa, 702. But there were special facts in the case in favor of the plaintiff. He had been induced to become a stockholder and to loan money to the company under a misapprehension of its condition, and he had been an officer of it but a few weeks. Besides, the *liens* which his attachment postponed were *subsequent legal liens*, and the question arose as between him and a subsequent mortgagee, and it was held, and seemingly justly held, that his attachment gave him a preference. That a creditor of a corporation known to be insolvent cannot attach property turned over by the corporation to another creditor in *part payment* of a *bona fide* indebtedness due to the latter, although such transfer was made after its insolvency was ascertained, — see *State v. Brockman*, 39 Mo. App. 131.

¹ *Ridge Turnpike Co. v. Peddle*, 4 Pa. St. 490.

not concerned with it in this treatise. The same has been held of the property of *turnpike* and *railway* companies,¹ but even in such cases the true principle would extend no further than to prevent the seizure of such property as might be *necessary* to enable the corporation to discharge its public duties.² Nor would it apply in a case where a statute gives a specific *lien*.³ *Equitable interests in land* are subject to attachment in some jurisdictions, and notably in Missouri.⁴ Property, the *title of which is held by the directors* of a corporation *in trust for the corporation*, is attachable under this rule at the suit of a creditor of the corporation; and after securing a lien upon the same by the levy of his attachment, the creditor is entitled to the aid of a court of *equity* to subject the land to sale in satisfaction of his judgment, without suing out an execution thereon and having it returned *nulla bona*.⁵

§ 7798. **Bond for Attachment.**—The bond given by a corporation, where it is the plaintiff in an attachment suit, must, unless the statute otherwise provides, be *under the corporate seal*.⁶ A *stockholder* of a corporation, being a different person in law from the corporation itself,⁷ *may become a surety* on a bond given to dissolve an attachment of the property of the corporation.⁸ A statute providing that in attachment cases “*no undertaking shall be required* where the party or parties defendant are all non-residents of the State, or a foreign corporation,”⁹ does not deprive foreign corporations of

¹ *Ante*, § 7758; *post*, § 7848.

² A statute of Florida, seemingly in affirmation of this principle, enacts that all *money* and *property* of railroad companies in the hands of their officers, employes, or agents, shall be subject to *garnishment* upon judgments against such companies. Florida Acts 1887, ch. 3738, No. 58, p. 111.

³ See, for instance, *Hill v. La Crosse & C. R. Co.*, 11 Wis. 214, 223.

⁴ Rev. Stat. Mo. 1889, § 4915; *Evans v. Wilder*, 5 Mo. 313; Rankin

v. Harper, 23 Mo. 579, 585; *Herrington v. Herrington*, 27 Mo. 560; *Dunnic v. Coy*, 23 Mo. 525; s. c. 75 Am. Dec. 133.

⁵ *Chicago & C. Bridge Co. v. Anglo-American Packing & C. Co.*, 46 Fed. Rep. 584.

⁶ *Tanner & C. Engine Co. v. Hall*, 22 Fla. 391.

⁷ *Ante*, §§ 1071, 4471.

⁸ *City Nat. Bank v. Cupp*, 59 Tex. 268.

⁹ Civ. Code Kan., § 102.

the *privileges and immunities of citizens of the several States*, within the meaning of the constitution of the United States.¹

§ 7799. **Liability to Attachment of Corporations Formed by the Concurrent Legislation of Different States.**—A corporation formed by the concurrent legislation of two or more States, to operate a continuous interstate railway, or an interstate bridge, is a *domestic corporation* within each of the States,² and therefore is *not subject to foreign attachment* therein;³ though if the conduct of the corporation has given grounds for attachment, such as would exist against domestic persons or corporations under the attachment laws, then, of course, it would be subject to such an attachment.

¹ Head *v.* Daniels, 38 Kan. 1; s. c. 15 Pac. Rep. 911; *post*, § 7876.

² *Ante*, §§ 47, 319, 320, 688, 7438, ³ Sprague *v.* Hartford &c. R. Co., 7452, 7472, 7490; *post*, §§ 7817, 8012, 5 R. I. 233.
8020, 8128.

CHAPTER CLXXXIX.

GARNISHMENT OF CORPORATIONS.

SECTION

- 7804. Corporations may be summoned as garnishee.
- 7805. Whether corporate officers subject to garnishment.
- 7806. Service of the garnishment upon what officer.
- 7807. Proof *aliunde* of official character.
- 7808. When statute relating to service of ordinary process governs.
- 7809. Officer to make disclosure not necessarily officer to receive service.
- 7810. Authority of officer or agent to make disclosure.
- 7811. Process directed to corporation and not to agent.
- 7812. Garnishment of receivers of corporations.

SECTION

- 7813. Attachment of shares by garnishment against corporation.
- 7814. Garnishment of member of mutual insurance company.
- 7815. Garnishment of insurance companies before adjustment.
- 7816. Garnishment of such companies where the policy has been assigned.
- 7817. Garnishment of corporation formed by concurrent action of different States.
- 7818. Answer of the garnishee.
- 7819. Relief in equity against garnishee.
- 7820. Other matters relating to the garnishment of corporations.

§ 7804. Corporations may be Summoned as Garnishee.—

Upon a principle already explained,¹ a corporation may be summoned and charged as a *garnishee* in a suit by *attachment*, where the statute giving the remedy by garnishment uses the word “person,” in designating the garnishee.² Although some of the earlier decisions were to the contrary,³ it is believed that, either under the foregoing principle of interpretation, or under the operation of express statutory provisions, a domestic corporation may be summoned and charged as garnishee

¹ *Ante*, §§ 11, 5689, 7366, 7790; *post*, §§ 7900, 8059.

² *Baltimore & C. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655, 665; *s. c.* 65 Am. Dec. 254.

³ *Union Turnpike v. Jenkins*, 2 Mass. 37. Compare *Glaize v. South Carolina R. Co.*, 1 Strobb. L. (S. C.) 70.

in any case where a resident person could be so summoned and charged.¹ Although a proceeding by garnishment is a proceeding *in rem* as against the principal debtor whose property it seizes in the hands of the garnishee, — yet, as against the garnishee, it is a proceeding *in personam*; and hence the principle is a sound one that, wherever a corporation has acquired such a domicile in the domestic jurisdiction as to be capable of being there served with process in an action *in personam*, it is there liable to garnishment, if it have in its hands money or property belonging to the plaintiff, in a proceeding against his debtor, either under an attachment or an execution.²

§ 7805. Whether Corporate Officers Subject to Garnishment. — According to some opinion, those *officers* of a corporation, such as its *treasurer*, whose custody is merely the custody of the corporation itself, and through whom alone it can hold custody of money or property, are not subject to garnishment.³ Thus, a creditor proceeding by attachment against a railroad company, cannot levy his attachment, by garnishment or trustee process directed against its *station agent*, who holds money belonging to it for passage tickets sold and freight collected; because, in order to support a proceeding by garnishment, the money or property which it is sought to subject must in fact be in the hands of a person other than the prin-

¹ *Boyd v. Chesapeake &c. Canal Co.*, 17 Md. 195; *s. c.* 79 Am. Dec. 646; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 416, 445; *Clark v. Chapman*, 45 Ga. 486; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490; *Everdell v. Sheboygan &c. R. Co.*, 41 Wis. 395; *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253: A public *municipal corporation* is not, however, liable to garnishment for a sum due to an officer of such corporation as a part of his *salary*. *Hawthorn v. St. Louis*, 11 Mo. 59; *s. c.* 47 Am. Dec. 141. For garnishment of *third persons* after judgment against corporation under old

statute of Missouri (Rev. Code Mo. 1835, p. 126), — see *Lindell v. Benton*, 6 Mo. 361.

² 2 Wade Attach., § 342; *Boyd v. Chesapeake &c. Canal Co.*, 17 Md. 195; *s. c.* 79 Am. Dec. 646; *Taylor v. Burlington &c. R. Co.*, 5 Iowa, 114; *Varnell v. Speer*, 55 Ga. 132.

³ *Mueth v. Schardin*, 4 Mo. App. 403; *McGraw v. Memphis &c. R. Co.*, 5 Coldw. (Tenn.) 434; *Fowler v. Pittsburgh &c. R. Co.*, 35 Pa. St. 22; *Pettingill v. Androscoggin R. Co.*, 51 Me. 370; *Neuer v. O'Fallon*, 18 Mo. 277; *s. c.* 59 Am. Dec. 313.

cipal debtor.¹ So, the *cashier of a bank* in which were deposited the funds of a corporation of which he was also the treasurer, could not be summoned as garnishee of the corporation, whose funds he so held as its treasurer.² But this rule, and the reason on which it is founded, seem to involve a refinement which is destitute of sense. The officer, agent, or servant of a corporation, holding for it the actual custody of its money or property, holds it under a species of trust, or bailment, and without doubt the corporation can maintain the ordinary actions at law against him to recover possession of it, or to recover damages for its conversion. When, therefore, a judgment had been recovered against a bank, and under an execution on that judgment, the president of the bank was summoned as garnishee, and answered that he had in his custody nothing belonging to the bank, except as president of the bank, and that he owed it nothing, it was held that the proceeding against him could be sustained.³ On the same principle, it has been held that, under a judgment against a corporation, a garnishment may properly be directed against one of its officers who describes himself as "auditor, cashier, or paymaster."⁴ On the other hand, the difficulty of maintaining this theory will appear on suggestion that it *puts the officer, agent, or servant of the corporation under two masters,*

¹ *Pettingill v. Androscoggin R.Co.*, 51 Me. 370; *Fowler v. Pittsburgh & C. R. Co.*, 35 Pa. St. 22.

² *Sprague v. Steam Nav. Co.*, 52 Me. 592.

³ *Ballston Spa Bank v. Marine Bank*, 18 Wis. 515, 518. Dixon, C. J., said: "There can be no doubt that the property of a private corporation is liable for its debts, and that, whether such property is found in the hands of its president or any other person. The possession is immaterial, so far as the liability is concerned; for neither the president nor any other officer of the corporation has any right to withhold its property when required to answer the just debts of the

corporation. It would be easy, indeed, for such corporations to avoid the payment of their debts, if placing their property in the hands of their officers was placing it beyond the reach of creditors. For the purpose of this proceeding, Mr. Harris is regarded as an individual having in his hands property of the bank liable in law for the satisfaction of its debts; and the fact that he happens at the same time to be its president, constitutes no excuse whatever for the refusal to surrender such property or to answer questions properly propounded to him concerning it."

⁴ *Everdell v. Sheboygan & C. R. Co.*, 41 Wis. 395.

and in a position of conflict between the command of the law on the one hand, and the command of his superior on the other. If he disobeys the law, he is liable to punishment for contempt of court; if he disobeys the command of his superior corporate officer, or of its board of directors, he is liable to lose his position, his salary, and with it the means of supporting his family.¹ Process by garnishment lies against the keeper of a toll-gate belonging to an incorporated plank road company, to subject the money in his hands as the property of the company.² The fact that a corporation had directed its treasurer to pay, out of its funds in his hands, a specified sum to the defendant in the attachment suit, as a mere gratuity for the benefit of the employés of such defendant, was not regarded as sufficient to render the treasurer liable to the garnishment at the suit of those employés; nor would it render the corporation thus liable.³

§ 7806. Service of the Garnishment upon What Officer. Where the *statute prescribes the officer* of a corporation upon whom the garnishment must be served in order to bind the corporation, it must of course be followed, or the service will not be good,⁴ although such service might be good under the

¹ This is strongly illustrated by a case where the process of garnishment was served upon the auditor and treasurer of a corporation, who, at the time of the garnishment, had in his hands a quantity of money belonging to it. This money was kept in a safe provided by the corporation to which the garnishee alone had the key. But he did not retain the custody of it, but suffered his superiors to deprive him of that custody after being served with garnishment; and his defense was that he did not have the *independent control* of the money, but was under an obligation to dispose of it as directed by his superiors. The court held that the defense proceeded upon grounds which were fallacious, and

that it was the duty of the employé to obey the command of the law, and to disobey the command of his superior officer. *First National Bank v. Dav-enport &c. R. Co.*, 45 Iowa, 120.

² *Central Plank Road Co. v. Sam-mons*, 27 Ala. 380. The court said: "The garnishee in this case does not materially differ from any other agent who collects money for his principal. He has collected a certain amount for the company, which he has in his hands. For that sum the appellant [the company] could maintain an action." *Ibid.*

³ *Neuer v. O'Fallon*, 18 Mo. 277; *s. c.* 59 Am. Dec. 313.

⁴ *Northern Central R. Co. v. Ri-der*, 45 Md. 24; *Raymond v. Rock-*

principles of the common law. Thus, if the statute designates the *secretary*, it will not be enough to leave a copy of the notice with one who is at once its president, treasurer, financial manager, and general agent.¹ So, where the statute designates the *officer* upon whom the service may be made, an *attorney* of the corporation *cannot accept service* so as to give the court jurisdiction to proceed.² On the other hand, a service upon such officer will be good.³

§ 7807. **Proof Aliunde of Official Character.**—In one jurisdiction it has long been the settled principle, in the case of service of process upon a corporation by delivering a copy to its president or other officer, to require on the part of the plaintiff proof that such person was at that time such officer of the corporation; and it must be recited in the judgment that this was proven to the satisfaction of the court, or, in the absence of a voluntary appearance, the judgment will be void.⁴ Thus, a judgment by default, without such recital, is void. This rule applies to service of a garnishment.⁵

land Co., 40 Conn. 401; *ante*, §§ 7503, 7509; *post*, § 8021. As to service of garnishment on *foreign corporations*, see *post*, § 8080.

¹ *Raymond v. Rockland Co.*, 40 Conn. 401.

² *Northern Central R. Co. v. Rider*, 45 Md. 24.

³ Thus, in Nebraska by force of statute, where the garnishee is a corporation, the notice "shall be left with the president or other head of the same, or the secretary, cashier, or managing agent thereof." Code Neb., § 935. Under this statute where a *book-keeper* of a bank was the only person whom the officer found in the bank attending to its business during its business hours, it was held that a service upon him was good. *First Nat. Bank v. Turner*, 30 Neb. 80; *s. c.* 46 N. W. Rep. 290. Where the president and directors of the corporation

requested the officer to deliver the notice to one of their clerks, which he did, it was held equivalent to delivering it to them, and the service was good. *Davidson v. Donovan & Co.* Canal Co., 4 Cranch C. C. (U. S.) 578.

⁴ *Planters' & Co. Bank v. Walker*, 1 Minor (Ala.), 391; *Lyon v. Lorant*, 3 Ala. 151; *Wetumpka & Co. R. Co. v. Cole*, 6 Ala. 655; *Montgomery & Co. R. Co. v. Hartwell*, 43 Ala. 508, and cases cited, p. 511. Compare *ante*, § 7507.

⁵ It follows that a return which recites, "Served on the Montgomery & Eufaula Railroad Company, the garnishee, by leaving a copy of the garnishment with Lewis Owen, president of said road," is insufficient to authorize a judgment *nisi*, on failure to answer, against the railroad company, in the absence of an ap-

§ 7808. **When Statute Relating to Service of Ordinary Process Governs.** — It has been held in Georgia, in the absence of any statute directing a special method of service in such actions, that the only manner in which garnishment can be served upon a corporation is by personal service upon its president, or other officer fulfilling the duties of president for the time being, as at common law; and that service upon an agent under a statute authorizing a summons so to be served is valid.¹ But this decision seems to have proceeded upon an unsound view, and it was better held in Maryland that the word "process" used in a statute relating to ordinary actions against corporations, which authorized service upon the president or any director or manager or other officer, was sufficiently comprehensive to embrace a notice of garnishment; so that a service of such notice on two officers and directors was sufficient.²

§ 7809. **Officer to Make Disclosure not Necessarily Officer to Receive Service.** — Upon this subject it should be kept in mind that, upon principle, it is not necessary that the officer or agent of the corporation upon whom the notice of garnishment is served, should sustain such a relation to the corporation that the *disclosures* made by him, in case he should undertake to answer for it, would *bind it*. As we shall presently

pearance; but proof that Lewis Owen was the president of the company at the time of the service must have been made to the court, and the fact must appear in the judgment. *Montgomery &c. R. Co. v. Hartwell*, 43 Ala. 508.

¹ *Clark v. Chapman*, 45 Ga. 486. See also *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

² *Boyd v. Chesapeake &c. Canal Co.*, 17 Md. 195; *s. c.* 79 Am. Dec. 646. It was further held that, where the notice was given to one of the directors in his official capacity, to the end that it might be communicated by him to the board, the corporation was bound

by it, though it was not communicated, — since the statute authorized service on "*any* director." *Ibid*. Where the statute relating to the service of *ordinary process* upon corporations prescribed that service must be had on the president or other head of the corporation, or on the secretary, treasurer, or other *managing agent* thereof, and there was no special provision relating to the service of notice of garnishment, such a notice could not be served upon the *paying-teller* of a banking corporation so as to bind the corporation. *Kennedy v. Hibernia &c. Society*, 38 Cal. 151.

see, the question what agent is entitled to *bind the corporation* by his disclosures made in the garnishment proceeding, is quite a different question from the question what agent sustains such a relation to the corporation that *notice* to him will, in theory of law, affect the corporation with knowledge.¹ If there is no special provision of statute on the subject, then a service of the garnishment upon any officer or agent who sustains such a relation to the corporation that a service upon him of a *summons*, in an ordinary action *in personam*, would give the court jurisdiction to proceed to judgment, will give the court jurisdiction to proceed against the corporation, and to compel a disclosure as garnishee, or to render a judgment by default or confession in the absence of a disclosure.² This will be more apparent when it is considered that, although, as against the principal debtor, who may be a non-resident, the action is merely a proceeding *in rem*, having for its object to compel his appearance by impounding his property, and to satisfy the debt which he owes the plaintiff out of that property, — yet, in so far as it is a proceeding against the person or corporation holding that property for the principal debtor, it is in the nature of an action *in personam*.³

§ 7810. Authority of Officer or Agent to Make Disclosure.

If the statute prescribes what officer or agent of the corporation must make the disclosure, it is conceived that it must be followed; and, outside of any statutory provision, it is obvious that the corporation cannot be bound by the act of every agent who may volunteer to make the disclosure in its behalf.⁴ On the other hand, it seems equally clear on principle, that if the corporation is duly served with garnishment so as to be affected with notice under the principles relating to service of process upon corporations, then it is bound to appear in the person of some officer capable of making the disclosure for it;⁵ and

¹ *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599.

² *Kennedy v. Hibernia &c. Society*, 38 Cal. 151.

³ *Ante*, § 7804.

⁴ *Karp v. Citizens' Nat. Bank*, 76 Mich. 679; s. c. 43 N. W. Rep. 680.

⁵ "A failure to answer by some officer or agent who can answer knowingly, would authorize a judgment for

when it does appear by one of its officers, the natural presumption would be that such officer was authorized by it to make the disclosure. In the absence of any statute specially controlling the question, the obvious legal rule would be that whatever officer or agent of the corporation sustains such a relation to it as to possess authority to *bind it* by his *declarations* or *admissions* in respect of the subject-matter of the garnishment, would be its officer or agent to make the disclosure; and this question has already been considered.¹ And here another distinction must be taken, and that is between the power of an officer or agent of a corporation to *bind it* by his admissions in the form of a pleading, and his power to make admissions as a *witness* which will be competent *evidence* against it, subject to explanation or rebuttal. The power to *testify* to the *fact* that the corporation owes a debt, and the power to appear as the representative of the corporation and *confess* that it owes a debt, for the purpose of the rendition of a judgment against it, which shall be a complete estoppel against it, are essentially different, and the latter must rest upon some clear principle of agency. There must have been an *authorization* in some form, clearly expressed or fairly implied.² As

want of an answer, subject to be made final, as in other cases." Stone, C. J., in *Ex parte Cincinnati &c. R. Co.*, 78 Ala. 258, 260.

¹ *Ante*, §§ 4656, 4777, *et seq.*, 4912, *et seq.*

² It has been held that an authority to an agent "to appear before all judges and justices of the peace, in any court or courts, there to do, say, pursue, implead, arrest, attach, and prosecute, as occasion shall be or require," — does not authorize the agent to make a *conclusive acknowledgment* of a notice by the corporation in an answer in his behalf as garnishee. *Dickson v. Morgan*, 7 La. An. 490. This holding can be regarded as hardly more than the opinion of a single judge; for it is weakened by the fact

that two of the judges concurred on another ground, and that one of them dissented. *Ibid.* Two judges, Eustis, C. J., and Rost, J., were of the opinion that the power of answering interrogatories on oath cannot be conferred upon one person by another. *Ibid.* But this is a clear aberration. The power of answering interrogatories can be conferred by one person on another, and whether the answer shall be on oath or without oath, is a question which is *modal* in its character, relating merely to the course of procedure in the particular forum. Power can be conferred by one person upon another to bind the former by his admissions, and everything else relates merely to the mode of making the admissions. It

already stated,¹ it does not at all follow, as a principle of statutory construction, that the *answer* is to be made by the officer designated by statute to receive service of summons. Therefore, where the statute designates the officer on whom the notice is to be served, it will be sufficient if the affidavit in answer is made by *some other appropriate officer*. Thus, where the writ was served on the *treasurer* of a corporation, and the affidavit making this disclosure was made by its *assistant treasurer*, this was sufficient.²

§ 7811. Process Directed to Corporation and not to Agent.

We have already seen that, according to the theory of some courts, denied by others, if the corporation is the *principal debtor*, its officer or agent holding its funds may be summoned as garnishee by process directed against him in his own

has been held that where a principal places money in the hands of his agent to pay a debt due from him to another person, and such person, at the time, has no knowledge of the direction and acts of the principal, and the agent, while on his way to make the payment, is duly garnished at the instance of certain judgment creditors of his principal, — the money is to be applied, in the proceeding by garnishment, to satisfy the claims of the judgment creditors; and after the garnishment, the money being *in custodia legis*, the agent is not liable for it to the person to whom he was directed by his principal to pay it over. *Center v. McQuesten*, 18 Kan. 476.

¹ *Ante*, § 7809.

² *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599. Where the statute provided that the summons in the garnishment proceeding might be “served on the president, cashier, secretary, treasurer, general or special agent, superintendent, or other prin-

cipal officer of such corporation,” and that it should “be the duty of the officer so served, or of the proper officer of such corporation having knowledge of the facts, to appear before the justice at the return day,” etc., — it was held that the *assistant treasurer* of a railroad company was its proper officer, for the purpose of making a disclosure in a proceeding in which it had been summoned as garnishee. *Whitworth v. Pelton*, 81 Mich. 98; *s. c.* 45 N. W. Rep. 500. The *general agent of a foreign corporation* doing business in Michigan, who is authorized to receive service of process in its behalf, has authority, under the governing statute, when he has been served with garnishee process against his company, to make an answer or disclosure in its behalf, and the corporation is not to be considered in default for want of an answer after a disclosure filed by such agent. *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65. Compare *Lake Shore &c. R. Co. v. Hunt*, 39 Mich. 469.

name;¹ but where the corporation is not the principal debtor, but the object of the process is to attach in its hands money which it owes to the principal debtor, then the process must run against it, and not against its agent holding its funds.²

§ 7812. **Garnishment of Receivers of Corporations.** — "Receivers are officers of the court, and consequently money in their hands is *in custodia legis*, under precisely the same circumstances, and subject to the same conditions, as it would be so held when in possession of the *clerk* of a court."³ The money or property in his hands, provided it is such as might rightfully come into his hands, is therefore held by him as the mere *officer or hand of the court* which has appointed him, for the purpose of administration under the control and direction of the court, and is not subject to garnishment by creditors of the corporation whose property it is.⁴ Some close questions have arisen with respect of the *time* when this immunity from attachment *arises*, and also in respect of the time when it *ceases* to operate.⁵ We find holdings to the effect that the mere appointment and qualification of the receiver does not prevent a seizure under attachment of the property of the principal debtor until the receiver has reduced the

¹ *Ante*, § 7805.

² *Sun Mutual Ins. Co. v. Seeligson*, 59 Tex. 3; *Insurance Co. v. Friedman*, 74 Tex. 56; *s. c.* 11 S. W. Rep. 1046. Thus, although a *foreign corporation*, doing business within the domestic State, was subject to garnishment (*Selma &c. R. Co. v. Tyson*, 48 Ga. 351; *Insurance Co. v. Friedman*, 74 Tex. 56; *s. c.* 11 S. W. Rep. 1046), yet it was necessary that the process should be directed against the corporation itself, and it was not sufficient merely to summon its local agent representing it within the domestic State, and having the custody of some of its funds there. A garnishment directed against the agent personally would not bind the funds of the corporation unless he had such

funds in his hands at the time of the answer; and if, after money was sent by the corporation to such agent, a second garnishment was served upon him, it was the latter service which fixed the lien of the attaching creditor. *Daniels v. Meinhard*, 53 Ga. 359.

³ 2 Wade Attach., § 424; citing *Field v. Jones*, 11 Ga. 413; *Bentley v. Shrieve*, 4 Md. Ch. 412; *Hagedon v. Bank of Wisconsin*, 1 Pinn. (Wis.) 61; *s. c.* 39 Am. Dec. 275; *Nelson v. Connor*, 6 Rob. (La.) 339.

⁴ *Ante*, § 6931; 2 Wade Attach., § 424; citing *Taylor v. Gillean*, 23 Tex. 508; *Farmers' Bank v. Beaston*, 7 Gill & J. (Md.) 421; *s. c.* 28 Am. Dec. 226.

⁵ *Ante*, §§ 6919, 6920.

property into his possession;¹ and on the other hand, that any *residuum* in the hands of the receiver may be attached, as the property of the beneficiary in the trust whose distributive share it is, and that the attachment may be levied upon it for the purpose of holding it, even before the receiver has rendered his final account,²—a decision which seems contrary to sound principle.³

§ 7813. **Attachment of Shares by Garnishment against Corporation.**—“In Virginia, where proceedings in attachment may be at law or in equity, it is held that *stock in a corporation* is an estate liable to seizure by attachment; and for the purpose of such proceedings, the stock may be regarded as in possession of the corporation, and may be reached by the creditor of the owner, by process of garnishment.”⁴ The same mode of procedure exists in Tennessee, where there is a statutory remedy in the court of chancery.⁵ But this mode of procedure is not general, and clearly does not exist upon any sound principle relating to remedial justice, except where it is given by express statute. We have already had occasion to consider the nature of shares of stock,⁶ and in whatever light this species of property may be viewed, it is perfectly clear that it cannot be viewed in the light of a fund in the hands of a corporation, belonging to the shareholder. The

¹ *Farmers' Bank v. Beaston*, 7 Gill & J. (Md.) 421; s. c. 28 Am. Dec. 226.

² *McPherson v. Snowden*, 19 Md. 197; *Groome v. Lewis*, 23 Md. 137; s. c. 87 Am. Dec. 563.

³ Upon the question of the right to attach by garnishment the distributive share of a fund in the hands of a receiver, master in chancery, or other judicial trustee, see Wade on Attach., § 424; *Van Riswick v. Lamon*, 2 McArthur (D. C.), 172; *Williams v. Jones*, 38 Md. 555; *Weaver v. Davis*, 47 Ill. 235; *Langdon v. Lockett*, 6 Ala. 727; s. c. 41 Am. Dec. 78; *ante*, § 6934. Judge Wade, reviewing these authorities, concludes by saying: “The au-

thorities seem to concur in holding receivers and similar officers liable to garnishment, when they have in their hands a definite sum to which the defendant or the judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of this conclusion.”

⁴ 2 Wade Attach., § 342; citing *Chesapeake & C. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

⁵ *Montidonic v. Page*, 10 Heisk. (Tenn.) 443.

⁶ *Ante*, §§ 1071, 2767.

corporation is indeed a qualified *trustee* for the shareholder for the protection of his *legal title* to his shares;¹ and in the discharge of this trust is bound to see that the shares stand in his name on its books, and is liable for a conversion of them if it wrongfully transfers them to the name of another.² But the title and right of the shareholder are not that of a part owner of a joint fund, but that of a several owner of an intangible chose in action,³ of which the corporation is not, except in the qualified sense just explained, the custodian. It must follow from these considerations that corporate shares cannot be attached by a notice of garnishment served upon the corporation, except in those cases where a statute expressly gives that peculiar form of remedy.⁴

§ 7814. Garnishment of Member of Mutual Insurance Company. — In like manner, *unpaid assessments upon their premium notes*, due by the policy-holders of a mutual insurance company, are subject to garnishment by creditors of the company. When, therefore, a person insured has suffered a loss under his policy, and the company, in order to meet that loss, makes an assessment upon the premium notes of its members, the insured, upon failing to receive the amount due him, may, after reducing his claim to judgment, provided the company still remains solvent, issue (in Pennsylvania) an "*attachment-execution*" against the amount of unpaid assessments still in the hands of the members of the company, and against the amount of assessments collected by an agent of the company,

¹ *Ante*, § 2486.

² *Ante*, § 2487, *et seq.*

³ *Ante*, §§ 1071, 1073.

⁴ *Planters' &c. Bank v. Leavens*, 4 Ala. 753; *Ross v. Ross*, 25 Ga. 297. The garnishment of stockholders as *debtors of the corporation* stands on a totally different footing; and here, as already seen, they are liable to garnishment where a *call* has been made and duly *notified*, so that they are indebted to the corporation in a

distinct amount at the time when the garnishment is served. *Ante*, § 3578. See also *Pease v. Underwriters' Union*, 1 Ill. App. 287; *Faull v. Alaska &c. Co.*, 14 Fed. Rep. 657; *s. c.* 8 Sawy. (U. S.) 420; *Peterson v. Sinclair*, 83 Pa. St. 250, and cases there cited. That shares of stock are not subject to *attachment* without the aid of statute, see *Haley v. Reid*, 16 Ga. 437; *Foster v. Potter*, 37 Mo. 525.

but not paid over by him.¹ In Pennsylvania, — and no reason is perceived why the rule should not be general, — a creditor of a mutual fire insurance company, who has reduced his claim to judgment and issued an “attachment-execution” thereon, and summoned a member as garnishee, who is indebted to the company on his premium note for his proportion of loss sustained, but the amount of which indebtedness has not at the time been fixed by assessment, acquires a *lien* upon such indebtedness and a right to *preference in distribution* where a *receiver* is subsequently appointed by a decree of a court dissolving the corporation, although the assessment is levied by such receiver.² In other words, the debt due by the member to the company upon his premium note is capable of being seized in attachment, although the amount of it has not yet been fixed by an assessment, and although such amount is subsequently fixed by an assessment made by a court receiver for the general purpose of a judicial administration.³

§ 7815. **Garnishment of Insurance Companies before Adjustment.** — Where a loss has happened under a policy of insurance, and a creditor of the insured seeks to impound, by attachment and garnishment, the debt which thereby accrues to him from the insurance company, the question of his right to proceed will depend upon the question whether the circumstances have occurred which would entitle the insured to maintain an action against the company to recover the amount which has become due under the policy. But the mere fact that there has been no adjustment of the loss would not seem to oppose an obstacle to a garnishment by the insurance company;⁴ for the adjustment is the act of only one of the parties to the contract, and the right of the insured to recover does not depend upon that act, but depends upon the terms of the contract, and the fact of the loss. Besides, if the amount of the debt were not ascertained, it would nevertheless, on principle and

¹ Hays v. Lycoming &c. Ins. Co.,
98 Pa. St. 184.

² *Ibid.*

⁴ Hanover Fire Ins. Co. v. Connor,

³ Hays v. Lycoming &c. Ins. Co., 20 Ill. App. 297.
99 Pa. St. 621.

authority, be capable of being impounded by attachment and garnishment, so as to fix a lien upon it, which would hold the amount which might be ascertained to be due.¹ Many statutes relating to garnishment provide in terms for the attaching by garnishment of *debts not yet due*; but it has been justly held under such a statute that it refers only to claims which are already *fixed in amount, or capable of being fixed*, and which are not dependent for their validity or amount on anything to be done or earned in future, or on a continued liability which may be changed by events.² If this principle is applied to the garnishment of the amount due by an insurance company under a policy where a loss has taken place, and if, by the terms of the policy, the company is allowed a stated time within which to rebuild or repair, which time is not expired at the time of the service of the garnishment, then the attaching creditor cannot proceed, provided the rule of the jurisdiction is that he must proceed upon the statement of facts existing at the time of the service of the garnishment, and not upon that existing at the time of the disclosure or the trial.³ Similarly, it has been held that where the policy contains the usual provision for notice to the company in case of loss and for the submission to the company of proofs of loss by the assured, these provisions must be substantially complied with, unless waived by the company, for they are conditions precedent to the right of the assured to maintain an action on the policy; and consequently, until they are complied with, or waived, he cannot maintain his action, and his creditor cannot impound the debt by garnishment.⁴

§ 7816. Garnishment of Such Companies where the Policy has been Assigned.—Some peculiar questions have arisen, in proceedings by garnishment against insurance companies, growing out of the relation subsisting between the company and the policy-holder. It has been held, for instance, that

¹ *Hays v. Lycoming &c. Ins. Co.*, 28 Mich. 201; *Godfrey v. Macomber*, 128 Mass. 188. See also *McKean v.*

² *Vogel v. Preston*, 42 Mich. 511. *Turner*, 45 N. H. 203.

³ *Martz v. Detroit Fire &c. Ins. Co.*, ⁴ *Gies v. Bechtner*, 12 Minn. 279.

where an insurance company is summoned as garnishee in an action against a policy-holder, premiums due on policies previously *assigned* by the policy-holder with the consent of the company, cannot be *set off* against the amount due by the company on account of the loss.¹ And where insurance policies were assigned with a stipulation that a portion of the proceeds should be paid by the *assignee* to a third person, it was held that the assignee could not be charged as garnishee of the third person.² Where a policy of insurance on *goods at sea* was assigned by the policy-holder to his creditor, and the goods were lost, and subsequently a creditor of the policy-holder proceeded by garnishment against the insurance company, which had not received notice of the assignment, it was held that the assignment was sufficient to vest an equitable right in the assignee, and that the company could not be charged.³ Where the creditor of a policy-holder proceeded by garnishment against the insurance company to reach an amount due under a policy which was made payable to a third party "as his interest should appear," and his interest appeared to be that of a *mortgagee* of the insured property, under a mortgage which was *not recorded*,—it was held that the mortgage was sufficient to uphold his right to the insurance money, to the amount actually due under the policy.⁴ But here, stress was laid upon the fact that the mortgage had been made in good faith. It would have been open to the garnishing creditor to contest the right of the mortgagee to the fund, upon the ground that the mortgage was fraudulent as against creditors.⁵

§ 7817. Garnishment of Corporation Formed by Concurrent Action of Different States.—Corporations formed by the concurrent legislation of two or more States to build and operate an interstate bridge, or an interstate railway, are, as

¹ *Cleveland v. Clap*, 5 Mass. 201.

² *Field v. Crawford*, 6 Gray (Mass.), 116.

³ *Wakefield v. Martin*, 3 Mass. 558.

⁴ *Coykendall v. Ladd*, 32 Minn. 529; *s. c.* 21 N. W. Rep. 733.

⁵ *North Star Boot & Shoe Co. v. Ladd*, 32 Minn. 381; *s. c.* 20 N. W. Rep. 334.

already seen,¹ a *domestic corporation* within each of the States. Such a corporation is a *resident* of each of such States, for the purposes of the ordinary jurisdiction of its courts, and consequently may be subjected to garnishment in any one of them, provided the *situs of the debt* is there, though its principal office or place of business be not there.²

§ 7818. **Answer of the Garnishee.**—The rule of the common law being that a corporation could not *speak*, nay even *whisper*, except by its corporate *seal*,³ it followed that, where this rule was adhered to, a corporation proceeded against as garnishee could *answer only under its corporate seal*.⁴ But the general disuse and abolition of corporate seals has rendered this rule obsolete, and it is believed that in such a case the corporation may answer without the use of its seal, by any authorized agent.⁵

¹ *Ante*, §§ 47, 319, 320, 688, 7438, 7452, 7472, 7490, 7799; *post*, §§ 8012, 8020, 8128.

² Drake Attach., 5th ed., § 479; Mahaney v. Kephart, 15 W. Va. 609, 625; Smith v. Boston &c. Railroad, 33 N. H. 337. See also Bolton v. Pennsylvania Co., 88 Pa. St. 261.

³ *Ante*, § 5044, note 2, p. 3766.

⁴ Baltimore &c. R. Co. v. Gallahue, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254.

⁵ *Statutes* also exist changing this principle, such as the following in Alabama: "The provisions of this chapter are applicable to all private corporations, and all affidavits required to be made under its provisions may be made by the president, cashier, secretary, or any other duly authorized agent of such corporation; and such corporation may do and be dealt with under its provisions in the same manner as if they were natural persons." Ala. Code, § 3267. "This," said Stone, C. J., "is manifestly a change of the common-law mode of

official action by a corporation, for, at common law, corporate acts were performed under the seal of the corporation. Garnishment is a species of attachment, and the purging of the conscience of some one having knowledge of the facts, is necessary to its successful administration. Hence, the legislative change, by which a sworn personal answer is secured. And, under this statute, corporations 'may do and be dealt with, in the same manner as if they were natural persons'; that is, they may be required to answer orally, to have their answers rejected, if they refuse to answer when so ordered, and to have judgment rendered against them for want of an answer. The answer may be made by the 'president, cashier, secretary, or any other duly authorized agent of such corporation.' The legislature cannot be supposed to have intended that the corporation may, at its mere pleasure, authorize one of the named officers, or any other agent it may appoint, to attend and

§ 7819. **Relief in Equity against Garnishee.**—It is a principle of equity jurisprudence that equity will not *relieve a party against a judgment* recovered against him *at law*, unless he was prevented from making his defense by circumstances not necessary to be here stated, but “unmixed with negligence or fault on his part.”¹ For the purposes of this rule the negligence of the *agent* through whom the judgment-debtor acted in making his defense is imputable to him. Therefore, the negligence of an officer of a corporation, in allowing a judgment to be rendered against the corporation as garnishee, when the debt has been previously assigned to another party, and notice thereof has been given to another officer, will exclude such corporation from relief in equity against the judgment.²

§ 7820. **Other Matters Relating to the Garnishment of Corporations.**—A number of other matters, depending mostly upon local statutes, will now be referred to, chiefly in the notes. The fact that the *money is payable* on the draft of the creditor or depositor *upon giving a certain notice*, as is usual where money is deposited at interest in a savings bank, does not prevent *his* creditor from seizing it by garnishment although

make answer for the corporation. It might select an agent with intentional reference to his want of knowledge of the facts about which he is to be interrogated. The intention was, that the answer should be made by some person cognizant of the facts, whether that person was president, cashier, secretary, or some other agent of the corporation. A failure to answer by some officer or agent who can answer knowingly, would authorize a judgment for want of an answer, subject to be made final as in other cases.” *Ex parte Cincinnati & C. R. Co.*, 78 Ala. 258. Under statutes of Michigan (*How. Mich. Stat.*, § 8055, as amended by *Mich. Pub. Acts* 1885, p. 240), a corporation proceeded

against as garnishee in a court of *justice of the peace* in a different township from that in which the principal business office of the corporation is situated, may *transmit by mail its disclosure* verified by the oath of its proper officer. *Whitworth v. Pelton*, 81 Mich. 98; *s. c.* 45 N. W. Rep. 500. *Compelling an answer* under Alabama statute by *attachment or judgment nisi*: *Ex parte Cincinnati & C. R. Co.*, 78 Ala. 258.

¹ *Foster v. Wood*, 6 Johns. Ch. (N. Y.) 87, 89; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.), 332; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Slack v. Wood*, 9 Gratt. (Va.) 40.

² *Richmond Enquirer Co. v. Robinson*, 24 Gratt. (Va.) 548.

the notice has not been given.¹ It has been held in Missouri that the *validity of a conveyance* may be tried in a proceeding by garnishment in a court of law.² Extending this doctrine, it is held that the question of the validity of a transfer of the assets of a corporation, alleged to have been made in fraud of creditors, may be tried in a proceeding by garnishment.³

¹ Clapp v. Hancock Bank, 1 Allen (Mass.), 394.

² Lee v. Tabor, 8 Mo. 322; Lackland v. Garesche, 56 Mo. 267.

³ Eyerman v. Kriekhaus, 7 Mo. App. 455. Garnishment of *debt due to two corporations jointly*, evidenced by *note* or *draft* alleged to have been *transferred in fraud of creditors*: Humphreys v. Atlantic Milling Co., 98 Mo. 542; s. c. 10 S. W. Rep. 140. That the *affidavit* must state that the garnishee is a *corporation*, or a *partnership*, etc., see Insurance Co. v. Friedman, 74 Tex. 56. *Return* on the writ of garnishment directed against two

corporations, showing service on "the within named garnishee," fatally defective: Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3, 7. The court say that "such a return is not sufficient upon an ordinary citation, and is equally defective as a return to a citation in garnishment": Citing Graves v. Robertson, 22 Tex. 130; Thomason v. Bishop, 24 Tex. 302; Ryan v. Martin, 29 Tex. 412. Attaching by garnishment the *withdrawal value* of shares in *co-operative bank*: Atwood v. Dumas, 149 Mass. 167; s. c. 21 N. E. Rep. 236; 3 L. R. A. 416.

CHAPTER CXC.

MANDAMUS AGAINST CORPORATIONS.

SECTION	SECTION
7826. <i>Mandamus</i> against corporations to compel performance of public duties.	formance of discretionary acts.
7827. When not issued to compel the performance of public duties.	7830. Who apply for the writ: plaintiff in the action.
7828. Doctrine that the public duty must be enjoined by statute.	7831. Against corporation in corporate name.
7829. Does not lie to compel the per-	7832. Corporation may appeal where the writ runs against its officers.

§ 7826. **Mandamus against Corporations to Compel Performance of Public Duties.**—A writ of *mandamus* will be issued to compel a corporation to perform a *public duty*, where the duty is plainly prescribed by a mandatory statute, where there is clear proof of a breach of that duty, and where there is no other adequate legal remedy to compel its performance.¹ Thus, *mandamus* lies to enforce a provision in the charter of a *railroad company* requiring it to maintain its railroad in a con-

¹ "Where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no specific or adequate remedy, the writ of *mandamus* will be awarded." 1 Redf. on Railw. (4th ed.) 644; quoted with approval in *State v. Southern Minn. R. Co.*, 18 Minn. 40, 41. "But the writ will not be awarded, unless the right sought to be enforced is a complete and perfect legal right, and, of course, the reciprocal obligation a complete and

perfect legal obligation." *Ibid.*; citing *Ex parte Napier*, 18 Q. B. 692, 694. "The right and obligation are necessarily correlative; if there be no obligation, there is no right." *Ibid.* *Mandamus* lies where there is *no other remedy at law*, and the fact of there being a *remedy in equity* furnishes no objection to the remedy by *mandamus*; nor is it an objection that the respondent may be punished for omitting to do the act to compel which the *mandamus* is sought. *People v. New York*, 10 Wend. (N. Y.) 393.

tinuous line;¹ or to run its cars to a certain point on tide water;² or to compel the Union Pacific Railroad Company to operate its line to Council Bluffs, in the State of Iowa, instead of making its eastern terminus at Omaha, in the State of Nebraska;³ or to compel a railroad company to build and keep in proper repair, bridges where its road crosses a public highway;⁴ or to reconstruct a public road which it has occupied with its railroad tracks;⁵ or to remove a bridge constructed across a navigable stream without a draw, and in lieu thereof to construct and maintain therein a bridge with a draw, for the passage of vessels in compliance with the governing statute;⁶ or to perform the statutory duty of constructing and maintaining a farm crossing for the benefit of a private owner;⁷ or to compel a *canal company* to bridge a canal over a private way, which it has cut off;⁸ or to compel a *railroad company* to run all its passenger trains to a station which it has once located and used, in a town made a terminal point by its charter, which town is a county seat;⁹ or to maintain a station in a certain town where there is a clear and strong case of public necessity;¹⁰ or to restore to its former usefulness a public highway which it has occupied with its tracks;¹¹ or to erect fences as

¹ Union Pac. R. Co. v. Hall, 91 U. S. 343.

² State v. Hartford &c. R. Co., 29 Conn. 538.

³ Union Pac. R. Co. v. Hall, 91 U. S. 343; affirming *s. c.* 4 Dill. (U. S.) 479.

⁴ State v. Wilmington Bridge Co., 3 Harr. (Del.) 312; People v. Troy &c. R. Co., 37 How. Pr. (N. Y.) 427; People v. Boston &c. R. Co., 70 N. Y. 569. It is no objection to granting the writ, in such case, that the company is liable to indictment for omitting to perform the act. *Ibid.*

⁵ Com. v. New York &c. R. Co., 138 Pa. St. 58; *s. c.* 20 Atl. Rep. 951.

⁶ New Orleans &c. R. Co. v. Mississippi, 112 U. S. 12.

⁷ State v. Chicago &c. R. Co., 79 Wis. 259; *s. c.* 12 L. R. A. 180; 48 N. W. Rep. 243. Here again, the fact that an *action is given for a penalty* for failing to perform the duty does not prevent the remedy by *mandamus*, because that is not such an adequate remedy at law as bars the remedy to compel the performance of the duty. *Ibid.*

⁸ State v. Savannah &c. Canal Co., 26 Ga. 665.

⁹ People v. Louisville &c. R. Co., 120 Ill. 48.

¹⁰ People v. Chicago &c. R. Co., 130 Ill. 175.

¹¹ People v. Dutchess &c. R. Co., 58 N. Y. 152.

directed by statute;¹ or to establish and maintain a station at a particular place, where the statute law so requires;² or to compel a *water supply company*,³ or a *gas-light company*,⁴ to supply a customer who complies with the conditions entitling him to be supplied; or to compel a *railroad company*, which has leased its road and which owns no personal property of any material value, to *pay a tax upon its capital stock*,⁵ or to compel the board of trustees of the Wabash & Erie Canal to send up the papers in an appeal made by a land-owner from an assessment of damages for taking his land.⁶

§ 7827. When not Issued to Compel the Performance of Public Duties. — It is said that a writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a *specific legal duty* on its part to do that act, and clear proof of a breach of that duty.⁷ For instance, if the charter of a railroad corporation simply authorizes it, but without requiring it, to construct and maintain a railroad to a certain point, *mandamus* will not lie to compel it to complete and maintain its road to that point, where it appears that it can not be done at a profit,⁸ or where a grant of public lands has been made to enable it to do so, which grant has been forfeited.⁹ So, in the view of a majority of the Supreme Court of the United States, a *mandamus* will not lie to compel a railroad corporation to build

¹ *People v. Rochester &c. R. Co.*, 76 N. Y. 294.

² *Com. v. Eastern R. Co.*, 103 Mass. 254, 259; *s. c.* 4 Am. Rep. 555. Compare *Southeastern R. Co. v. Railway Comm.*, 6 Q. B. Div. 586.

³ *Haugen v. Albina Light &c. Co.*, 21 Or. 411; *s. c.* 14 L. R. A. 424; 45 Alb. L. J. 170; 28 Pac. Rep. 244.

⁴ *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136; *s. c.* 1 Abb. Pr. (N. s.) (N. Y.) 404.

⁵ *Person v. Warren R. Co.*, 32 N. J. L. 441.

⁶ *Wabash &c. Canal Co. v. Johnson*, 2 Ind. 219.

⁷ *Gray, J.*, in *Northern &c. R. Co. v. Washington*, 142 U. S. 492, 498; *s. c.* 11 Rail. & Corp. L. J. 115; 12 Sup. Ct. Rep. 283.

⁸ *York &c. R. Co. v. The Queen*, 1 El. & Bl. 858; *Great Western R. Co. v. The Queen*, 1 El. & Bl. 874; *State v. Southern Minn. R. Co.*, 18 Minn. 40.

⁹ *State v. Southern Kansas Ry. Co.*, 24 Fed. Rep. 179. Compare *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.), 180.

and maintain a station at a particular place, unless there is a clear specific duty so to do imposed by statute, and a clear breach of that duty.¹ So, a *mandamus* will not be granted to compel a railroad company to operate a line leased by it under a *lease* which both parties to the suit agree is illegal and void.²

§ 7828. Doctrine that the Public Duty must be Enjoined by Statute. — The doctrine of many courts is that *mandamus* will not lie to compel a corporation to perform a public duty unless the performance of that duty is *clearly and expressly enjoined by statute*, no matter how great the public necessity for its performance may be.³ This is a very poor doctrine, and an examination of several of the cases which affirm it illustrate that fact. In one of them there was a clear and pressing public necessity for the building of a proper station house on the Erie Railway at a town containing twelve hundred inhabitants. The company refused to build the station house, not because they had not the means to do so, but because the directors decided that it would not be to their interest to do so. Application was made to the railway commissioners, and upon a hearing they held that the company ought to build

¹ Northern &c. R. Co. v. Washington, 142 U.S. 492; s. c. 35 L. ed. 1092; 11 Rail. & Corp. L. J. 115; 12 Sup. Ct. Rep. 283. See to the contrary, cases in the preceding section, and note that the dissenting opinion of Mr. Justice Brewer, concurred in by Field and Harlan, JJ., seems to show that this case was wrongly decided on its merits. The Supreme Court of Iowa refused to grant a *mandamus* to compel a railroad company to transport an article called "New Era Beer," the statute law of that State prohibiting common carriers from bringing into the State *intoxicating liquors*, including beer, and the article being *prima facie* within the prohibition, so that it was discretionary

with the carrier to refuse to transport it, although in point of fact it was not an intoxicating liquor. Milwaukee Malt Extract Co. v. Chicago &c. R. Co., 73 Iowa 98; s. c. 34 N. W. Rep. 761.

² People v. Colorado &c. R. Co., 42 Fed. Rep. 638; s. c. 8 Rail. & Corp. L. J. 270; 45 Am. & Eng. Rail. Cas. 599.

³ People v. New York &c. R. Co., 104 N. Y. 58; s. c. 58 Am. Rep. 454; Northern Pac. R. Co. v. Washington, 142 U.S. 492. Compare Atchison &c. R. Co. v. Denver &c. R. Co., 110 U.S. 667, which was a bill in equity to compel one connecting railroad to grant certain facilities to another.

the station house. But as the legislature had clothed them with only an advisory power, the corporation ignored their recommendation; whereupon the Attorney-General applied for a writ of *mandamus*. This was granted by the Supreme Court; but the Court of Appeals, reversing its decision, held that, although the grievance complained of was an obvious one, yet the burden of removing it could be imposed upon the defendant by the legislature only.¹ So, in a case where the manipulators of a railroad corporation had built its road into a county where a county seat was already established and inhabited, and which was the largest and most prosperous town in the county, and for many miles along the road; but nevertheless, the manipulators ran the road through the county seat without establishing a station there, or making it a stopping-place, but established a new town contiguous thereto, — a paper town — and all this for reasons best known to its manipulators, — perhaps because the county seat refused to pay a bonus to them, or because they could make a real-estate speculation by founding a new town, — it was held, reversing the court below, that a *mandamus* would not issue to compel them to establish a station and stop their trains at the county seat.² The better view is that under every railroad charter or enabling statute, there is an *implied obligation* on the part of the company to maintain a station wherever the public interest demands it; that the State legislature, their sessions often limited to a few weeks, cannot bestow such a special attention upon the interests of local communities as to prescribe by statute that railroad companies shall be obliged to maintain stations at this or that point; that such legislatures have not the proper facilities for determining where such stations should be located, without doing injustice to the railroad company on the one hand or to the people on the other hand; and that consequently the power ought to reside in the judicial courts, upon a full hearing, to make such determination, and to enforce it

¹ *People v. New York &c. R. Co.*,
104 N. Y. 58, 67; s. c. 58 Am. Rep.
454.

² *Northern Pac. R. Co. v. Wash-
ington*, 142 U. S. 492 (Brewer, Field,
and Harlan, JJ., dissenting).

by *mandamus*, the writ going of course, only in a clear and strong case of public necessity. Such in substance is the doctrine of the Supreme Court of Nebraska;¹ and such manifestly is the principle on which other courts have acted.² But under this theory there must of course be a *very clear case of public necessity* for the establishment of the depot at a particular place, otherwise the writ will not lie.³

§ 7829. Does not Lie to Compel the Performance of Discretionary Acts.—It is a settled principle in relation to the use of the writ of *mandamus*, especially with reference to corporations, that where the statute law vests in a corporation, or in its governing body or officer, a *discretion* in relation to a particular matter, that discretion will not be controlled by *mandamus*, whether it has been exercised wisely or unwisely.⁴ On this ground a *mandamus* has been refused to control the action of a board of *school directors*;⁵ to compel the Governor to issue a proclamation prescribed by law on the application for a

¹ *State v. Republican Valley R. Co.*, 17 Neb. 647; *s. c.* 52 Am. Rep. 424.

² *People v. Chicago &c. R. Co.*, 130 Ill. 175; *Railroad Commissioners v. Portland &c. R. Co.*, 63 Me. 269; *s. c.* 18 Am. Rep. 208.

³ *Mobile &c. R. Co. v. People*, 132 Ill. 559, 572; *s. c.* 22 Am. St. Rep. 556. On the subject of the *location of a railway station*, the following cases, holding that, the question being one of public duty, a railway company *cannot bind itself, by contract with private individuals*, to locate its station at a particular point, may be compared with those which have preceded: *Bestor v. Wathem*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *Marsh v. Fairbury &c. R. Co.*, 64 Ill. 414; *s. c.* 16 Am. Rep. 564; *Snell v. Pells*, 113 Ill. 145; *St. Louis &c. R. Co. v. Mathers*, 71 Ill. 592; *s. c.* 22 Am. Rep. 122; and 104 Ill. 257. A provision in the charter of a railroad company that "the

corporation shall be obliged to receive at all proper times and places and convey persons and articles," is held to mean at all *reasonable* times and places, consistent with the right of the public to use the road; and it is held that, whether or not the times and places established by the corporation are of this description, is ultimately to be determined by the judicial courts; and that where the railroad commissioners, acting in pursuance of their power, have directed a railroad company to establish a station at a certain place, that direction will be enforced by *mandamus*. *Railroad Commissioners v. Portland &c. R. Co.*, 63 Me. 269; *s. c.* 18 Am. Rep. 208.

⁴ *People v. Bell*, 4 Cal. 177. Compare *Commonwealth v. President of Anderson Ferry*, 7 Serg. & R. (Pa.) 6.

⁵ *Clark v. Board of Directors*, 24 Iowa, 266.

charter of a corporation, the statute requiring him to issue it *when satisfied* that the law has been in all respects complied with;¹ to compel the *Commissioner of Insurance* to admit a *foreign insurance company* to do business in the State;² or to compel a *railroad company* to maintain a station at a particular place, there being no statute so requiring.³ But *mandamus* may be resorted to, to compel an inferior officer to do the act which is sought to be enforced, in all cases where the officer has *no discretion*, and where he is under obligation to do the specific act, and there is no adequate remedy in the ordinary course of law.⁴

§ 7830. Who Apply for the Writ: Plaintiff in the Action.

Where the writ is demanded to enforce a *public* right, the action is generally brought on behalf of the United States, or the State, as the case may be, by its Attorney-General or prosecuting attorney according to the directions of the statute law.⁵

¹ *State v. Chase*, 5 Ohio St. 528.

² *American Casualty Ins. Co. v. Fyler*, 60 Conn. 448; *s. c.* 25 Am. St. Rep. 337; 22 Atl. Rep. 494; *post*, § 7902.

³ *Northern & c. R. Co. v. Washington*, 142 U. S. 492; *s. c.* 11 Rail. & Corp. L. J. 115; 12 Sup. Ct. Rep. 283. An analogous doctrine is that the writ of *mandamus* does not issue to compel *judicial action*; but as judicial action cannot be in any case imputed to a private corporation, this principle is irrelevant to the present discussion. *United States v. Lawrence*, 3 Dall. (U. S.) 42; *Chase v. Blackstone Canal Co.*, 10 Pick. (Mass.) 244. Where, however, an association or society has certain statutes for the control of the rights of its members in the society, and certain judicatories to administer those statutes, *mandamus* does not lie in behalf of a member to enforce his rights therein, until his remedies have been exhausted before the ad-

judicatory of the society. *Ante*, § 912. That the members of a *county court* act ministerially in contracting for public work and may be controlled by *mandamus*,—see *Anderson County Court v. Stone*, 18 B. Mon. (Ky.) 848. *Mandamus* against a *judge* to reinstate a suit instituted by a corporation, erroneously dismissed for want of sufficient security for costs: *Ex parte Morgan*, 30 Ala. 51.

⁴ *People v. Bell*, 4 Cal. 177.

⁵ In *Northern & c. R. Co. v. Washington*, 142 U. S. 492; *s. c.* 11 Rail. & Corp. L. J. 115; 12 Sup. Ct. Rep. 283, it was prosecuted in the name of Washington Territory on the relation of Dunstin, its prosecuting attorney. In *New Orleans & c. R. Co. v. Mississippi*, 112 U. S. 12, it was brought on the relation of a district attorney of one of the judicial districts of the State of Mississippi. In Connecticut, a *mandamus* to compel a railroad company to continue to operate the road to the terminus fixed by the charter

It may also be brought on the relation of some other public board or official, whose office is directly concerned with the performance of the public duty demanded of the corporation.¹ According to the weight of authority, it may also be brought on the relation of a *private party*, even where the object is to enforce the performance of a public duty.² But other courts take the view that, except where the legislature has otherwise provided, *only the State* can proceed, whatever may be the form of proceeding, and that there can be no collateral inquiry, in an action by a private citizen, as to the failure of a corporation to perform a public duty, or to discharge a debt which it owes to the public generally.³

§ 7831. Against Corporation in Corporate Name. — A writ of *mandamus* may properly be directed against a corporation

was held to be properly applied for by the attorney for the State. *State v. Hartford &c. R. Co.*, 29 Conn. 538.

¹ For instance, in Pennsylvania, a *mandamus* to compel a railroad company to reconstruct a highway injuriously occupied by it, may be instituted on the relation of the *road commissioner* of the township within which the highway is situated, acting officially and after procuring the consent of the Attorney-General. *Com. v. New York &c. R. Co.*, 138 Pa. St. 58; *s. c.* 20 Atl. Rep. 951.

² *Union Pac. R. Co. v. Hall*, 91 U. S. 343; affirming *s. c.* 4 Dill. (U. S.) 479. In the opinion of the court in this case by Mr. Justice Strong, the following passage occurs, at page 355: "There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer. *People v. Collins*, 19 Wend. (N. Y.) 56; *County Comm'rs v. People*, 11 Ill. 202; *Ottawa v.*

People, 48 Ill. 233; *Hamilton v. State*, 3 Ind. 452; *People v. Halsey*, 37 Ind. 344; *State v. County Judge of Marshall*, 7 Iowa, 186; *State v. Rahway*, 33 N. J. L. 110; *Watts v. Carroll Parish*, 11 La. An. 141. See also *Dillon on Mun. Corp.*, sec. 695; *High on Ex. Rem.*, secs. 431, 432; *Cannon v. Janvier*, 3 Houst. (Del.) 27. The principal reasons urged against the doctrine are, that the writ is prerogative in its nature, — a reason which is of no force in this country, and no longer in England, — and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted."

³ *Martindale v. Kansas City &c. R. Co.*, 60 Mo. 508. In this case it was held that an action could not be maintained by a private person for the refusal of a railroad company to transport him to and from a station which they had abandoned.

in its corporate name, and need not necessarily be directed against the *officers* who wield its power.¹

§ 7832. **Corporation may Appeal where the Writ Runs Against its Officers.**—But where the writ is directed against the officers of a corporation to compel them to perform a corporate act, it has been regarded as a proceeding against the corporation itself, in such a sense as entitled it to *appeal* from the decision in its corporate name.²

¹ *State v. Chicago &c. R. Co.*, 79 (ante, § 7589) it will be discovered that Wis. 259; *s. c.* 12 L. R. A. 180; 48 N. the defendant was a corporation. W. Rep. 243. In many preceding ² *Louisville v. Kean*, 18 B. Mon. cases where the writ was successful (Ky.) 9.

CHAPTER CXCI.

LIMITATION AND LACHES.

SECTION	SECTION
7837. Corporations may acquire title by adverse possession	7840. Part payment to take the case out of the statute.
7838. Limitation of actions to forfeit charters.	7841. Limitation of actions against foreign corporations.
7839. Limitation of actions by creditors against trustees of corporations.	7842. Equitable doctrine of <i>laches</i> .

§ 7837. **Corporations may Acquire Title by Adverse Possession.** — Statutes of limitation *operate upon the plaintiff*, so as to deprive him of his remedy. Such being their operation, where a corporation, sued for the recovery of land, defends on the ground of title perfected through adverse possession under the statute of limitations, it is immaterial whether it is capable of acquiring *title* to land, under its governing statute; but it is sufficient that it can acquire and hold *possession*, and that it has done so. When it is considered that a corporation may be a *disseisor*,¹ the conclusion naturally follows that, when sued in any kind of action for the possession of real property, it may defend upon the ground of having had an adverse possession during the period of the statute of limitations, equally with a natural person.²

§ 7838. **Limitation of Actions to Forfeit Charters.** — Statutes have been enacted imposing a special limitation upon the time within which an action can be brought by the State to forfeit the charter of a corporation for misuser or non-user. In Ohio, for instance, where the action is for misuser, the

¹ *Ante*, §§ 5777, 6305, 7394, 7398, 7399.

² *Humbert v. Trinity Church*, 24

Wend. (N. Y.) 587; *People v. Trinity Church*, 22 N. Y. 44; affirming s. c. 30 Barb. (N. Y.) 537.

limitation is five years, but where it is to oust it of a franchise not conferred, it is twenty years.¹ The principle which applies to ordinary statutes of limitation is equally applicable to a statute of this kind, that want of *knowledge* on the part of the State or of its officer not superinduced by fraud, does not take the case out of the statute.²

§ 7839. Limitation of Actions by Creditors against Trustees of Corporations.—It has been held that the *directors* of a corporation are not such *trustees* of its assets in behalf of creditors as to debar them from interposing the defense of the statute of limitations, when the *creditors* bring a bill in equity to charge them with funds of the corporation alleged to be wrongfully converted by them. The theory of the holding is that the trust under which they hold the property of the corporation in favor of creditors is not an *express trust*, but a trust which the law raises for equitable purposes; and the court reason that one who is not actually a trustee, but upon whom that character is forced by a court of equity, may avail himself of the statute of limitations.³ That this is the rule in regard to trustees of those *implied trusts* which courts of equity raise for the purposes of justice, is true.⁴ But it is be-

¹ State v. Standard Oil Co., 49 Ohio St. 137, 188; s. c. 34 Am. St. Rep. 541; 30 N. E. Rep. 279.

² State v. Standard Oil Co., 49 Ohio St. 137; s. c. 34 Am. St. Rep. 541; 30 N. E. Rep. 279. Under section 1047 of the Revised Statutes of the United States, providing that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued," it has been held that the right to forfeit the charter of a national bank for a violation of its

provisions is limited to five years. Welles v. Graves, 41 Fed. Rep. 459; s. c. 7 Rail. & Corp. L. J. 392. And it has been held that where, under this statute, the right to forfeit the charter of a national bank has been lost by lapse of time, this has the effect of barring a proceeding against the directors to charge them personally with the violation of law for which the charter might have been forfeited. *Ibid.*

³ Baxter v. Moses, 77 Me. 465, 481; s. c. 52 Am. Rep. 783.

⁴ Baker v. Atlas Bank, 9 Metc. (Mass.) 182; Peabody v. Flint, 6 Allen (Mass.), 52; Farnam v. Brooks, 9 Pick. (Mass.) 212; Kane v. Black, 7 Johns. Ch. (N. Y.) 90; Stringer's

lieved that such is not the nature of the trust upon which the directors of a corporation hold its assets for its creditors after it becomes insolvent. They are not made involuntary trustees in a suit in equity for the purposes of a particular case, but they are regarded in equity as holding a *trust fund* for the benefit of the creditors of the company for general purposes;¹ and the general rule is that the statute of limitations is not available to them until they repudiate their trust relation and begin an adverse holding, which must be openly and publicly manifested.²

§ 7840. Part Payment to Take the Case out of the Statute.—Where a *part payment* of a debt is pleaded to take the case out of the statute of limitations, if the debtor is a corporation, there will, in some cases, be a question whether the debt has been paid on behalf of the corporation *by a person authorized thereto*.³ Where, as in the case of a *religious corporation*, the corporation consists of the trustees, churchwardens, or other governing body, and not of the congregation, then the question will be whether the governing body, where

Case, L. R. 4 Ch. 475; *Re Alexander Palace Co.*, 21 Ch. Div. 149; *Carrol v. Green*, 92 U. S. 509.

¹ *Ante*, §§ 1569, 2951. Compare especially *ante*, §§ 4361, 4362.

² Compare *ante*, § 3779, *et seq.*, § 4363. It has been held that an action by a stockholder against the directors of an insolvent national bank, founded in their negligence and wrongful acts, whereby the stockholders were compelled to pay assessments, is not an action "to enforce a liability created by law," and is not, hence, within the *three years* limitation prescribed by section 394 of the New York Code of Civil Procedure. *Brinkerhoff v. Bostwick*, 99 N. Y. 185; reversing *s. c.* 24 Hun (N. Y.), 352. Where a corporation has been *created to construct a gravel road, with power to lay assessments upon adjacent lands,*

and money has been advanced to the corporation on the faith of the assessments, and the president of the corporation has collected some of the assessments, and has not turned over the money to the lenders, he is deemed to hold the same *in trust* for them, and their right of action against him to recover the same dates from the time when, *repudiating the trust*, he assumed to hold the money adversely to them; that is to say, from the time he refused to pay it over to them upon request, and the statute of limitations begins to run from that date. *Pugh v. Miller*, 126 Ind. 189; *s. c.* 25 N. E. Rep. 1040.

³ See, for example, *Rew v. Petet*, 1 Ad. & El. 196, where a verdict resolving this question in the affirmative was sustained.

they contracted by their own names, authorized such part payment. This may be illustrated by a case where a parish vestry, having resolved to borrow money for the purposes of building an almshouse, borrowed the money upon the security of a promissory note, signed by the defendants,¹ with the stipulation that interest due upon the note should be regularly paid by the overseers for the time being, to a period within six years from the date when the action was brought upon the note. It was held to be a question for the jury, in dealing with the defense of limitation, whether, by the form of the note, the defendants had not constituted the parish officers for the time being, their agents for the payment of interest, so as to take the case out of the statute.²

§ 7841. Limitation of Actions against Foreign Corporations.—Statutes of limitation form no part of any contract unless made so by the parties to the contract. They concern only the *form* and *time* of the remedy for a breach of it. They are *local*, and have force only within the State which enacts them; and the courts of one State will not enforce the statutes of limitation of another State. Nearly all statutes *except from the time when they run* any period of time during which the debtor is a non-resident of the State and beyond the reach of its process. This exception is generally made by the use of the word “person” in describing the debtor; but, on a principle of interpretation already considered,³ it is justly held that a corporation is within the meaning of the statute; since the policy could not be imputed to the legislature of making a discrimination against its own citizens in favor of foreign corporations, which it expressly refuses to make in respect of foreign citizens.⁴ It follows that a statute of limitation does not run

¹ Thus “J. H., churchwarden, J. E., overseer, or others for the time being.”

² *Jones v. Hughes*, 5 Exch. 104.

³ *Ante*, §§ 11, 5689, 7366, 7700.

⁴ *Olcott v. Tioga R. Co.*, 20 N. Y. 210; *s. c.* 75 Am. Dec. 393 (overruling *Faulkner v. Delaware &c. Canal*

Co., 1 Denio (N. Y.), 441); *Rathbun v. Northern Cent. R. Co.*, 50 N. Y. 656; *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 43 (overruling *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 372; *s. c.* 93 Am. Dec. 409); *State v. Central Pac. R. Co.*, 10 Nev. 47, 81.

against a foreign corporation until such time as it comes voluntarily within the State and submits to its jurisdiction in some of the modes elsewhere pointed out.¹ The mere fact that it has property in the State which might be seized or affected in a *proceeding in rem*, does not, it has been held, take the case out of this rule. Nor is the rule less applicable because the action is brought by a foreign creditor, unless the statute makes a discrimination against such creditors.² On the other hand, a foreign corporation which has acquired within the domestic State a domicile for the purposes of litigation in any of the modes elsewhere pointed out,³ is not a non-resident in such a sense as suspends the operation of the statute of limitations against it, but may plead the statute of limitations as a resident corporation might.⁴ These principles conform to the principle which governs in the interpretation of this exception to the statute of limitations in the case of non-resident persons: the true test of the running of the statute being whether the defendant invoking its power has been amenable to the service of process during the whole period of its non-residence.⁵ For instance if, under the local statute, a foreign corporation have a managing agent within the State upon whom process may be served, so as to give jurisdiction over it in actions *in personam*, the period during which the running of the statute will be suspended against it, will be the period during which the plaintiff is disabled from suing by reason of its having no such managing agent in the State.⁶

¹ *Post*, § 7889, *et seq.*

² *Waterman v. Sprague Man. Co.*, 55 Conn. 554, 576; *s. c.* 12 Atl. Rep. 240.

³ *Post*, § 7889, *et seq.*

⁴ *Huss v. Central R. & C. Co.*, 66 Ala. 472.

⁵ *Ibid.*

⁶ *Express Co. v. Ware*, 20 Wall. (U. S.) 543. It is believed that in some of the foregoing cases the true principle has been *misapplied*, so as to cut off the defense of limitation in cases where, during the alleged

period of non-residence, the foreign corporation was domiciled within the State for jurisdictional purposes,—and notably in a case where the foreign corporation was the lessee of a railroad in the domestic State, connected with a road of which it was the owner in the State of its own origin, and where it had a managing agent of its leased railroad within the domestic State,—a circumstance which clearly made it amenable to the process of the courts of that State in actions *in personam*. *Rathbun v.*

§ 7842. **Equitable Doctrine of Laches.**— Outside the direct operation of statutes of limitation, lies the equitable doctrine of *laches*; a doctrine under the operation of which courts of equity frequently repel suitors where, under all the circumstances of the case, they have been guilty of inexcusable delay in moving to enforce their rights, so that there is a probability that adverse rights have been acquired upon the faith of the existing state of things, which would be disturbed if such suitors were admitted to the remedy which they seek. Premising that, in the application of this doctrine of laches, courts of equity do not necessarily apply the analogy of the statute of limitations, a decision may be referred to where it was held that a transaction fairly and openly entered into between a corporation and one of its directors, sanctioned by all and inuring to the benefit of the corporation, will not be set aside at its instance, *seven years* afterwards, on the ground that it was *ultra vires*;¹ and another, where it was held that the stockholders of a corporation cannot have an agreement by its officers canceled after it has been acted upon by the other party for *more than twenty years*, on the ground that they have just discovered the facts entitling them to such cancellation, where they could, by the exercise of even slight diligence, have easily discovered such facts, at any time after the execution of the agreement.² Numerous other applications of this doctrine have already been given, as will be seen by a reference to the index.

Northern Cent. R. Co., 50 N. Y. 656. Such a construction of the statute visits upon foreign corporations a discrimination which is not visited upon foreign citizens. There is a holding in Vermont to the effect that statutes of limitation do not commence running in favor of a foreign corporation until it acquires tangible property within the State: *Hall v. Vermont &c. R. Co.*, 28 Vt. 401. But this is contrary to the doctrine in Connecticut, which, as above seen, is to the

effect that the fact that the foreign corporation may have had, during the whole period, property within the domestic State which might have been reached by a proceeding *in rem*, does not enable it to avail itself of the defense of the statute. *Waterman v. Sprague Man. Co.*, 55 Conn. 554, 576.

¹ *Pneumatic Gas Co. v. Berry*, 113 U. S. 322.

² *Jesup v. Illinois &c. R. Co.*, 43 Fed. Rep. 483.

CHAPTER CXCI.

EXECUTIONS AGAINST CORPORATIONS.

ART. I. IN GENERAL. §§ 7847-7860.

ART. II. THE WRIT AND PROCEEDINGS THEREUNDER. §§ 7865-7869.

ARTICLE I. IN GENERAL.

SECTION

7847. General rule that corporate property subject to execution.

7848. Otherwise as to property of corporations created for public objects.

7849. Sequestration of earnings.

7850. Liens of judgments upon railroad property.

7851. Rolling stock vendible under execution.

7852. Alienation through sales to enforce mechanics' liens.

7853. Corporate franchises not subject to execution.

7854. Nor is property necessary to enjoyment of corporate franchises.

SECTION

7855. Cases to which this exemption does not extend.

7856. Decisions denying this exemption.

7857. Statutes abolishing this exemption.

7858. Levying upon a franchise of taking tolls and upon tolls to accrue under a franchise.

7859. Effect of levy upon personal property subject to existing mortgages.

7860. Levying upon the assets of a dissolved corporation, or a corporation in liquidation.

§ 7847. General Rule that Corporate Property Subject to Execution. — The *jus disponendi* is involved in the very idea of property; and it is well said that, in the absence of some express legal exemption, "it is an inseparable incident to property, legal or equitable, that it should be liable to the debts of the owner, as it is to his alienation."¹ This principle, in its application to the property of corporations, is de-

¹ Hough v. Cress, 4 Jones Eq. (N. C.) 295, 297; ante, § 6466. It is stated in an elementary work that the mere grant of the right to be a body

corporate would give, in the absence of any restriction, the power to acquire and dispose of property. Grant Corp. 4.

clared by statute in several States. Nevertheless, it has been said that some restriction upon this right is generally found, either in the object of the incorporation or in the nature of the property. But it is very properly conceded that where such a restriction does not apply, a corporation may be regarded as occupying the position of an individual owner. "There would be the same right of voluntary alienation, and a like liability to involuntary alienation. What the company could convey, its creditors might subject."¹ It follows that the property, whether real or personal, of corporations which are formed for the prosecution of objects of personal benefit, such as banking, trading, and manufacturing companies, may be seized and sold for the payment of the debts of the corporation, in like manner as the property of individual debtors may be seized and sold.² A corporation cannot therefore claim that its *funds* are exempt from the process of its creditors, because it needs them for the repair of its works, or has by resolution set them aside for that purpose,³ unless those works are affected with a public interest.⁴ And even then, whatever *exemption from execution* the law annexes to the property of private corporations necessary for the performance of their *public duties*, under the principles hereafter stated, may be waived by the legislature; and the power of the legislature to subject the property of a corporation, of whatever description, to the payment of its debts, is undeniable.⁵

§ 7848. **Otherwise as to Property of Corporations Created for Public Objects.** — But in respect of corporations created for *public objects*, such as *railway, turnpike* and *canal* companies, the view is that property belonging to such corporations, which is indispensable to the exercise of the franchises conferred upon them and to the performance of the correlative

¹ *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 377; *s. c.* 75 Am. Dec. 518, 520, 521. *ical &c. Orphan Home v. Buffalo &c. Asso.*, 64 N. Y. 561.

² *State v. Bank*, 6 Gill & J. (Md.) 81. ³ *Fox v. Reed*, 3 Grant Cas. (Pa.) 205; *s. c.* 26 Am. Dec. 561; *Evangel-*

⁴ *Post*, § 7848. ⁵ *Louisville &c. Co. v. Ballard*, 2 Metc. (Ky.) 165.

duties which they have assumed in behalf of the public, is not vendible in execution for the satisfaction of their debts.¹ Thus, a creditor of a *turnpike* company cannot levy upon and sell, under his execution, a section of the company's road.² Neither can a creditor of a *canal* company levy his execution, as was attempted in one case, "on a house and lot, sundry canal boats, a wharf and sundry other lots"; and in such a case an injunction will be granted to restrain the sale.³ So, a *railway* and its appurtenances, being necessary to the exercise of the franchise granted by the State, cannot be levied on and sold under an execution on a judgment against the corporation.⁴ So, where the plaintiff purchased, at a sale at execution against a *navigation* company, certain lands which had been condemned for its use under the provisions of its act of incorporation, including the bed covered by the waters of its canal at its terminus, and thereafter brought an action to recover its possession, it was held that he must be nonsuited.⁵

§ 7849. **Sequestration of Earnings.**—In such a case the statute law has intervened in some States and provided for the *sequestration of the tolls or earnings* of the corporation, while allowing it to proceed with its public duties.⁶

¹ Foster v. Fowler, 60 Pa. St. 27.

² Ammant v. New Alexandria & C. Turnp. Co., 13 Serg. & R. (Pa.) 210; s. c. 15 Am. Dec. 593.

³ Gue v. Tide Water Canal Co., 24 How. (U. S.) 257. It was said, among other things, by Chief Justice Taney, in giving the opinion of the court in this case, that it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors have a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by disavowing from the franchise property which was essential to its useful existence.

⁴ Youngman v. Elmira & C. R. Co., 65 Pa. St. 278; Plymouth R. Co. v.

Colwell, 39 Pa. St. 337; s. c. 80 Am. Dec. 526. Two cases which impugn this doctrine are State v. Rives, 5 Ired. L. (N. C.) 297, and Arthur v. Commercial & C. Bank, 9 Sm. & M. (Miss.) 394; s. c. 48 Am. Dec. 719, which follows State v. Rives. The former case is overruled by the same court in Gooch v. McGee, 83 N. C. 59; s. c. 35 Am. Rep. 558; and the latter is discredited by the case last cited and by the whole current of judicial authority. But in Coe v. Columbus & C. R. Co., 10 Ohio St. 372, 403; s. c. 75 Am. Dec. 518, — it was held that such a levy could be made.

⁵ Gooch v. McGee, 83 N. C. 59; s. c. 35 Am. Rep. 558.

⁶ See Rev. Code N. C. 1883, ch. 16, § 671, et seq. When this question

§ 7850. Liens of Judgments upon Railroad Property.—

A statute creating a lien upon the real estate of judgment defendants within the county in which judgments may be

was first before the Supreme Court of Pennsylvania, it was suggested by Tilghman, C. J., that the legislature ought to remedy the defect in the law, by providing for some mode of sequestration by which the profits arising from the operation of *plank roads* might be secured to the creditors of the respective companies. "But," he added, "in providing this remedy the public interest will not be neglected; care will be taken that so much of the tolls as is necessary shall, in the first place, be applied to the repair of the road, and only the *net profits* subject to the payment of debts." *Ammant v. New Alexandria &c. Turnp. Road*, 13 Serg. & R. (Pa.) 210; *s. c.* 15 Am. Dec. 593. Eleven years afterwards this suggestion was acted upon by the legislature, and an act was passed providing for the sequestration of the profits (Penn. Act of June 16, 1836) of corporations to satisfy judgments against them. See *Reed v. Penrose*, 36 Pa. St. 214, 240; *s. c.* 2 Grant Cas. (Pa.) 500; *Loudenschlager v. Benton*, 3 Grant Cas. (Pa.) 390; *Foster v. Fowler*, 60 Pa. St. 27; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 339; *s. c.* 80 Am. Dec. 526; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27. This statute was superseded by another statute, passed in 1870, the sole purpose of which is held to have been to supersede the remedy by sequestration and to substitute therefor the ordinary mode of levy and sale, under *fiat facias*, of the property, franchises and rights of the corporation. *Iron City Nat. Bank v. Siemens-Anderson Steel Co.*, 14 Fed. Rep. 150. As to the construction and effect of

this latter statute, see *Philadelphia &c. R. Co.'s App.*, 70 Pa. St. 355; *Bayard's App.*, 72 Pa. St. 453; *Hopkins's App.*, 90 Pa. St. 69; *Longstreth v. Philadelphia &c. R. Co.*, 11 W. N. Cas. (Pa.) 309. It will be recalled that *land* could not be sold under execution at common law, but that the satisfaction of judgments out of land could only be had by the species of sequestration called extending an *elegit*. This principle, no doubt, obtained in the American colonies at an early day, and traces of it were found in the statute laws of some of the States at a later period. Thus, by the laws of Indiana, as recited in a judgment of the Supreme Court of the United States (*Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 124, *anno* 1858), lands and tenements could not be sold under execution until the rents and profits thereof for a term not exceeding seven years should have been first offered for sale at public auction; and if that term, or a less one, should not satisfy the execution, then the estates or interest of the debtor might be sold, provided it brought two-thirds of its appraised value. Under this statute the tolls of a bridge company were levied upon and sold under an execution against it; and it was held that, in such a case, the remedies of the creditor were surrounded with such embarrassment that he might maintain a *bill in equity in aid of his execution at law*, and have a *receiver* appointed to collect the tolls and pay them into court for the purpose of discharging his judgment. *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 112, 124. In further-

rendered, is applicable to railroad property.¹ If there is a statute declaring that the *rolling stock* of a railroad corporation shall be deemed a *fixture*, then such a judgment becomes a lien at once upon the road and rolling stock,² although the effect of the lien might be nothing more than to give the judgment creditor a priority in distribution in case of a sale of the road by a proceeding in equity. The lien-holder may maintain a *suit in equity* for the enforcement of his lien after the railroad property has passed, under a subsequent mortgage, into the hands of a new owner.³ There is no difficulty in the conclusion that lands purchased by the railroad company, beyond what are actually dedicated to its public duties, are bound by the lien of judgments against it, and are liable to be levied upon under executions and sold, like the lands of any other debtor.⁴

§ 7851. Rolling Stock Vendible under Execution.—The generally prevailing doctrine that the rolling stock of a railroad company is *personal property*⁵ has a corollary in the proposition that it is vendible under an execution against the company.⁶ Courts have refused to extend the exemption stated in a preceding section⁷ to this species of property, because of the difficulty of determining what portion of the rolling stock possessed by the railroad company may be really necessary for the performance of its *public duties*,—taking the

ance of the same policy of preserving intact the corporate privileges vested for the public benefit, it has been enacted that purchasers of the property at mortgage sale shall, *ipso facto*, become a body corporate and “succeed to all such franchises, rights and privileges, and perform all such duties” as the preceding corporation possessed, except that they shall not incur liability for its obligations. Bat. Rev. N. C. Stat., ch. 26, §§ 46, 47. See *Gooch v. McGee*, 83 N. C. 59; *s. c.* 35 Am. Rep. 558, 563, where these

provisions are quoted and commented upon.

¹ *Ludlow v. Clinton Line R. Co.*, 1 Flipp. (U. S.) 25; *Railroad Co. v. James*, 6 Wall. (U. S.) 750.

² *Railroad Co. v. James*, 6 Wall. (U. S.) 750.

³ *Ibid.*

⁴ *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337; *s. c.* 80 Am. Dec. 526.

⁵ See *post*, § 8097.

⁶ *Hoyle v. Plattsburgh & c. R. Co.*, 54 N. Y. 314; *s. c.* 13 Am. Rep. 595.

⁷ *Ante*, § 7848.

view that it is wiser to leave the question of such an exemption to the legislature.¹

§ 7852. **Alienation through Sales to Enforce Mechanics' Liens.**—On grounds of public policy, the power to sell a *railway bridge*, or other *section* of a railway line, under judicial process to enforce a *mechanic's lien*, has been denied; since, if the exercise of this power were allowed, the interruption of a great line of railway travel, and consequently great public inconvenience, might flow from a successful effort at collecting a small private debt.² In like manner, it has been held that a *railroad bridge* is not subject to a mechanic's lien, as being a *building*, within the meaning of a statute making every "dwelling-house or other building" subject to a lien in favor of mechanics and material-men.³ But a building erected for a railway company for any of its uses, such as a *station house*, *freight house*, etc., may well be regarded as a building within the meaning of such a statute.⁴

§ 7853. **Corporate Franchises not Subject to Execution.**—Unless there is a statute providing otherwise, the franchise of a corporation—by which is meant its *right to be a corporation*, and as such to carry on a particular business, and to exercise certain powers and enjoy certain immunities,—cannot be taken in execution.⁵ The reason is twofold, the one technical and the other substantial. The technical reason is that a franchise, being an incorporeal hereditament, cannot, upon

¹ *Boston &c. Railroad v. Gilmore*, 37 N. H. 410; *s. c.* 72 Am. Dec. 336, 340.

² *Ante*, § 7848.

³ *La Crosse &c. R. Co. v. Vanderpool*, 11 Wis. 119; *s. c.* 78 Am. Dec. 691.

⁴ *Hill v. La Crosse &c. R. Co.*, 11 Wis. 214, 224; distinguishing *La Crosse &c. R. Co. v. Vanderpool*, 11 Wis. 119; *s. c.* 78 Am. Dec. 691.

⁵ *Ante*, § 5364; *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257; *Stew-*

art v. Jones, 40 Mo. 140; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27; *s. c.* 42 Am. Dec. 315; *Am-mant v. New Alexandria &c. Turnp. Co.*, 13 Serg. & R. (Pa.) 210; *s. c.* 15 Am. Dec. 593; *Arthur v. Commercial &c. Bank*, 9 Smedes & M. (Miss.) 394, 431; *s. c.* 48 Am. Dec. 719, *per* Clayton, J; *State v. Rives*, 5 Ired. L. (N. C.) 297, 306, *per* Ruffin, C. J. *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372, 377; *s. c.* 75 Am. Dec. 518, 521.

the settled principles of the common law, be seized under a *fiery facias*.¹ The substantial reason is that corporations are generally created in consideration of an obligation on their part to perform certain *public duties*; from which it follows that the object of their creation might be defeated if their franchises could be seized in execution by any creditor, who might or might not be able to exercise them.²

§ 7854. **Nor is Property Necessary to Enjoyment of Corporate Franchises.** — The principle which exempts from execution the franchises of a corporation equally exempts such of its property as is necessary for the enjoyment of its franchises.³ Accordingly it has been held that a *section of the road-bed of a turnpike* company is not subject to execution. "The inconvenience would be excessive if the right of the company could be cut up into an indefinite number of small parts and vested in individuals."⁴ Upon the same principle it has been held that a *house occupied by a collector of tolls* on a canal is exempt from levy and sale under a writ of *fiery facias* against the canal company. The court proceed upon the

¹ Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 263; Stewart v. Jones, 40 Mo. 140; Munroe v. Thomas, 5 Cal. 470; Thomas v. Armstrong, 7 Cal. 286; Winchester &c. Turnp. Co. v. Vimont, 5 B. Mon. (Ky.) 1; Arthur v. Commercial &c. Bank, 9 Smedes & M. (Miss.) 394, 431; s. c. 48 Am. Dec. 719; Ludlow v. Hurd, 6 Am. Law Reg. 493; Hatcher v. Toledo &c. R. Co., 62 Ill. 477; Seymour v. Milford &c. Turnp. Co., 10 Ohio, 476; Freeman on Ex., § 179; Talcott v. Township of Pine Grove, 1 Flipp. (U. S.) 120.

² Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27; s. c. 42 Am. Dec. 315. Upon the same principle, it has been held that a corporation has no power, unless such power is given by statute, to transfer its franchises and corporate rights.

Those franchises are in the nature of a *trust* committed to the corporation by the public, and upon obvious grounds they cannot barter away this trust to another unless the legislature has permitted them to do so. Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.) 328. See *ante*, § 5352, *et seq.*

³ Gue v. Tide Water Canal Co., 24 How. (U. S.) 257; Ammant v. New Alexandria &c. Turnp. Co., 13 Serg. & R. (Pa.) 210; s. c. 15 Am. Dec. 593; Susquehanna Canal Co. v. Bonham, 9 Watts & S. (Pa.) 27; s. c. 42 Am. Dec. 315. See also *ante*, §§ 5358, 5373. *Contra*, State v. Rives, 5 Ired. L. (N. C.) 297, 306.

⁴ Ammant v. New Alexandria &c. Turnpike Co., 13 Serg. & R. (Pa.) 210; s. c. 15 Am. Dec. 593.

ground that the property is essentially necessary to the enjoyment of the corporate rights and privileges of the company; and that, such being the case, it could make no difference whether it was situated upon the site of the canal or upon adjacent ground.¹ It was on like grounds extended to the locks, wharf, house, and land belonging to a canal company, and necessary to the operation of the canal.² Within the same principle has been included a corporation organized "to protect life and property in or contiguous to burning buildings, and to remove and take charge of such property,"—this being regarded as a *quasi*-public body, whose property is necessary to the carrying out of the public objects for which it was created.³

§ 7855. **Cases to Which This Exemption does not Extend.**—This exemption is founded alone on the consideration that the corporation has *public duties* to perform, and that it would be disabled from performing them by the deprivation of the property thus exempted. The reason upon which the exemption is founded has *no application to ordinary business corporations*, formed for mining, manufacturing, or trading, with the continued existence of which the public has no special concern. Such corporations are now freely allowed to be created under enabling statutes, and the power conferred upon them by such statutes can scarcely be called franchises. If their property is sold under execution, the purchasers may as freely incorporate themselves to own and use it, or they may own and use it without becoming so incorporated. The principle, therefore, has no application to such corporations, but their property is vendible in execution equally with that of individuals.⁴ In other directions the exemption extends

¹ *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27; s. c. 42 Am. Dec. 315. The same exemption was extended to the *cars* belonging to and used by a *railroad company*, and upon the same grounds. *Covey v. Pittsburgh &c. R. Co.*, 3 Phila. (Pa.) 180. But see *ante*, § 7851.

² *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257, 263.

³ *Boyd's Appeal* (Pa.), 15 Atl. Rep. 736. It was therefore held that its property was not leviable under an execution apart from its franchises, but that proceedings must be had under the act of 1870. *Ibid.*

⁴ This is substantially the view of Mr. Freeman, as shown by a learned note in 15 Am. Dec. 595.

no further than the reason on which it is founded. Property which is not necessary to the performance, by a corporation, of its public duties, is not within the exemption. Thus it has been held that a *canal basin* is not a legitimate incident to a *railroad*, having no authorized canal connection, and is not protected from levy and sale on execution against the railroad company.¹ So, where a corporation *abandons a portion of its franchises*, the property which it employed in the exercise of those franchises becomes subject to execution. Thus, where a *railroad company* ceases to use a portion of its road for public purposes, and proceeds to take up and carry away the *rails*, they may be levied upon and sold.²

§ 7856. Decisions Denying This Exemption. — Decisions are not wanting which deny that the *property* of corporations is exempted from execution on the theory of being necessary to the performance of their *public duties*. These decisions concede that the *franchise* of a corporation cannot be taken in execution, unless the State has so provided, because the purchaser would thereby become a new corporation; but they hold that the property of a corporation may be taken in execution, like the property of an individual, unless the legislature has seen fit to declare, as a principle of public policy, an exemption in its favor.³

¹ Plymouth R. Co. v. Colwell, 39 Pa. St. 337; s. c. 80 Am. Dec. 526.

² Benedict v. Heineberg, 43 Vt. 231.

³ State v. Rives, 5 Ired. L. (N. C.) 297; Atlanta v. Grant, 57 Ga. 340. The opinion in this case by Bleckley, J., though short, contains the following striking observations: "The franchise to be a corporation is what constitutes an artificial person. That is breath or being, and not property. You cannot sell it any more than you can sell the life of a man. But things, and the right to use things for profit, are property, whether in the hands of a corporation, or of a natural person.

A chartered railroad is property. The rights and privileges conferred by charter to use it as an instrument of transportation, are also property; for they adhere to it as accessories or incidents, and add to its value. Without them the railroad, as such, would be almost, or quite, useless. To own it, would be like owning a horse, with no right to ride him or drive him — no right to put him to labor. This would be owning materials merely; the iron and timbers, the earth and masonry, of the railroad; or the hide and flesh and bones of the horse. Whatever belongs to a corporation is subject to be applied to the payment of

§ 7857. **Statutes Abolishing This Exemption.** — It is stated by Mr. Freeman, in a learned note in the American Decisions,¹ that in most States statutes have been enacted under which franchises, and all property connected therewith, may be made available in satisfaction of judgments recovered against their owners.² A tendency has been discovered in one case to *construe such a statute strictly*, on the theory of its being in derogation of the common law; but this means no more than that, the statute having created a power which did not exist before, and prescribed the mode of its exercise, the levying officer cannot go outside of the statute for his authority to proceed, or for a direction as to the manner of proceeding.³

§ 7858. **Levying upon the Franchise of Taking Tolls and upon Tolls to Accrue under a Franchise.** — There is some confusion in the decisions upon this subject. The Supreme Court of the United States have held that the franchise or right to *take toll on boats going through a canal*, is not vendible in execution, unless there is a statute so providing; because such franchise is an *incorporeal hereditament*, which cannot be seized under a *fiery facias*, under the principles of the common law.⁴ The same court, in an earlier decision, held that, under a statute of Indiana prohibiting the sale of lands and tenements under execution until the rents and profits thereof for

its debts. It has no exempt property. In this State only the heads of families are entitled to withhold any of their assets from creditors. All other debtors must pay if they can. Their property, both legal and equitable, is all subject. What cannot be reached by strictly legal process, may be brought in by appealing to the powers of a court of equity, or to the equitable powers of a court of law." *Ibid.*, 57 Ga. 346.

¹ 15 Am. Dec. 596.

² Thus, in 1870, the Legislature of Pennsylvania passed an act providing that the franchises and other property of corporations might be

sold on execution. Philadelphia &c. R. Co.'s App., 70 Pa. St. 355; *ante*, § 7849.

³ James v. Pontiac &c. Plank Road Co., 8 Mich. 91. That the rule of the *strict construction* of statutes is an infringement upon legislative power, see the author's views, *ante*, § 3014.

⁴ Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 263. Compare *Tip-pets v. Walker*, 4 Mass. 595, where the power to levy on the franchise of taking tolls was doubted by Parsons, C. J.; and also the statement of Gray, J., in *Richardson v. Sibley*, 11 Allen (Mass.), 65, 71; s. c. 87 Am. Dec. 700, 704.

a term not exceeding seven years should have been first offered for sale at public auction, etc., the tolls to be paid by the public for using a *public bridge* during a period of time within the period named in the statute,—in the particular case for one year,—might be levied upon and sold under an execution. But as the tolls, when collected, would be in the possession of the judgment debtor, the remedy of the creditor was surrounded with such embarrassments that *equity would aid him*, by the appointment of a *receiver*, to collect the tolls and pay them into court for his benefit.¹

§ 7859. **Effect of Levy upon Personal Property Subject to Existing Mortgages.**—The effect of the levy of an execution upon personal property of a corporation which is subject to existing mortgages, as for instance, upon the *rolling stock* of a railway company, is said to give the levying creditor a lien as to any interest of the mortgagors which is subject to the levy, such as possession coupled with a beneficial use,²—which we suppose means that the purchaser at the execution sale might acquire a right to the beneficial use of the property until the prior mortgagee should elect to foreclose, or to take possession under his mortgage. But where a suit to foreclose has been brought, and in such suit a *receiver* has been appointed, and, under the orders of the court, the receiver has taken possession of the mortgaged property, it seems that no rights are acquired by the levying creditor.³

§ 7860. **Levying upon the Assets of a Dissolved Corporation, or a Corporation in Liquidation.**—It seems that an execution cannot be levied upon the assets of a *dissolved corporation*, unless the statute law so provides; because, at common law the land reverted to the grantor, and the personalty fell into the hands of the State.⁴ In such a case the remedy

Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112, 124.

² Coe v. Columbus &c. R. Co., 10 Ohio St. 372; s. c. 75 Am. Dec. 518, 542; citing Curd v. Wunder, 5 Ohio St. 93.

³ *Ibid.* Compare *ante*, § 6200.

⁴ *Ante*, § 6718. In an old case which was an information against the mayor and commonalty of Colchester for not repairing a bridge, it was said that if the corporation be

of the judgment creditor would be to proceed in equity to have a *receiver* appointed in aid of his execution, and to have the property administered as a trust fund for creditors and stockholders. If the corporation is in liquidation under a statute by which its directors are made its trustees to wind up its affairs, or in the hands of a receiver appointed by a court of equity, then an execution cannot be levied upon its property; because to allow this would give preference to a particular creditor and allow him to impair or destroy the fund which the law has put in pledge for the benefit of all. But if the directors, acting as trustees, under such a statute, neglect for a number of years—in the particular case for four years—to apply the trust property to the discharge of a judgment against the company, and it does not appear that there are other creditors, an *injunction will not issue* to restrain the judgment creditor from selling the trust property on execution.¹ So, if the sheriff has made the levy *prior to the appointment of a receiver*, a sale of the property thereafter will not, it has been held, be absolutely void as against the creditor in the execution, but at most, irregular.²

ARTICLE II. WRIT AND PROCEEDINGS THEREUNDER.

SECTION

7865. Misnomer in the writ.

7866. Sales under such executions.

7867. Distribution of the proceeds of the sale.

SECTION

7868. Right of a stockholder to redeem.

7869. Other questions arising under such executions.

§ 7865. **Misnomer in the Writ.**—The execution must follow the judgment; therefore, where the execution is against a corporation in name substantially different from that against which the judgment was rendered, the levy must fall.³ Im-

dissolved, no execution can be had against them if they were found guilty; and this was not denied, but it was also laid down that if the inhabitants be named, all lands are chargeable, though the corporation be dissolved by statute.

¹ Good v. Sherman, 37 Tex. 660.

² Varnum v. Hart, 119 N. Y. 101; s. c. 28 N. Y. St. Rep. 262; 23 N. E. Rep. 183.

³ Bradford v. Water Lot Co., 58 Ga. 280.

material *variances* between the writ and judgment will, however, be overlooked,—as where the action is brought in the name of the Bank of the State of Arkansas, which is the correct name, and the judgment entry recites the recovery of a judgment in favor of the State Bank of Arkansas.¹ Especially in proceedings before a *justice of the peace*, will variances and misnomers in such entries of judgment be overlooked, where there is no doubt, from the whole record, as to the real corporation intended.² But, of course, a judgment recovered against one corporation does not warrant the issuing of an execution against a totally different corporation; and if the sheriff levies it upon the property of such a corporation he will be responsible as a *trespasser*.³

§ 7866. *Sales under Such Executions.*—The *stockholders* of the corporation have such an interest in its property as will give them a standing in a court of equity to prevent an unlawful or fraudulent sale of it under execution, provided the directors, on request, refuse to institute the proper proceedings in the corporate name.⁴ They are not in a *fiduciary relation* to each other, as *tenants in common*⁵ or otherwise, such as will prevent any one of them from bidding at the sale to prevent a sacrifice of the corporate property, or to further his own personal interest. A *stockholder*, so bidding and purchasing, is not amenable in equity to the other stockholders, if there has been no fraud in the sale, even where he has purchased for less than its real value. In such a case the other stockholders may protect their rights by attending and bidding also, so as to prevent a sacrifice of the property to the particular stockholder.⁶ A *director*, on the other hand, sustains such a fiduciary relation to the corporation and to the stockholders, that he is not allowed to become a purchaser at

¹ Webster v. Bank, 4 Ark. 423.

² Wilton Town Co. v. Humphrey,
15 Kan. 372.

³ Ante, § 1071.

⁴ Ibid.

⁵ Mickles v. Rochester City Bank,
11 Paige (N. Y.), 118; s. c. 42 Am.

⁶ House v. Cooper, 30 Barb. (N. Dec. 103.
Y.) 157; ante, § 4479, et seq.

a judicial sale of its property, where his personal interest will come in contact with his duty as a fiduciary. In such a case he can only purchase subject to the right of the corporation to disaffirm, and it is totally immaterial whether any fraud in fact has supervened.¹ The same principle will disable an *officer* of the corporation from becoming a purchaser in his own right; and if he becomes a purchaser, the purchase will be regarded as having been made for the corporation.² A *director* or *officer* may, however, *become a creditor* of the corporation, and even a judgment creditor; and where he occupies such a position, it may become necessary for him to bid at the execution sale, in order to make the execution realize the amount of his judgment. In such a case it is conceived that his purchase would not be presumptively void, though equity would, no doubt, scrutinize the matter closely. If a *corporation* is the plaintiff in the judgment, it may obviously bid at the execution sale, for the purpose of protecting its rights, provided it has the faculty of purchasing and holding the property subject to sale, under any circumstances. But as a *public corporation*, for instance a *county*, can acquire and hold property for public purposes only, it has been held that it cannot bid in property at an execution sale, even under its own judgment.³

§ 7867. **Distribution of the Proceeds of the Sale.** — Under the Pennsylvania statute of 1870,⁴ superseding the remedy by sequestration under the act of 1836, the proceeds of an execution sale of the property and franchises of a corporation are distributed among all the creditors as in case of insolvency, the levy creating no *lien* thereon.⁵ But under the later

¹ *Hoyle v. Plattsburgh &c. R. Co.*, 54 N. Y. 314; *s. c.* 13 Am. Rep. 595, 605; *ante*, § 4071, *et seq.*

² *McAllen v. Woodcock*, 60 Mo. 174, where the purchase was made by one who was a stockholder and also the treasurer.

³ *Williams v. Lash*, 8 Minn. 496.

⁶ Bayard's Appeal, 72 Pa. St. 453.

See the observation of Johnson, C., in *Hoyle v. Plattsburgh &c. Co.*, 54 N. Y. 314; *s. c.* 13 Am. Rep. 595, 606. Compare *Beach v. Miller*, 130 Ill. 162; *s. c.* 17 Am. St. Rep. 291; 28 Am. & Eng. Corp. Cas. 468; 22 N. E. Rep. 464; reversing *s. c.* 23 Ill. App. 151.

⁴ *Ante*, § 7849.

statute of April 9, 1872, a *preference* is given to the *wages* of laborers in the distribution of a fund arising from the proceeds of an execution sale of corporate *personalty*; and this preference has been accorded to a laborer who was also a stockholder.¹

§ 7868. Right of a Stockholder to Redeem. — Not only can a *stockholder* interpose and demand the aid of a court of *equity* to prevent an irregular and *fraudulent* sale of the corporate property, if the directors upon request will not proceed,² but it has been held that where the property of a corporation has been sold under execution, and no steps are taken by the corporate authorities to redeem the property within the period limited by law, a stockholder may interpose and redeem the property for the corporation, and hold it liable for the money advanced for that purpose. By so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the original purchaser at the sheriff's sale.³

§ 7869. Other Questions Arising under Such Executions. *Bonds* of a corporation, intended to be issued but held by its trustees or agents in *escrow*, or for negotiation, are not *property* in a legal sense, except to the extent of the value of the paper on which they are printed, and cannot consequently be seized under process against the corporation.⁴ While, as already seen, the shareholders have a standing in equity to *enjoin an illegal sale* of the property of a corporation in case

¹ *National Bank v. Oxford &c. Car Co.*, 2 Pa. County Ct. 360. Where a corporator obtained *insurance* on corporate real estate, in the joint names of himself and the corporation, and the property was afterwards sold under a *judgment* against the corporation in favor of such corporator, and bid in by him, and subsequently partially destroyed by fire, and not redeemed, — it was held that he was entitled to receive the insurance money due on the policy; though it would be other-

wise in the case of a loss happening before the sale, or in case of a redemption of the property, in which case the corporation would be entitled to it. *Mickles v. Rochester City Bank*, 11 Paige (N. Y.), 118; s. c. 42 Am. Dec. 103.

² Compare *ante*, § 4520, and other decisions in that title.

³ *Wright v. Oroville &c. Mining Co.*, 40 Cal. 20.

⁴ *Cunningham v. Pennsylvania &c. R. Co.*, 11 N. Y. St. Rep. 663.

the directors upon request will not proceed in the name of the corporation,¹ yet it has been held that the pendency of a bill by a member to redress breaches of duty by the trustees will not affect the right of a judgment creditor to sell land of the corporation under his execution; and that the purchaser at the sale does not take title affected by a *lis pendens*.²

¹ *Ante*, §§ 4518, 6527; *House v. Cooper*, 30 Barb. (N. Y.) 157.

² *Paine v. Root*, 121 Ill. 77; *s. c.* 13 N. E. Rep. 541; 9 West. 752. The statute of New Jersey respecting *proceedings supplementary to execution* (N. J. Rev., p. 393) has been held to furnish a mode for compelling satisfaction of judgments against natural persons, and not as including corporations. *Conner v. Todd*, 48 N. J. L. 361; *s. c.* 7 Atl. Rep. 477. Levying under Mass. Stat. 1851,

ch. 315, § 3, upon the property of a stockholder: *Dewey v. Baker*, 16 Gray (Mass.), 130. Circumstances warranting the refusal of an injunction upon a sale of the franchise, under an execution on a judgment for a debt payable in installments, a portion of which was alleged not to have fallen due, no fraud or collusion appearing: *Ward v. Salem Street Railway*, 108 Mass. 332.

TITLE NINETEEN.

FOREIGN CORPORATIONS.

TITLE NINETEEN.

FOREIGN CORPORATIONS.

CHAPTER CXCIIL.

STATUS AND POWERS OF, IN GENERAL.

SECTION

7875. *Status* of foreign corporations as settled by Federal decisions.
7876. Not entitled to the privileges and immunities of citizens in the several States.
7877. Whether entitled to the "equal protection of the laws" of the State within which it is permitted to do business.
7878. Federal protection of foreign corporations engaged in interstate commerce.
7879. What is interstate and foreign commerce within this prohibition.
7880. What is not interstate commerce within this prohibition.
7881. Cannot migrate, but must dwell in place of its creation.
7882. May make and take contracts in other States and countries except where prohibited.
7883. Presumptions arising in support of the validity of the contracts of foreign corporations.
7884. Cannot exercise corporate franchises in a foreign jurisdiction except by comity.

SECTION

7885. Cases to which this comity does not extend.
7886. All their rights subject to the domestic law.
7887. States may impose conditions upon which they may do business.
7888. May be required to appoint a resident agent upon whom process may be served.
7889. May establish agencies and do business in the domestic State unless prohibited.
7890. Foreign corporations made domestic corporations *quoad hoc*.
7891. When deemed to have been made such, and when not.
7892. Instances where such adoption and domestication were held to have taken place.
7893. Instances where such adoption and domestication held not to have taken place.
7894. Statutes subjecting foreign corporations to the same liabilities and restrictions as domestic corporations.
7895. *Status* of "tramp corporations."
7896. Further of "tramp corporations."

6 Thomp. Corp. § 7875.] FOREIGN CORPORATIONS.

SECTION	SECTION
7897. To what extent may act in other States.	7902. <i>Mandamus</i> to compel issuing of license to foreign corporation.
7898. <i>Status</i> of foreign insurance companies.	7903. Foreign corporation doing business under the same name as a domestic corporation.
7899. <i>Status</i> of corporations created by the Congress of the United States.	7904. Courts will not interfere with internal management of foreign corporations.
7900. Foreign corporations when deemed "persons."	7905. But will settle ordinary questions depending upon the construction of foreign charters.
7901. When the word "corporation" used in statutes, applies to foreign corporations.	

§ 7875. Status of Foreign Corporations as Settled by Federal Decisions.—The following propositions of law are settled by the decisions of the Supreme Court of the United States: 1. A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the State or sovereignty by which it is created. It must dwell in the place of its creation. 2. Where a corporation is created by the laws of a State, the legal presumption, for the purposes of Federal jurisdiction, is that all its members are citizens of the State by which it was created; and in a suit by or against it, it is conclusively presumed to be a citizen of such State. 3. A corporation endued with its capacities and faculties by the co-operating legislation of two States cannot have one and the same legal being in both States. Neither State can confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised. 4. The constitutional privilege which a corporation has, as a citizen of one State, to sue the citizens of another State in the Federal courts, cannot be taken away by simply declaring it to be a corporation of the latter State.¹

¹ So stated, in substance, by Snyder, J., in *Rece v. Newport News &c. Co.*, 32 W. Va. 164; *s. c.* 5 Rail. & Corp. L. J., 515, 517,—on the authority of the following Federal cases, which support the statement:—*Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Marshall v. Baltimore R. Co.*, 16

How. (U. S.) 314; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210; *Railway Co. v. Whitton*, 13 Wall. (U. S.) 270; *Muller v. Dows*, 94 U. S. 444; *Memphis R. Co. v. Alabama*, 107 U. S. 581. Learned notes on the *status, powers, and rights of foreign*

§ 7876. **Not Entitled to the Privileges and Immunities of Citizens in the Several States.**—From what has preceded it must be concluded that a corporation is not a “*citizen*” within the meaning of that clause of the Federal constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.¹ Therefore, a corporation created by one State can exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.² Such a construction of the constitutional provision under consideration often would, it has been pointed out, operate to confer upon citizens of other States combining themselves into corporations, *greater privileges* than are enjoyed by the citizens of the domestic State, and deprive the State of all control over the extent of corporate franchises, proper to be granted, within its limits.³

§ 7877. **Whether Entitled to the “Equal Protection of the Laws” of the State within Which It is Permitted to do Business.**—The *fourteenth amendment* to the Constitution of the United States provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” It is past all doubt that the framers of this celebrated provision had no idea in their minds that it would be turned into a means of protecting foreign corporations and guaranteeing to them the same privileges which are enjoyed by domestic corporations. Such a construction would sweep away all the previous constitutional doctrine on the question of the *status* of foreign corporations. It would operate to give to them, in

corporations will be found in 14 Am. & Eng. Corp. Cas. 28; 15 Am. & Eng. Corp. Cas. 438; and 22 Am. & Eng. Corp. Cas. 551.

¹ Const. U. S., art. 4, § 2.

² Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Paul v. Virginia, 8 Wall. (U. S.) 168; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566; s. c. 10 Myer Fed. Dec., § 16; Pem-

bina &c. Min. Co. v. Pennsylvania, 125 U. S. 181; Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369; Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114; s. c. 10 Sup. Ct. Rep. 958; State v. Lathrop, 10 La. An. 398; Farmers' &c. Ins. Co. v. Harrah, 47 Ind. 236.

³ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 586.

any State, the privileges and immunities of citizens in that State, which, we have already seen,¹ they do not possess under another clause of the constitution. It would, in its practical workings, oblige any State to concede to foreign corporations the same privileges within its limits which it concedes to corporations of its own creation; and it could be easily extended, by judicial construction, so as to prevent any State from excluding foreign corporations from its limits, or from prescribing the terms upon which they should reside and do business within its boundaries. Down to the present time, such a construction has not been arrived at, although, such is the steady tendency of the Federal judiciary to enlarge the rights of corporations, that it cannot be predicted whether it will not be reached in the near future. The present judicial construction of the clause under consideration is that it does not prohibit a State from imposing such conditions upon foreign corporations as it may choose, as requisite to their admission within its limits.² It may, for instance, impose upon foreign insurance companies doing business within the State, a *tax* of two dollars upon every one hundred dollars of premiums received by such companies, although no such tax is imposed on domestic companies; nor is this a violation of the principle that taxation must be uniform.³

¹ *Ante*, § 7876.

² *Pembina &c. Min. Co. v. Pennsylvania*, 125 U. S. 181. See also *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114, 118; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110.

³ *Ducat v. Chicago*, 48 Ill. 172; *s. c.* 95 Am. Dec. 529. The court proceeded upon the view "that corporations have no *status* in States, as citizens of the State creating them, and when they come into this State to do business and make profits, a discrimination can be rightfully made between them and our domestic corporations of the same character; that, if it should be deemed good policy, by the legislature, they could be so taxed,

or otherwise burdened, as to compel them to leave the State. They may be regarded as a benefit or a nuisance according to the caprice of the legislature." *Ibid.*, 179, *per* Breese, C. J. A decision of the Supreme Court of California goes to the length of holding that, after a foreign corporation has been admitted to do business in that State, it is incompetent for the legislature to impose a tax upon it, which is not imposed upon domestic corporations of a like character. The court regard it as violative of a provision of the Constitution of the State. *San Francisco v. Liverpool &c. Ins. Co.*, 74 Cal. 113; *s. c.* 5 Am. St. Rep. 425. However this may be, it is clear

§ 7878. **Federal Protection of Foreign Corporations Engaged in Interstate Commerce.**—The Constitution of the United States provides that “the Congress shall have power . . . to regulate commerce with foreign nations, and among the several States and with the Indian tribes.”¹ The present construction of this provision is that the power thus conferred upon Congress is *exclusive* to the extent that, by conferring it upon Congress, the constitution prohibits it to the States, in so far as the power relates to matters of general or national concern, such as require uniformity of regulation; but that, in so far as it relates to matters of local concern, the States may impose regulations, so long as Congress declines to act.² It is also the settled construction of this provision that interstate commerce carried on *by corporations* is entitled to the same protection against State exactions as when carried on by individuals.³ Although Congress has exercised the power in a very few instances, this construction involves the further conclusion that the non-exercise by Congress of the power is tantamount to the declaration that, in any given particular, except in matters of local concern only, commerce among the several States *shall be free*.⁴

that it violates no principle of the Federal Constitution, as the Supreme Court of California seem to suppose.

¹ Const. U. S., art. 1, § 8, cl. 2.

² *Cooley v. Board of Wardens*, 12 How. (U. S.) 299, 319; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336; *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 492, 493. See also *Brown v. State*, 12 Wheat. (U. S.) 419; *Passenger Cases*, 7 How. (U. S.) 283; *Crandall v. State*, 6 Wall. (U. S.) 35, 42; *Ward v. Maryland*, 12 Wall. (U. S.) 418, 430; *State Freight Tax Cases*, 15 Wall. (U. S.) 232, 279; *Henderson v. New York*, 92 U. S. 259, 272; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Mobile v. Kimball*, 102

U. S. 691, 697; *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557.

³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

⁴ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 122, *per* Mr. Justice Johnson; *Passenger Cases*, 7 How. (U. S.) 283, 462, *per* Mr. Justice Grier; *State Freight Tax Cases*, 15 Wall. (U. S.) 232, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. R. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 493.

§ 7879. **What is Interstate and Foreign Commerce within This Prohibition.** — So far as we are enlightened by judicial decisions, we shall consider in this section, what is, and in the following section, what is not, *interstate and foreign commerce*, within the meaning of the prohibition spoken of in the preceding sections. In the first place, it is to be observed that interstate and foreign *transportation* is interstate and foreign commerce, within the meaning of the commerce clause of the Federal constitution.¹ Interstate or foreign transportation, within the meaning of this principle, takes place whenever freight is taken up within the limits of a State and set down within the limits of another State or foreign country; or whenever freight is taken up within the limits of another State or foreign country and set down within the limits of the domestic State.² *Telegraphic communications* between different States are interstate commerce within the same principle, and as such are directly within the power of regulation conferred upon Congress, and free from the control of State regulations, except such as are strictly of a police character.³ Therefore, the Act of Congress of July 24, 1866, in so far as it declares that the erection of *telegraphic lines* shall, as against State interference, be free to all who accept its terms and conditions, and that a telegraphic company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation by Congress of commercial intercourse among the States, and is also appropriate legislation to execute the powers of Congress over the *postal service*.⁴ For the same reason, a State cannot lay a tax on the *interstate business* of a *telegraph company*, especially if such company has accepted the provisions of the act of 1866 so as to become an *agent of the government* of the United States, which would make State laws unconstitutional, in so far as they impose a tax upon

¹ Bowman v. Chicago &c. R. Co., 125 U. S. 465; Lyng v. Michigan, 135 U. S. 161; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

² Case of State Freight Tax, 15 Wall. (U. S.) 232.

³ Leloup v. Mobile, 127 U. S. 640, 645.

⁴ Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

messages sent in the service of the government.¹ Sales by a corporation situated without a State, of goods, to a resident of the State, to be shipped to him into the State, belong to the operations of interstate commerce, and are consequently not subject to a prohibition of the State constitution against foreign corporations doing business within the State without having an agent or place of business therein.² So does a contract by which a resident of a State agrees with a foreign corporation to canvass certain territory within the State for the sale of its manufactured productions,—the corporation agreeing to sell the same to him on a credit, and taking a bond from him to secure payment for such sales. Such a contract is therefore unaffected by a State statute prohibiting business within the State by foreign corporations which have not complied with certain regulations, such as filing a certificate and designating an agent upon whom process may be served.³

§ 7880. What is not Interstate Commerce within This Prohibition.—The business of *insurance*, as ordinarily conducted, is *not commerce*; and an insurance company of one State, having an agency by which it conducts the insurance business in another State, is *not engaged in commerce between the States*; so that restrictions imposed in the State to which it has migrated upon the manner of its conducting its business are not inhibited by that clause of the Federal constitution which confers upon Congress power to regulate commerce among the States.⁴

§ 7881. Cannot Migrate, but must Dwell in Place of its Creation.—The following propositions are believed to be settled law: (1) That a corporation can exist only by force of the statute or other law of the State or country in which it is

¹ Telegraph Co. v. Texas, 105 U. S. 460.

² Ware v. Hamilton-Brown Shoe Co., 92 Ala. 145; s. c. 9 South. Rep. 133.

³ Gunn v. White Sewing Machine

Co., 57 Ark. 24; s. c. 20 S. W. Rep. 591; 18 L. R. A. 206.

⁴ Paul v. Virginia, 8 Wall. (U. S.) 168; reaffirmed in Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566; s. c. 10 Myer Fed. Dec., § 16.

created; (2) that the laws of one State or country can, by their own vigor, have no extra-territorial force in another State or country, but are allowed to operate there only on the principle of comity; (3) that, as a corporation is a creature of the law of the State or country creating it, it cannot migrate into another State or country, establish its residence there, and exercise its franchises there, without the consent of the legislature of that other State or country, express or implied. This doctrine was conceded in a leading case, in the following language in the opinion of the court by Chief Justice Taney: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."¹

§ 7882. **May Make and Take Contracts in Other States and Countries except where Prohibited.**—But it does not follow, from the doctrine of the preceding section, that the existence of a corporation will not be so far recognized in States and countries other than the State or country of its creation, as to allow it to make and take, in such State or country, such contracts as are permitted to ordinary persons. It is, as has been pointed out, a mere artificial being, invisible and intangible; and yet it is a *person*, for certain purposes, in contemplation of law, and especially for purposes relating to the jurisdiction of the courts of the United States.² As natural persons, through the intervention of their agents, are con-

¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 588. To the same effect see *Day v. Newark India Rubber Co.*, 1 Blatchf. (U. S.) 628; *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Rece v. Newport News &c. Co.*, 32 W. Va. 164; *s. c.* 9 S. E. Rep. 212; 3 L. R. A. 572; 5 Rail. & Corp. L. J. 515.

² *Ante*, §§ 11, 5689, 7366, 7790, 7804; *post*, §§ 7900, 8059; *United States v. Amedy*, 11 Wheat. (U. S.) 392; *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 102, 125; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; 588.

tinually making contracts in countries in which they do not reside, which contracts are universally allowed to be valid unless prohibited by the law of such country,—so it has been reasoned that an artificial person may, by its agents, make contracts, within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by such persons by the law of such sovereignty. Such contracts will undoubtedly be valid if (1) within the scope of the powers conferred upon the corporation by the law of the sovereignty which has created it, and where it dwells; and (2) if permitted by the law of the sovereignty within which the contract is made, or within which it is to be performed.¹ But it must be carefully kept in mind that the power of a corporation to make contracts in another State or country does not rest upon the same footing as that of a natural person when dealing with property rights of which he is the beneficial owner or possessor. The power of a natural person thus to deal with his own is conceded, it may be assumed, by every civilized State, subject, of course, to limitations which concern its own laws and policy, without reference to the citizenship or domicile of such person. But the power of foreign corporations so to contract necessarily involves in it an exertion of the power conferred on the artifi-

¹ See, in support of these propositions, the reasoning of Taney, C. J., in *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 588; also *Connecticut &c. Ins. Co. v. Cross*, 18 Wis. 109; *New York Floating Derrick Co. v. New Jersey Oil Co.*, 3 Duer (N. Y.), 648; *Mumford v. American Life Ins. &c. Co.*, 4 N. Y. 463; *Bard v. Poole*, 12 N. Y. 495. It has been said that a concession of the power of a corporation to make contracts other than in the State of its creation is nothing more than an admission of the existence of the artificial person, created by the laws of another State, and clothed with the power of making certain contracts. "It is but the usual comity of recognizing the laws of another State. Natural persons, through the intervention of their agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract *within the scope of its limited powers*, in a sovereignty in which it does not reside, provided such contracts are permissible by the law of the place?" *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. (Pa.) 180, 225.

cial body by the sovereign creating it, and the law of that sovereign, conferring the power, has no extra-territorial force of its own vigor. It is, therefore, only on the principle of *comity* that corporations are allowed to make and take contracts within the bounds of other sovereignties. But, at least as among the States of the American Union, this comity is so freely exercised that, for practical purposes, it may be said that such a power exists in the United States as a matter of law, except where prohibited by the positive local law. It is true that it is also said in some judicial opinions, that the power does not exist where it is opposed to the public policy of the State within which its exercise is attempted. What is, or what is not public policy is, of course, a judicial question, except where the legislature has spoken, in which case the voice of the legislature is conclusive evidence. Assuming, then, that it has power so to do under its own charter or governing statute, it may be regarded, for practical purposes, a settled principle of American law, that a corporation created in one State of the Union may make and take contracts in another State except where prohibited by the laws of such other State.¹

§ 7883. Presumptions Arising in Support of the Validity of the Contracts of Foreign Corporations. — It will be presumed, in the absence of proof to the contrary, when the acts of a corporation, done in another State, are drawn in question, that the corporation was properly authorized in the State by which it was created.² Where the validity of a contract, made by a corporation in a State other than the State of its creation is drawn in question, it will not be presumed, in the absence of proof, that there is any restriction in its charter, or in the laws of the State of its creation, prohibiting it from making such contracts in a foreign jurisdiction.³ But it will be pre-

¹ Blair v. Perpetual Ins. Co., 10 Mo. 559; s. c. 47 Am. Dec. 129; Stoney v. American Life Ins. Co., 11 Paige (N. Y.), 635.

² Wood Hydraulic &c. Co. v. King, 45 Ga. 34, 40.

³ New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer (N. Y.), 648;

sumed that it acts under a general, and not under a limited authority.¹

§ 7884. **Cannot Exercise Corporate Franchises in a Foreign Jurisdiction except by Comity.**—From the foregoing principles it must follow that a corporation created under the laws of one State or country, cannot exercise any of the franchises which are peculiar to corporations, and which are not possessed by individuals, within the limits of another State or country, except by the comity of that other State or country, which comity is generally expressed by its legislature in statutes relating to the subject of foreign corporations.² This comity will generally be extended so as to allow the foreign corporation to exercise, within the domestic State, any powers with which it may be endowed by its own charter, unless repugnant to the policy of the domestic State or injurious to its citizens;³ but when to allow its exercise would be contrary to good policy or prejudicial to the interests of the State, the comity ceases to be obligatory.⁴ This comity, it has been well reasoned, is the comity of *States*, and not the comity of *courts*. In other words, the power of determining whether, how far, with what modification, or on what conditions, the laws of one State, or any rights dependent upon them, shall be recognized in another State, is a *legislative power*. The conclusion, then, is that the judiciary must be guided in deter-

Boulware v. Davis, 90 Ala. 207. That this is the rule in regard to domestic corporations, see *ante*, §§ 5644, 5967; *Chataque Co. Bank v. Risley*, 19 N. Y. 369, 381; *s. c.* 75 Am. Dec. 347; *Farmers' Loan & Co. v. Clowes*, 3 N. Y. 470.

¹ *New England & C. Ins. Co. v. Hasbrook*, 32 Ind. 447. Thus, an agreement between a banking corporation, located in Wisconsin, and commission merchants in the city of New York, by which the former is to consign produce to the latter for sale on commission, against which drafts are to

be drawn, and to keep the drawees in funds to meet the same, in cases where consignments are not made, was not deemed necessarily illegal, in the absence of anything to show what powers are possessed by the bank, by virtue of its charter. *Perkins v. Church*, 31 Barb. (N. Y.) 84.

² *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

³ *Alward v. Holmes*, 10 Abb. N. Cas. (N. Y.) 96.

⁴ *Ducat v. Chicago*, 48 Ill. 172; *s. c.* 95 Am. Dec. 529.

mining the question by the practice and policy adopted by the legislature.¹

§ 7885. Cases to Which This Comity does not Extend.— Without attempting to enumerate, in a single section, all the cases to which this comity does not extend, it may be observed, in the first place, that it does not extend so far as to concede to foreign corporations the powers which their own charters do not permit them to exercise;² nor so far as to permit a foreign corporation to exercise powers within the State which a domestic corporation of the same kind is not permitted to exercise under the constitution and policy of the State.³

¹ *Thompson v. Waters*, 25 Mich. 214; s. c. 12 Am. Rep. 243; *Carroll v. East St. Louis*, 67 Ill. 568; s. c. 16 Am. Rep. 632.

² *Diamond Match Co. v. Powers*, 51 Mich. 145; *Talmadge v. North American Coal &c. Co.*, 3 Head (Tenn.), 337; *Thompson v. Waters*, 25 Mich. 214; s. c. 12 Am. Rep. 243; *ante*, § 3046; *post*, § 7905.

³ *Clarke v. Central Railroad &c. Co. of Georgia*, 50 Fed. Rep. 338; *Empire Mills v. Allston Grocery Co.* (Tex. App.), 15 S. W. Rep. 505; s. c. 12 L. R. A. 366; 9 Rail. & Corp. L. J. 294; 33 Am. & Eng. Corp. Cas. 16; s. c. affirmed on rehearing, 15 S. W. Rep. 200; s. c. 33 Am. & Eng. Corp. Cas. 15. For instance, where the privilege of organizing into a corporation for the purpose of carrying on *mercantile operations* is denied to the citizens of a State by its own legislature, it will not allow them, or other persons, to evade the statute by becoming incorporated in another State for the sole purpose of carrying on mercantile operations in the particular State. *Ibid.* It was at one time held in one of the departments of the Supreme Court of New York, that

the comity of that State does not extend so far as to recognize what is called a "*tramp corporation*," that is, a corporation organized in another State for the sole purpose of doing business in the State of New York, but that, after such a corporation migrated into the State of New York, it lost the franchises conferred upon it by the State of its birth, and became a mere *partnership* in the State of New York, and its members became liable as partners. *Merrick v. Brainard*, 38 Barb. (N. Y.) 574. But this policy was reversed by the Court of Appeals of New York. *Merrick v. Van Santvoord*, 34 N. Y. 208. And the law of that State is in such a condition that its citizens may organize themselves into a corporation in a remote State—in West Virginia, for example,—for the purpose of carrying on business within the State of New York, thereby evading, to a large extent, the jurisdiction of the courts of New York between its own citizens, and escaping the operation of the laws of New York which would have been applicable to their conduct in case they had remained unincorporate. *Demarest v. Flack*, 128 N. Y. 205.

§ 7886. **All their Rights Subject to the Domestic Law.** — Except so far as varied by recent judicial innovations, the doctrine declared in a leading case on the *status* of foreign corporations remains a principle of American constitutional law. Taney, C. J., in giving the opinion of the court, said: "Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied."¹ Beyond that, as he further pointed out, everything rests upon the mere comity of States and nations.² It has been well said that "a corporation which seeks by its agents to establish a domicile of business in a State other than that of its creation, must take that domicile as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."³ It becomes amenable to the laws of the latter State and to the process of its courts, upon the same principle, and to the same extent as natural persons, or domestic corporations.⁴ If such foreign corporation is, through its agents or servants, guilty of a *trespass* or other *wrong* within the State where it has acquired a domicile, it cannot escape the consequences of its illegal act by setting up its charter and existence under a foreign State or government.⁵

§ 7887. **States may Impose Conditions upon Which They may do Business.** — It may be stated, as a general proposition, that, as a State has the power entirely to exclude from its limits a foreign corporation, so it has the power of prescribing

¹ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 538.

² *Ibid.*

³ Attorney-General v. Bay State Mining Co., 99 Mass. 148, 153; quoted with approval in Clark v. Main Shore R. Co., 81 Me. 477; s. c. 17 Atl. Rep. 497.

⁴ Riddle v. New York &c. R. Co., 39 Fed. Rep. 290.

⁵ Austin v. New York &c. R. Co., 25 N. J. L. 381; People v. Central R. Co. of New Jersey, 48 Barb. (N. Y.) 478; Warren Man. Co. v. Etna Ins. Co., 2 Paine (U. S.), 501. Compare Merrick v. Brainard, 38 Barb. (N. Y.) 574.

the terms upon which alone it may be permitted to do business within its limits.¹

§ 7888. May be Required to Appoint a Resident Agent upon Whom Process may be Served.—A foreign corporation may be required by the legislature of a State within which it seeks to do business to *appoint a resident agent*, upon whom all process may be served in suits against such corporation, and to execute a *power of attorney* in due form to that end;² in default of which it will not be permitted to do business within the State, and any contracts which it assumes to make within the State will be voidable,³ at least in the absence of circumstances of estoppel.⁴

§ 7889. May Establish Agencies and do Business in the Domestic State, unless Prohibited.—Speaking now more particularly with reference to *American interstate law*, and not with reference to the larger principles of private international law as obtaining between nations which are entirely sovereign, it may be laid down that a corporation, created in one State of the American Union, may lawfully *establish agencies* in any other State, for the transaction of its business; may make and take contracts which are there allowed to be made and taken by natural persons; and may maintain actions to enforce the same, unless prohibited or restrained from so doing by its own charter or governing statute, or by the statute law of such State, or unless it is declared by the judicatories of such State to be against its public policy to allow it to be done in

¹ Home Ins. Co. v. Davis, 29 Mich. 238; Farmers' &c. Ins. Co. v. Harrah, 47 Ind. 236; Attorney-General v. Bay State Mining Co., 99 Mass. 148, 153; s. c. 96 Am. Dec. 717; State v. Lathrop, 10 La. An. 398; Western Union Tel. Co. v. Mayer, 28 Ohio St. 521; Re Comstock, 3 Sawy. (U. S.) 218; Semple v. Bank of British Columbia, 5 Sawy. (U. S.) 88; Paul v. Virginia, 8 Wall. (U. S.) 168, 181; Lafayette

Ins. Co. v. French, 18 How. (U. S.) 404, 407; Ducat v. Chicago, 10 Wall. (U. S.) 410. As to the conditions, see *post*, § 7928, *et seq.*

² Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369.

³ Re Comstock, 3 Sawy. (U. S.) 218; Semple v. Bank of British Columbia, 5 Sawy. (U. S.) 88; Bank of British Columbia v. Page, 6 Or. 431.

⁴ *Post*, §§ 7959, 7960.

a given instance. Generally speaking, then, a foreign corporation is at liberty to deal through its agents in another State, and to have the benefits of its contracts and the remedies to enforce the same within such other State, to the same extent, in the absence of legislative restraint, as a natural person has within such State.¹

§ 7890. **Foreign Corporations Made Domestic Corporations Quoad Hoc.**—A State may, by its legislation, impose upon foreign corporations, which seek to come within its limits to conduct their business, the condition that they shall be subjected to the duties and obligations of domestic corporations,—in short, that they shall be, when so acting within the territorial limits of the State, *domestic corporations for the purposes of jurisdiction*.² The question whether the legislature of a State has adopted and domesticated a corporation created by another State, is in every case purely a question of *legislative intent*, to be determined upon the *construction* of the *statutes* of the State to which such act of adoption and domestication is sought to be imputed.³ Upon the questions of the *canons of interpretation* to be applied in such a case, it has been observed with reference to a railroad company: "To make such a company a corporation of another State, the language used must imply creation or adoption in such form as

¹ Williams v. Creswell, 51 Miss. 817; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343; Weymouth v. Washington &c. Co., 1 MacArthur (U. S.) 19; Saltmarsh v. Spaulding, 147 Mass. 224, 228.

² Railroad Co. v. Harris, 12 Wall. (U. S.) 65. See also Maryland v. Northern Central R. Co., 18 Md. 193 (double incorporation); Sprague v. Hartford &c. R. Co., 5 R. I. 233 (consolidation); Goshorn v. Board of Supervisors, 1 W. Va. 308; Pomeroy v. New York &c. R. Co., 4 Blatchf. (U. S.) 121; McGregor v. Erie R. Co., 35 N. J. L. 115; James v. St. Louis &c. R. Co., 46 Fed. Rep. 47; Ohio &c.

R. Co. v. Wheeler, 1 Black (U. S.), 286, 293, 297; Railroad Co. v. Vance, 96 U. S. 450, 457; Memphis &c. R. Co. v. Alabama, 107 U. S. 581; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290; Goodlett v. Louisville &c. R. Co., 122 U. S. 391; Graham v. Railroad Co., 118 U. S. 161; Clark v. Barnard, 108 U. S. 436; Uphoff v. Chicago &c. R. Co., 5 Fed. Rep. 545; Stout v. Sioux City &c. R. Co., 8 Fed. Rep. 794; s. c. 3 McCrary (U. S.), 1.

³ James v. St. Louis &c. R. Co., 46 Fed. Rep. 47; Uphoff v. Chicago &c. R. Co., 5 Fed. Rep. 545.

to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers.”¹

§ 7891. When Deemed to have been Made Such, and when not. — Although there will be, in many cases, great difficulty in determining whether a foreign corporation has been *adopted* and *domesticated* by the legislation of a State, yet certain conclusions stand out clearly. One is that where a corporation, — for instance, a railroad company, — created under the laws of a foreign State, or of different foreign States, *consolidates* with a corporation created under the laws of the domestic State, and the consolidation takes place under the domestic law, — the domestic tribunals will treat the united company as a domestic corporation, and they become a domestic corporation in each State.² Another is that a corporation *chartered by the concurrent action of two or more States*, with substantially the same powers, is regarded as a *domestic corporation in each of those States*, for the purposes of local jurisdiction, and the application of local police regulations.³ Another is that the

¹ *Pennsylvania R. Co. v. St. Louis &c. R. Co.*, 118 U. S. 290, 296.

² *State v. Chicago, Burlington &c. R. Co.*, 25 Neb. 156; *s. c.* 41 N. W. Rep. 125; *State v. Missouri &c. R. Co.*, 25 Neb. 164; *s. c.* 41 N. W. Rep. 127; *State v. Chicago, St. Paul &c. R. Co.*, 25 Neb. 165; *s. c.* 41 N. W. Rep. 128; *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286; *Burger v. Grand Rapids &c. R. Co.*, 22 Fed. Rep. 561; *Colglazier v. Louisville &c. R. Co.*, 22 Fed. Rep. 568; *Sprague v. Hartford &c. R. Co.*, 5 R. I. 233; *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171; *s. c.* 49 N. W. Rep. 1110; 10 Rail. & Corp. L. J. 447; *Central Trust Co. v. St. Louis &c. R. Co.*, 41 Fed. Rep. 551; *State*

v. Northern R. Co., 18 Md. 193; *ante*, §§ 47, 319, 320, 688, 7438, 7450, 7472, 7490, 7799, 7817; *post*, §§ 8012, 8020, 8128.

³ *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286. See *Rece v. Newport News &c. Co.*, 32 W. Va. 164; *s. c.* 3 L. R. A. 572; 5 Rail. & Corp. L. J. 515, for a consideration of the *status* of such a corporation. That the *ultra vires* acts of a foreign corporation, which is a creature of the laws of two different States, are not made valid by a *confirmatory statute*, enacted by the legislature in *one* only of such States, see *Fisk v. Chicago &c. R. Co.*, 4 Abb. Pr. (N. S.) (N. Y.) 378. There is also a theory to the effect that such

mere fact of *conferring special or particular powers*, not amounting to general corporate powers, upon a foreign corporation, does not make it a domestic corporation,—as, for instance, where a statute confers upon a society incorporated in another State the power of *taking by gift*, etc., and of holding and conveying any real and personal property for all the purposes of its incorporation.¹ Still another is that a corporation does not *lose its residence* and citizenship in the State of its creation, from the mere fact that the bulk of its property and business lies in another State;² nor *gain a residence* in such other State, by the mere fact of purchasing and using property therein.³ Still another is that the mere *licensing* of a foreign corporation to do a particular thing, as, for instance, to *purchase and hold lands*, and to *lease* property with which to transact its business,⁴ or, to *construct a railroad* within the domestic State, does not necessarily make it a domestic corporation,⁵ although the State may, at its election, treat it as

a corporation is at once a *domestic* and a *foreign* corporation within each of the States creating it,—a domestic corporation to the extent of its action under the government of the domestic State, and a foreign corporation as regards the other sources of its existence. *State v. Northern R. Co.*, 18 Md. 193.

¹ *Re Prime's Estate*, 18 N. Y. Supp. 603.

² *Wilkinson v. Delaware & C. R. Co.*, 22 Fed. Rep. 353.

³ *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99; *International Life Assurance Co. v. Sweetland*, 14 Abb. Pr. (N. Y.) 240.

⁴ *State v. Delaware & C. R. Co.*, 30 N. J. L. 473.

⁵ *Goodlett v. Louisville & C. R. Co.*, 122 U. S. 391; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65; *Callahan v. Louisville & C. R. Co.*, 11 Fed. Rep. 536; *Baltimore & C. R. Co. v. Cary*, 28 Ohio St. 208; *Morgan v. East Tennes-*

see & C. R. Co., 4 Woods (U. S.), 523. The rule is the same where the foreign corporation is proceeding without any license, but with the *tacit consent* of the State within which it operates and uses the property: *Railroad Co. v. Koontz*, 104 U. S. 5. It has been held by a Federal district judge that an act of the Legislature of Georgia providing that a certain railroad company of that State should have the power to sell its road within that State to any railroad company of another State, which might, by the laws thereof, be authorized to purchase the same, and that such purchasing company should have all the rights of the selling company,—does not, after the sale and purchase, make the purchasing company a corporation of the State of Georgia: *Morgan v. East Tennessee & C. R. Co.*, 4 Woods (U. S.), 523. But this may be doubted, in view of some of the holdings hereafter referred to: *post*, § 7892

such for the purpose of imposing upon it reasonable *police regulations*.¹ Moreover, a foreign railroad corporation, by merely *leasing* and operating a domestic *railroad*, does not become a domestic corporation,² whether it operates it under a license from the domestic State or by its mere *tacit consent*.³

§ 7892. **Instances where Such Adoption and Domestication were Held to have Taken Place.** — Where a railroad company had been incorporated by the Legislature of Indiana, and subsequently the Legislature of Ohio passed an act reciting the incorporation of the company in Indiana, and declaring "that the corporate powers granted to said company, by the act of Indiana incorporating the same, shall be recognized," and at a later date authorizing the extension of the company's road to Cincinnati in the State of Ohio, and declaring that the intention of the previous act "was to recognize, confirm, and adopt the charter of said Ohio and Mississippi Railroad Company as enacted by the legislature of the State of Indiana," — it was held that this was a chartering, by the State of Ohio, of a corporation of the same name and style as that which existed in the State of Indiana; and, therefore, that the company was a distinct and separate body in Indiana from the corporate body of the same name in Ohio.⁴ In a subsequent case, the corporation created by the Ohio legislation last referred to, was characterized as "the case of an Indiana railroad company, licensed by Ohio."⁵ - - - - Where a railroad corporation, created under the laws of Indiana, had made a written contract of lease with a railroad corporation created under the laws of Illinois, by which the Indiana corporation acquired the right, and assumed the duty of managing and carrying on the business of the main line and

¹ *McGregor v. Erie R. Co.*, 35 N. J. L. 115.

² *Baltimore &c. R. Co. v. Cary*, 28 Ohio St. 208.

³ *Railroad Co. v. Koontz*, 104 U. S. 5.

⁴ *Ohio &c. R. Co. v. Wheeler*, 1 Black (U. S.), 286, 293, 294. See *ante*, § 47. By recurring to other titles it will appear that judicial opinion on the subject of the *status* of two corporations organized by the legis-

latures of two different States to operate a railway, bridge, or other work lying partly within one of such States and partly within the other, has undergone a considerable modification since the rendition of the decision last cited: *Ante*, §§ 47, 319, 320. Compare *ante*, §§ 688, 7438, 7452, 7472, 7490, 7499, 7817, 7891; *post*, §§ 8012, 8020, 8128.

⁵ *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, 83.

a branch road of the latter company, situated within the State of Illinois, and the Legislature of Illinois, referring to the lease, enacted that "the said lessees, their associates, successors, and assigns, shall be a railroad corporation in this State, under the said style of 'The Indianapolis and St. Louis Railroad Company,' and shall possess the same, or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations," — the act was held not to import a mere license to an Indiana corporation to exert its corporate powers within the State of Illinois, but to create the lessees, their associates, successors, and assigns, a distinct body within the latter State.¹ - - - The State of Tennessee, in 1846, created a corporation by the name of the Memphis & Charleston Railroad Company. Subsequently the Legislature of Alabama passed "an act to incorporate the Memphis & Charleston Railroad Company." This latter act referred to the act of the Tennessee legislature, and granted to the company a right of way through the State of Alabama, to construct its road to certain points named, declaring that it should have all the rights and privileges granted to it by its act of incorporation, subject to the restrictions therein imposed. It was held, in view of these, and a collection of other provisions enacted by the Legislature of Alabama, that it was the purpose of that legislature to *re-incorporate* the company under the laws of Alabama.² - - - So, where a railroad company is chartered by one State, but a portion of its main line

¹ Railroad Co. v. Vance, 96 U. S. 450, 453, 457.

² Memphis &c. R. Co. v. Alabama, 107 U. S. 581, 584. See also Uphoff v. Chicago &c. R. Co., 5 Fed. Rep. 545, where there is a learned and valuable opinion upon this subject by Mr. District Judge Hammond, holding that certain legislation of Kentucky had operated to make a Louisiana railroad company a citizen of the State of Kentucky for the purposes of Federal jurisdiction. The Kentucky statute declared the Louisiana corporation to be "a body politic and corporate," and then authorized it to construct and operate its road through the State of Kentucky to the Ohio River. In James v. St. Louis

&c. R. Co., 46 Fed. Rep. 47, Mr. District Judge Parker held that a statute of Arkansas, which he recited, operated to make a railroad company organized under the laws of Missouri, a domestic corporation within the State of Arkansas. The statute enacted "that every railroad corporation of any other State, which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this State, and shall thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding."

lies within the limits of another State, and is operated within that State under powers conferred by the legislation of that State, it may be treated as a domestic corporation of that State for the purposes of police regulation, and consequently for the purposes of the *regulation of its tolls and charges* for carriage within that State; and a statute relating to the tolls and charges of "every incorporated company or companies in this State," etc., applies to such a railroad company.¹ - - - An insurance corporation created in Alabama obtained an act from the Legislature of Mississippi, authorizing it to establish one or more *departments* under the same name in that State, but not until citizens of that State had subscribed for \$100,000 worth of capital stock, when it should be regarded as a home company, and have all the privileges of such companies. It was held that this act was not a mere license for the original corporation to do business in Mississippi, but created a *new corporation*.²

§ 7893. **Instances where Such Adoption and Domestication Held not to have Taken Place.**—Where, upon a true construction of all the applicatory legislation of the State, to which it is sought to impute an intent to adopt and domesticate a corporation created by another State, or to re-create it as a domestic corporation subject to its own control, if it is apparent that the intention of such State was merely to grant to the foreign corporation a *license* to conduct its business or exercise its franchises within its limits, — as, for instance, in the case of a *railroad company*, a license to construct and operate its road within the limits of the State between certain points, and, to that end, to exert some of its corporate powers, it will not be held to have adopted and domesticated the foreign corporation, or to have created it a new corporation of its own, for any purposes connected with Federal jurisdiction.³ - - A railroad corporation created by the State of Connecticut purchased

¹ McGregor v. Erie R. Co., 35 N. J. L. 115; s. c. 35 N. J. L. 89.

² Grangers' Life &c. Ins. Co. v. Kamper, 73 Ala. 325. For legislation construed as making a Pennsylvania railroad company a corporation within the State of Virginia, see Goshorn v. Board of Supervisors, 1 W. Va. 308. Where a *banking corporation*, created by the Legislature of

Virginia before the *separation of West Virginia from Virginia*, had branches in West Virginia, it was held, after the separation, that the corporation was a domestic corporation of West Virginia, as well as of Virginia. Farmers' Bank v. Gettinger, 4 W. Va. 305.

³ Goodlett v. Louisville &c. R. Co., 122 U. S. 391; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290.

the franchises and railroad of another railroad corporation, created under the laws of Rhode Island and Connecticut. The Legislature of Rhode Island ratified the sale, and authorized the purchasing corporation to exercise the rights, privileges and powers of the selling corporation. It was held that the purchasing corporation thereby became the legal successor of the selling corporation in Rhode Island, and, so far as it regarded that part of its railroad which lay within the State of Rhode Island, a corporation of that State.¹ - - - Statutes empowering railroad companies organized in certain other States to extend their roads into the particular State, and upon filing with the Secretary of the particular State their articles of incorporation, to be possessed of all the powers, franchises and privileges, and to be subject to the same liabilities as railroad companies organized under the laws of the particular State, have been held not to domesticate such foreign railroad companies so as to make them citizens of the particular State for the purposes of Federal jurisdiction.²

§ 7894. Statutes Subjecting Foreign Corporations to the Same Liabilities and Restrictions as Domestic Corporations.

Statutes exist in some of the States providing, in various language, that foreign corporations shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon domestic corporations of the like kind and character.³ The purpose of such a statute, as existing in Illinois, has been declared to be "to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law."⁴ It is also observed, concerning this statute, that "by declaring that foreign corporations shall have

¹ Clark v. Barnard, 108 U. S. 436.

² Stout v. Sioux City &c. R. Co., 8 Fed. Rep. 794; s. c. 3 McCrary (U. S.), 1. A corporation created in Maryland to build a railroad there, afterwards obtained a special charter in Delaware to extend its road into that State, but it never entered that State. It was held that it did not become a Delaware corporation. Phila-

delphia &c. R. Co. v. Kent County R. Co., 5 Houst. (Del.) 127.

³ See, for instance, the Illinois statute: Ill. Act Apr. 18, 1872; Rev. Stat. Ill. 1874, p. 290, § 26.

⁴ Stevens v. Pratt, 101 Ill. 206, 217; reaffirmed in Santa Clara Female Academy v. Sullivan, 116 Ill. 375; s. c. 56 Am. Rep. 776.

no other or greater powers, there is a direct implication that they shall have *equal powers* with domestic corporations of like character.”¹

§ 7895. Status of “Tramp Corporations.”—In what has preceded, there has been the assumption that a corporation organized in one State, and seeking to do business in another State under the protection of its laws, is *composed of the inhabitants of the State creating it*. The case now to be considered is the case where the citizens of one State go into another State for the purpose of organizing a corporation under favorable statutes, without the intention of carrying on any business in such State, but with the purpose of carrying on business, we will say, to state the strongest case, — in the State of their own residence. We will, for instance, state the case where several citizens of New York organized a pretended corporation in West Virginia, for the purpose of doing business, not in West Virginia, or in any other State than New York, the State of their own residence. In such a case is the law to be corrupted and perverted in favor of such manipulation, so far as to hold that the citizens of a State can be allowed to acquire a corporate existence, within that State, under, subject to, and governed by, the laws of another State? To put it another way, can the citizens of New York be allowed to import the laws of West Virginia governing private corporations, into the State of New York, and make those laws the rules of their own government in dealing with other citizens of New York; and will the courts of New York gravely sanction such frauds upon its own laws? These queries are suggested by a recent notable decision of the Court of Appeals of that State,² following

¹ *Santa Clara Female Academy v. Sullivan, supra*. A clause of such a statute defining the foreign corporations subject to the act as “*doing business in this State*,” has been held to embrace a foreign educational corporation to which a devise of lands had been made, which lands were situated in the State of Illinois. The court

said: “Receiving lands in this State by devise, and the assertion in the State of ownership over them, we regard a sufficient doing of business in this State to bring appellant within the purview of this language of the section.” *Ibid*.

² *Demarest v. Flack*, 128 N. Y. 205.

and extending the doctrine of an earlier notable case.¹ When it is considered that a corporation is, for the purposes of *Federal jurisdiction*, conclusively presumed to be a "*citizen*" of the State under whose laws it is created,—will the citizens of one State be permitted, by becoming thus incorporated under the laws of another State, to defraud the courts of their own State out of their rightful jurisdiction over controversies between them and other citizens of their own State, where the amount in controversy exceeds two thousand dollars? These questions, to the mind of the writer, answer themselves. The conclusion is that the "tramp corporation" should not be judicially recognized, but that its members should be held *liable* upon their contracts *as partners*, and upon their *torts* as *joint tort-feasors*. Undoubtedly the question is to be determined as a question of *comity*; for, considered as a question of mere power, one State cannot send any portion of its laws into another State, and make them operative there, whether on the backs of a pretended migrating corporation or otherwise.² And a State can, if it likes, abdicate its control over its own citizens, and allow its courts to be defrauded of their rightful jurisdiction over them. The liberal policy of the American States in extending hospitality to corporations, created honestly and for honest purposes under the laws of other States, has, in some cases, gone to the extent of holding that the courts of one State will recognize as valid a corporation formed under the laws of another State, by citizens or residents of that State, for the purpose of doing business in the domestic State; and the mere fact that it was not intended to do any business in the State within which the corporation was organized will not, of itself, be a sufficient ground for expel-

¹ *Merrick v. Van Santvoord*, 34 N. Y. 208.

² Thus, it was held by the Court of Appeals of Kentucky that the State of Maryland had no power to charter a bank with authority to establish branches within the State of Virginia in the face of the statute laws of the

latter State prohibiting such corporations except where chartered by the State of Virginia; and that such an attempted corporation, within the State of Virginia, under the laws of Maryland, was to be deemed *unchartered*. *Atterberry v. Knox*, 4 B. Mon. (Ky.) 90.

ling it from the State into which it migrates, or for holding its members liable in that State as partners, there being no actual intent to evade the laws of the State within which it settles.¹

§ 7896. Further of "Tramp Corporations."—But other courts have taken the view that, irrespective of the residence or citizenship of its members, the organization under the law of one State, of a corporation for the purpose of doing business exclusively in another State, is a fraud upon the laws of the latter State, and that such persons will not be deemed possessed of any of the immunities of a corporation in the latter State, but will be *liable* for their undertakings *as partners*.² The Supreme Court of Kansas have held, on the soundest grounds, that where a company was incorporated under the laws of Pennsylvania with the power of doing business anywhere "except in the State of Pennsylvania," it could not do business in Kansas; since there was no rule of comity which would allow one State to spawn corporations, and send them forth into other States to do business there which it would not permit them to do within its own boundaries.³

¹ This the writer takes to be the result of the following cases: Second Nat. Bank of Cincinnati *v.* Lovell, 2 Cin. (Ohio) 397; Merrick *v.* Van Santvoord, 34 N. Y. 208.

² Hill *v.* Beach, 12 N. J. Eq. 31; Land Grant &c. Co. *v.* Coffey County, 6 Kan. 245. Somewhat analogous is a decision of the Supreme Court of New Jersey, to the effect that a *fire insurance company* cannot be established in *Jersey City* under a charter of such a company located in *Trenton*; that such an organization in *Jersey City* is a fraud upon the statute, is outside of the charter, and creates no corporation *de jure* or *de facto*; so that, if such an organization assumes to write policies, its *directors* are *personally liable* thereon. Booth *v.* Wonderly, 36 N. J. L. 250. Similarly, it was early held in Mich

igan that where a bank is located in one county by its charter, and it assumes to establish an agency in *another county*, where it receives deposits and buys and sells exchange, it thereby violates its charter: People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282. But that decision was rendered at a time when the business of banking was an *exclusive privilege*, jealously guarded by the mistaken policy of the law; and it is doubtful whether it expresses the law as understood in our day. See Kruse *v.* Dusenbury (General Term of New York City Court), 1 City Ct. Rep. Supp. (N. Y.) 87; Lasher *v.* Stimson, 145 Pa. St. 30; *s. c.* 23 Atl. Rep. 552.

³ Land Grant &c. Co. *v.* Coffey County, 6 Kan. 245. So, in a recent notable case in Massachusetts, it appeared that a citizen of Massachu-

§ 7897. **To What Extent may Act in Other States.**—But even under the view that a corporation cannot migrate into another State and there acquire a residence, it is no objection to the validity of corporate acts that they are done in another State, or authorized at a meeting of directors held in another State, where the acts so done, or authorized, are not repugnant to the laws or policy of the other State within which they are done or authorized.¹ Thus, the directors of a railroad corporation chartered in Vermont, have power to *vote* at a *meeting* held out of the State to confer authority upon an agent to transfer its real estate.² And we have seen that meetings for the election of directors,³ and for the performance of other constituent acts,⁴ may, under some theories, be held outside of the limits of the State creating the corporation. Nor is there any

setts, who had formerly been engaged in business in that State, went to New Hampshire, and there, with the nominal co-operation of four "dummies," reorganized his business as a New Hampshire corporation. They went through certain forms prescribed by the New Hampshire statutes, and, as he supposed, did everything necessary and proper to establish, in a legal manner, a corporation called the "Forbes Woolen Mills." All the stock was issued to George Forbes, who paid fifty per cent of the capital stock in cash and supplies, and he was elected president and treasurer. No manufacturing was done in New Hampshire, nor was any business done there except the holding of corporate meetings, and possibly the sale, now and then, of a bill of goods in the ordinary course of business,—the principal place of business being at East Brookfield, in Massachusetts, where woolen goods were manufactured and sent to commission houses in New York. In an action against Forbes individually, for a debt contracted in such business, after a finding by the jury that there had been

no intention to carry on the actual business of the pretended corporation in New Hampshire, and that Forbes did not in good faith intend to organize a corporation, though he believed that the organization was technically valid in law, the trial judge ruled that Forbes was *personally liable*, and this judgment was affirmed in the Supreme Judicial Court. The court, among other things, said: "Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name." *Montgomery v. Forbes*, 148 Mass. 249, 253. See an article on this subject by Mr. George A. O. Ernst, 25 Am. Law Rev. 352.

¹ *Smith v. Alvord*, 63 Barb. (N. Y.) 415. See *ante*, § 686, *et seq.*

² *Arms v. Conant*, 36 Vt. 744.

³ *Ante*, § 696.

⁴ Compare *ante*, § 694.

objection to the validity of the ordinary contracts of a corporation, grounded on the place where they are entered into;¹ and the directors of a railroad company accordingly may make contracts out of the State of its incorporation, although the corporation itself cannot migrate.² We shall have occasion hereafter to consider a class of statutes prohibiting, under *penalties*, foreign corporations from doing business within the domestic State, except upon the *condition* of a certain *registration* and an *appointment of an agent* on whom *process* may be served, and other like conditions and restrictions. Such a statute has been held to have no application to a corporation organized to act as the agent of its own members in the sale of manufactured articles produced by them, which has and employs no capital in the domestic State, although the corporation occasionally has held meetings at a town situated partly within the domestic State and partly within the State of its creation.³

§ 7898. Status of Foreign Insurance Companies.—The terms upon which *foreign insurance companies* are permitted to do business within States other than those of their creation, are matters of statutory regulation, it may be assumed, in all the States of the Union. These regulations are more or less restrictive. In some cases they involve the imposition of *license taxes*, which are not required of domestic companies, and in other cases they impose upon foreign insurance companies onerous conditions which are not imposed upon domestic companies engaged in the same business. As a general rule, *no constitutional right is violated* by these impositions and

¹ Wright v. Bundy, 11 Ind. 398.

² *Ibid.*

³ Kilgore v. Smith, 122 Pa. St. 48; s. c. 15 Atl. Rep. 698. Many States have enacted statutes authorizing corporations created under their laws to hold *stockholders' meetings*, and do constituent corporate acts in other States of the Union, but providing, in some instances, that such corporations must keep an office, agent, and place of business within the State. See, for in-

stance, Ala. Acts 1888-89, No. 88, p. 76. The object of these statutes is to encourage the creation of corporations under the laws of the State, composed of citizens of other States, for the purposes of developing the resources of the State, by relieving them of the necessity of coming into the State whenever they hold a directors' meeting or do any constituent corporate act, as, for instance, increasing or diminishing their capital stock.

restraints. As the State has the right to exclude them altogether, it has the right to admit them upon such terms as it may see fit, and if those terms are too onerous, they must keep out. Nor is this an interference by the State with the exclusive power of Congress over *interstate commerce*; since the business of insurance, as ordinarily conducted, is not *commerce*, and an insurance company existing in one State, and having an agency in another State through which it conducts its business in that State, is not engaged in commerce between the States.¹

§ 7899. **Status of Corporations Created by the Congress of the United States.**—A chapter has been devoted to the consideration of this subject;² but attention may be called to a class of decisions which sustained the power of Congress to create the former *Bank of the United States*.³ A corporation created by an act of Congress with powers co-extensive with the Union,—assuming, of course, that in creating it Congress acts within the scope of its powers,—is *not a foreign corporation* within any State of the Union, any more than an act of Congress is a foreign law within any State of the Union.⁴ But where the corporation which has been created by the act of Congress, has been created in pursuance of the

¹ *Paul v. Virginia*, 8 Wall. (U. S.) 168; *ante* § 7880. The power of the States to prescribe upon what terms foreign insurance companies may do business within their limits has been affirmed in many subsequent cases: *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Insurance Co. v. Francis*, 11 Wall. (U. S.) 210; *Farmers' & Co. Ins. Co. v. Harrah*, 47 Ind. 236. Many State cases might be cited which merely illustrate these doctrines. See, for instance, *State v. Liverpool & Co. Ins. Co.*, 40 La. An. 463; *Tabor v. Goss*, 11 Colo. 419.

² *Ante*, § 665, *et seq.*

³ *McCulloch v. State*, 4 Wheat. (U. S.) 316; *Osborn v. Bank of*

United States, 9 Wheat. (U. S.) 738; *Magill v. Parsons*, 4 Conn. 317; *Bank of United States v. Roberts*, 4 Conn. 323; *Bank of United States v. Northumberland & Co. Bank*, 4 Conn. 333; *Com. v. Morrison*, 2 A. K. Marsh. (Ky.) 75.

⁴ Thus, it has been held that a railroad company incorporated by an act of Congress is not a foreign corporation within the meaning of a revenue statute of Pennsylvania; so that, although it does business in that State, it is not obliged to take out a *license* and pay the *tax* imposed on foreign corporations. *Com. v. Texas & Co. R. Co.*, 98 Pa. St. 90.

power exercised by Congress as the legislature of a particular district or territory,—as, for instance, the District of Columbia,—and the corporation is not engaged in interstate commerce, but, we will suppose, is engaged in the business of insurance, which is not commerce,¹ then it may well be treated as a foreign corporation by one of the States, within which Congress would have no power to create such a corporation, and make it a domestic corporation. For instance, under the statutes of Indiana, defining a foreign corporation to be a “corporation created by or under the laws of any other State, government, or country,” or, “one not incorporated or organized in this State,” an insurance company chartered by Congress within the *District of Columbia* is a foreign corporation in Indiana, and subject to the laws of that State regulating foreign insurance companies.²

§ 7900. **Foreign Corporations when Deemed “Persons.”** Corporations, as elsewhere seen, are “persons” within the intendment of statutes whose provisions can be as easily applied to them as to natural persons.³ They are “persons outside of this State,” within the meaning of a *statute of limitations*⁴ which excepts from its operation cases where, at the time the cause of action accrues against any “person,” he is outside of the State.⁵ They are also “persons” within the meaning of a statute relating to *taxation*, unless a different intent is indicated in the statute.⁶

¹ *Ante*, § 7880.

² *Daly v. National Life Ins. Co.*, 64 Ind. 1. That a *savings bank* incorporated by Congress in and for the *District of Columbia* may do business in Tennessee, and that its depositors may proceed against it in Tennessee, see *Hadley v. Freedman's Savings & Co.*, 2 Tenn. Ch. 122.

³ *Ante*, §§ 11, 5689, 7366, 7790, 7804, 7882; *post*, § 8059.

⁴ 2 Rev. Stat. N. Y. 297, § 27.

⁵ *Olcott v. Tioga & C. R. Co.*, 20

N. Y. 210; s. c. 75 Am. Dec. 393; overruling *Faulkner v. Delaware & C. Canal Co.*, 1 Denio (N. Y.), 441. Followed in *Thompson v. Tioga & C. R. Co.*, 36 Barb. (N. Y.) 79. So, under *Code of Kansas*: *North Mo. R. Co. v. Akers*, 4 Kan. 453; s. c. 96 Am. Dec. 183.

⁶ *British Commercial Life Ins. Co. v. Commissioners*, 31 N. Y. 32; s. c. 18 Abb. Pr. (N. Y.) 118; 28 How. Pr. (N. Y.) 41.

§ 7901. When the Word "Corporation," Used in Statutes, Applies to Foreign Corporations. — The answer to this must depend largely upon the subject-matter of the statute, its policy, and the context in which the word "corporation" is employed therein. The thread of no general principle can be traced through the decisions on this question of interpretation; and therefore the results of the cases will be stated without comment. The charter of a banking corporation granted by the Legislature of Ohio, *forbidding the appointment* to the board of directors, *of a director of any other bank*, or the copartner of a director, was held to disqualify directors of banking corporations created in other States, as well as directors of banking corporations created by the laws of Ohio.¹ A statute of the same State² providing that one may *insure his life* for the benefit of his wife and children to the extent of a policy represented by one hundred and fifty dollars in annual premiums, the balance to go to his personal representatives and creditors,—thus creating, in respect of life insurance policies, a sort of statute of *exemptions* in favor of the family of the assured,—has been held to apply as well to policies issued by foreign, as to policies issued by domestic insurance companies.³ A statute relating to the manner of *proving the acts of corporations by their records*, verified by *affidavit*,—creating, as it does, a general rule of evidence to be applied in the courts of the State enacting it, has been held to apply as well to foreign as to domestic corporations.⁴ A statute prohibiting "corporations" from interposing the defense of *usury*,⁵ has been held to apply to foreign corporations when litigating in the courts of the State of New York.⁶ A statute imposing restrictions upon the power of *insurance companies to forfeit their policies*, beginning with the words "all corporations, associations, partnerships, or individuals, doing business in this State under any charter, compact, agreement, or statute of

¹ State v. Buchanan, Wright (Ohio), 233.

² Ohio Rev. Stat., § 3628.

³ Cross v. Armstrong, 44 Ohio St. 613.

⁴ Andrews v. Ohio &c. R. Co., 14 Ind. 169.

⁵ N. Y. Laws 1850, ch. 172.

⁶ Southern Life Ins. &c. Co. v. Packer, 17 N. Y. 51.

this, or any other State,"¹ was manifestly drawn with the intent of including foreign insurance companies, and such was its construction;² although the statute of which it was amendatory³ received a different construction.⁴ On the other hand, a statute of California,⁵ requiring "every corporation now in existence to *file a copy of its articles of incorporation* in the office of the clerk of the county where its property is situated," is not applicable to foreign corporations.⁶ An act of Congress,⁷ prohibiting territorial legislatures from authorizing the organization of corporations except under general laws, does not preclude a corporation organized under a special charter granted by the legislature of a State from doing business in a Territory.⁸ A statute of North Carolina⁹ requiring every *contract* of a corporation, by which a liability exceeding \$100 may be incurred, to be *in writing*, signed by some authorized officer, or under the corporate *seal*, does not apply to foreign corporations.¹⁰ A statute of Wisconsin providing that all fire insurance companies must attach to their policies a copy of the application for the insurance, and that if they fail to do so they shall be precluded from pleading and proving the application, applies to foreign corporations insuring property within the domestic State, although the contract is made in another State.¹¹ By statute in Massachusetts,¹² the word "corporation," when employed in the General Statutes, includes corporations established under the laws of other States, and having a usual place of business within that Commonwealth; from which the implication is drawn that service

¹ Mass. Stat. 1872, ch. 325, § 7.

² *Morris v. Penn Mut. Life Ins. Co.*, 120 Mass. 503.

³ Mass. Stat. 1870, ch. 349, § 5.

⁴ *Morris v. Penn Mut. Life Ins. Co.*, *supra*.

⁵ Cal. Civ. Code, § 299.

⁶ *South Yuba Water &c. Co. v. Rosa*, 80 Cal. 333; *s. c.* 22 Pac. Rep. 222.

⁷ Rev. Stat. U. S., § 1889.

⁸ *Wells v. Northern Pacific R. Co.*, 23 Fed. Rep. 469. A statute of Ohio

relating to the sale of *railroad bonds* at such prices as the directors might choose to take, was, for obvious reasons, restrained to domestic corporations only. *McGregor v. Covington &c. R. Co.*, 1 Disney (Ohio), 509.

⁹ N. C. Code, § 683.

¹⁰ *Rumbough v. Southern Improv. Co.*, 106 N. C. 461; *s. c.* 11 S. E. Rep. 528.

¹¹ *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285; *s. c.* 45 N. W. Rep. 221.

¹² Mass. Stat. 1870, ch. 194.

of process may be had upon them in the manner provided in the case of domestic persons and corporations.¹

§ 7902. **Mandamus to Compel Issuing of License to Foreign Corporation.**—In the case of *foreign insurance companies* which are placed under restrictions by the legislation of nearly all the States, an officer of the executive department of the State, — sometimes the Secretary of State, and sometimes the Commissioner or Superintendent of Insurance, — is generally charged with the duty of issuing licenses to such corporations applying for permission to transact their business within the State, upon their complying with the conditions of the local statute law. It has been held that the granting or refusing of such a license is within the *final discretion* of the officer of the State appointed to issue it, and that his discretion is not reviewable by the judicial courts in a proceeding by *mandamus*.² But this view is clearly unsound, unless the statute says so in express words, or in language which gives rise to an unavoidable implication. Thus, in Wisconsin, the right which foreign insurance companies, organized on the *assessment plan*, have, under the applicatory statutes, to a license to do business in that State, upon complying with the prescribed conditions, is a right of which the insurance commissioner has no discretion to deprive them; and accordingly he will be compelled by *mandamus* to grant such a license, where the conditions of the statute have been complied with.³ In nearly all cases where the writ of *mandamus* has been applied for by foreign insurance companies to compel the proper ministerial officer of the State to grant them such a license, the question of their right to it has been considered and decided upon its merits, and the power to control the action of the officer by *mandamus* has been conceded or assumed.⁴

¹ *National Bank v. Huntington*, 129 Mass. 444.

² So held in respect of the power of the *Superintendent of Insurance* of New York, under N. Y. Laws, 1881, ch. 256: *Re Hartford Life & Annuity Ins. Co.*, 63 How. Pr. (N. Y.) 54.

³ *State v. Root*, 83 Wis. 667; *s. c.* 54 N. W. Rep. 33; 19 L. R. A. 271. See note to this case, 19 L. R. A. 271.

⁴ See, for instance, the following cases where a peremptory writ of *mandamus* was denied on the merits: *Isle Royale Land Corporation v. Sec-*

§ 7903. **Foreign Corporation doing Business under the Same Name as a Domestic Corporation.**—As already seen,¹ the right of a corporation to the exclusive possession of its name is protected in equity, and also in granting certificates of incorporation to new companies, on the principle which protects the proprietors of *trade-marks* used to designate particular goods, and of *trade names* under which individuals, partnerships, or corporations do business. On the one hand, statutes exist prohibiting foreign corporations from doing business within the domestic State under names similar to those possessed by domestic corporations.² On the other hand, a court of equity will not, at the suit of a corporation created in another State, *enjoin* a corporation of the State of the forum

retary of State, 76 Mich. 162; s. c. 43 N. W. Rep. 14, where *mandamus* was denied on the ground that the foreign corporation had been organized for purposes not contemplated by the domestic statute. Also *Ohio v. Moore*, 39 Ohio St. 486, where it was denied on the principle of the *lex talionis*,—Ohio corporations not being entitled to the same privileges in the State creating the relator corporation, and the Ohio statute demanding *reciprocity* from other States. Also *State v. Doyle*, 40 Wis. 220, cited in the preceding section.

¹ *Ante*, § § 296, 297.

² See *International Trust Co. v. International Loan & Trust Co.*, 153 Mass. 271; s. c. 26 N. E. Rep. 693; 10 L. R. A. 758; 9 Rail. & Corp. L. J. 510,—where such a statute was construed and applied. The statute prohibited foreign corporations from carrying on a “banking, mortgage, loan and investment, or trust business, within this Commonwealth in or under a name” previously used by a domestic corporation. Mass. Stat. 1889, ch. 452, § 2. This was construed to mean a banking business,

or a mortgage business, or a loan and investment business, or a trust business. *Ibid.* The same statute also provided that no foreign corporation should carry on certain named businesses under a name already in use by a domestic corporation, or so nearly identical as to be misleading. It was held that the meaning was that the *business* engaged in by the two corporations must be the same or so nearly similar as to mislead the public. *Ibid.* Another section of the statute recited that any violation thereof might, “on petition,” be enforced by *injunction*. This was construed to mean that the party to bring the petition for the injunction was the *domestic corporation* aggrieved by the action of the foreign corporation. *Ibid.* Under the statute an injunction was issued against a Missouri corporation called the “International Loan and Trust Company of Kansas City, Missouri,” from carrying on in Massachusetts a banking, loan, and investment business, at the suit of the “International Trust Company,” a Massachusetts corporation carrying on the same business. *Ibid.*

from the use of its corporate name, adopted *prior* to the organization of the complainant company. A foreign corporation cannot thus contest the right of a domestic corporation to the name given to it by the State creating it.¹

§ 7904. Courts will not Interfere with Internal Management of Foreign Corporations.—The general rule seems to be that the courts of one State will not interfere in controversies relating merely to the internal management of the affairs of foreign corporations.² Upon the question what acts of a foreign corporation are within this rule, and what without it, the distinction has been taken that where the act affects one solely in his capacity as a member, he must seek redress of his grievance in the courts of the State or country creating the corporation; but where the act affects his individual rights, he may demand redress of any tribunal where jurisdiction may properly be acquired.³ For instance, he cannot, it has been held, appeal to a domestic court to compel a foreign corporation to pay such *dividends* as may, on an accounting, appear to be proper.⁴ So, the complaint of a stockholder that he has been deprived of his rights as a *stockholder* by being excluded from his right to vote at a stockholders' meeting, and seeking to be reinstated as a member of the foreign corporation, is an action which will not be entertained.⁵ Upon the same ground, relief has been refused to stockholders of a foreign corporation to *restrain* the company from paying a *stock dividend*;⁶ to appoint a *receiver* of the assets of the corporation within the State of the forum;⁷ and to compel the for-

¹ Hazleton Boiler Co. v. Hazleton Tripod Boiler Co., 142 Ill. 494; s. c. 30 N. E. Rep. 339; affirming s. c. 40 Ill. App. 430.

² North State Copper &c. Min. Co. v. Field, 64 Md. 151, 154; Berford v. New York Iron Mine Co., 4 N. Y. Supp. 836; s. c. 56 N. Y. Civ. Proc. 236; Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378; Stafford v. American Mills Co., 13 R. I. 310; Red-

mond v. Enfield Man. Co., 13 Abb. Pr. (N. s.) (N. Y.) 332.

³ North State Copper &c. Min. Co. v. Field, 64 Md. 151, 154.

⁴ Berford v. New York Iron Mine, 4 N. Y. Supp. 836; s. c. 56 N. Y. Civ. Proc. 236.

⁵ North State Copper &c. Min. Co. v. Field, 64 Md. 151.

⁶ Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378.

⁷ Stafford v. American Mills Co., 13 R. I. 210; and see *ante*, § 7352.

eign corporation to *divide its assets* among its stockholders.¹ These, and other like cases, proceed upon two grounds: 1. The general impropriety of the courts of one State attempting to settle the internal affairs of a corporation created by and domiciled within another State; and 2. The inability of a court in one State to do full justice in such a case, for want of the necessary parties.² The doctrine obviously has its limitations. Manifestly it cannot always be applied so as to restrain the action of the tribunals of one State in the case of a “*tramp*” corporation,—that is to say, of a corporation organized entirely by citizens of the domestic State, under the laws of a foreign State, and having its office and entire business in the domestic State,—of which examples have already been given.³ Here, the State whose laws have been defrauded will not, on the one hand, surrender plenary control over the corporation, if indeed it admits it to be such; and on the other hand, a State whose laws have been defrauded by the organization under them of a corporation for the purpose of doing business wholly within another State and composed wholly of citizens of such other State, cannot, in general, do complete justice, from the mere circumstance of being unable to get possession of the assets of the corporation, which are beyond its jurisdiction.⁴

¹ *Redmond v. Enfield Man. Co.*, 13 Abb. Pr. (N. S.) (N. Y.) 332.

² *Ante*, § 3054, *et seq.*; § 7351.

³ *Ante*, § 7895, *et seq.*

⁴ There is a holding of a department of the Supreme Court of New York to the effect that, under § 1780 of the Code of Civil Procedure of that State, providing that an action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action, resident stockholders of a foreign corporation may maintain an action to *enjoin it* and its directors *from constructing branch lines of railroad*, and from expending funds therefor which are within the State, to the irreparable injury of the stockholders.

Ives v. Smith, 3 N. Y. Supp. 645; *s. c.* affirmed, 55 Hun (N. Y.), 606; 8 N. Y. Supp. 46. Construction of New York Act 1842, ch. 165, requiring foreign corporations keeping a *transfer agent* in New York to exhibit transfer book and list of stockholders to stockholders at all reasonable hours: *Kennedy v. Chicago & C. R. Co.*, 14 Abb. N. Cas. (N. Y.) 326; *People v. Paton*, 5 N. Y. St. Rep. 313; *Ervin v. Oregon R. & N. Co.*, 22 Hun (N. Y.), 566; *Phillips v. Germania Mills*, 20 Abb. N. Cas. (N. Y.) 381. That a demand for an inspection of the *stock book* is not sufficient as a demand for an inspection of the *transfer book*: *Kennedy v. Chicago & C. R. Co.*, 14 Abb. N. Cas. (N. Y.) 326.

§ 7905. **But will Settle Ordinary Questions Depending upon the Construction of Foreign Charters.** — But the courts of the domestic State will, — and this is a matter of everyday practice, — settle questions of right depending upon foreign charters, which do not involve the mere internal government of foreign corporations. They will, for example, where the question becomes material, inquire whether a corporation created by the laws of another State has transcended its charter powers.¹ In construing a foreign charter, they will, in general, follow the decisions of the State creating the foreign corporation;² though this rule has been denied where the question related to the devolution of title to land in the domestic State.³

¹ See the learned opinion of Mr. President King in *Bank of Kentucky v. Bank of Schuylkill*, 1 Pars. Sel. Cas. (Pa.) 180, 226; citing *Silver Lake*

Bank v. North, 4 Johns. Ch. (N. Y.) 370, 373.

² *Ante*, § 3046.

³ *Boyce v. St. Louis*, 29 Barb. (N. Y.) 650; *ante*, § 5784; *post*, § 7921.

CHAPTER CXCIV.

POWERS OF FOREIGN CORPORATIONS RELATING TO LAND.

SECTION

7913. Power to acquire and hold land.

7914. Decisions considering the question as one of public policy.

7915. Decisions conceding the power.

7916. May acquire and hold real estate for office purposes, etc.

7917. Whether this power exists in a foreign corporation organized for the purpose of dealing in real estate.

7918. Doctrine that such power is pre-

SECTION

sumed to exist until the State interferes.

7919. Power to take and hold lands by devise.

7920. Power limited by charter of corporation.

7921. Such charter construed according to the *lex rei sitæ*.

7922. Power to take and foreclose mortgages.

7923. Power to mortgage and encumber their lands.

§ 7913. **Power to Acquire and Hold Land.**—It is impossible to state in a paragraph any rule upon this subject applicable in all the States of the Union;¹ but the following is believed to be the doctrine which obtains in most of the States: 1. That a corporation created under the laws of one State of the Union may acquire and hold land in another State, when it might so acquire and hold land in the State of its creation,²—unless (a) the *local statute law* prohibits it from

¹ There is a note on this subject, collecting American decisions, in 30 Am. & Eng. Rail. Cas. 144.

² Thompson v. Waters, 25 Mich. 214; s. c. 12 Am. Rep. 243; State v. Boston & c. R. Co., 25 Vt. 433; *Lumbard v. Aldrich*, 8 N. H. 31; s. c. 28 Am. Dec. 381; *New York Dry Dock v. Hicks*, 5 McLean (U. S.), 111; *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114; s. c. 33 Am. Dec. 481; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375; s. c. 56 Am. Rep.

776, 779 (limiting *Carroll v. East St. Louis*, 67 Ill. 568; s. c. 16 Am. Rep. 632); *Starkweather v. American Bible Society*, 72 Ill. 50; s. c. 22 Am. Rep. 133; *United States Trust Co. v. Lee*, 73 Ill. 142; s. c. 24 Am. Rep. 236; *Whitman & c. Mining Co. v. Baker*, 3 Nev. 386; *Steam-Boat Co. v. McCutcheon*, 13 Pa. St. 13; *Missouri Lead Mining & c. Co. v. Reinhard*, 114 Mo. 218; s. c. 21 S. W. Rep. 488; *Barnes v. Suddard*, 117 Ill. 237; s. c. 7 N. E. Rep. 477; *University v.*

so doing,¹ or (b) — what is more vague and indeterminate, —

Tucker, 31 W. Va. 621; s. c. 8 S. E. Rep. 410; Columbus Buggy Co. v. Graves, 108 Ill. 459; New Hampshire Land Co. v. Tilton, 19 Fed. Rep. 73.

¹ Runyan v. Coster, 14 Pet. (U. S.) 122; Bard v. Poole, 12 N. Y. 495, 505; Com. v. New York &c. R. Co., 132 Pa. St. 591; s. c. 19 Atl. Rep. 291; 7 L. R. A. 634; Hickory Farm Oil Co. v. Buffalo &c. R. Co., 32 Fed. Rep. 22; s. c. 2 Rail. & Corp. L. J. 470; Com. v. New York &c. R. Co., 114 Pa. St. 340; s. c. 7 Atl. Rep. 756. Such statutes have been very often enacted by the State legislatures. See, for example, Penn. Act, April 6, 1833, construed in Runyan v. Coster, 14 Pet. (U. S.) 122, and in Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Laws of Neb. 1887, ch. 65, § 1, which appears to have been repealed: Carlow v. Aultman, 28 Neb. 672; s. c. 44 N. W. Rep. 873; N. J. Act, April 11, 1887; Laws N. J. 1887, ch. 124. Numerous *enabling statutes* also exist empowering foreign corporations, within prescribed limits, to own and hold real estate, — such as Penn. Act, April 17, 1889; Pamph. Laws Penn. 1889, No. 31, p. 35. This statute was possibly conceived to meet the condition of things exhibited by the decision of the Supreme Court of the United States (reversing the Supreme Court of Pennsylvania) in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, where a ferry company deriving its whole vitality from the city of Philadelphia, escaped taxation in Pennsylvania, because it was incorporated under the laws of New Jersey, and had its *situs* and owned its real estate, necessary to the conduct of its business, in Camden in that State, across the Delaware River from Philadelphia. The new State of Washington has enacted a very liberal

statute on this subject: Code Wash., §§ 2478 and 2479, as amended Feb. 3, 1886. Powers granted to foreign railroad companies, or to railroad companies created under the laws of other States, may be collected from the following, among other statutes: Ark. Acts 1887, No. 80, p. 110; Kan. Laws 1887, ch. 181, p. 273; Tenn. Acts 1887, ch. 160, p. 279; Wis. Laws 1887, ch. 394, p. 435. The evils of allowing *aliens* to buy up large portions of the national domain have led to the enactment, by Congress, of a stringent statute limiting this right, both as to persons and corporations: Act Cong. March 3, 1887; 24 U. S. Stat. at Large, p. 476; 1 Supp. to Rev. Stat. U. S., 2d ed., ch. 340, p. 556. A statute of Pennsylvania, of a later date than the one referred to in this note, enacts "that no corporation other than such as shall have been incorporated under the laws of this State, shall . . . hereafter acquire and hold any real estate within this Commonwealth, directly in the corporate name, or by or through any trustee, or other device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth." Penn. Act, April 26, 1855, § 5; Pamph. Laws Penn. 1855, 329. The penalty for violating this prohibition is that "all property hereafter acquired and held by persons, corporations, or associations forbidden by this act to hold the same, or held contrary to the intent of this act, . . . shall escheat to this Commonwealth, and upon the same being adjudged to have escheated under proceedings in court by *quo warranto* in all respects as is provided by law in the case of the usurpation of any corporate franchise, the same shall be taken in possession

the local courts declare it to be against the *public policy* of the

and disposed of," etc. *Ibid.*, § 9. Where a railroad company, organized under the laws of New York, acting through its president as trustee, by means of money which it supplied to him, purchased certain mining lands in the State of Pennsylvania, and then purchased with its own money the charter of a mining corporation, and acquired by such purchase nearly all the shares in such corporation, and then elected its own officers to be directors of such mining company, whereupon its trustee conveyed the mining property to the mining company whose charter the foreign railroad company had thus acquired, so that the foreign railroad company held nearly all the stock of the mining company, and managed its affairs through the agency of its own officers, for the manifest purpose of evading the provisions of the statute,—it was held, in substance, in a proceeding by the State to escheat the lands, that the State was entitled to have the jury instructed, in substance, to render a verdict for the State. *Com. v. New York & C. R. Co.*, 114 Pa. St. 340; *s. c.* 7 Atl. Rep. 756. But on a subsequent appeal in the same case, this decision was reconsidered and overruled. *Com. v. New York & C. R. Co.*, 132 Pa. St. 591; *s. c.* 19 Atl. Rep. 291; Sterrett and Clark, JJ., dissenting. In its revised view of the subject, the court proceeded substantially upon the following considerations: 1. That the land which the Attorney-General sought to escheat to the State as the land of the New York, Lake Erie, & Western Railroad Company, was really the land of the Northwestern Mining and Exchange Company, a corporation created under the laws of Pennsylvania, and having the power to hold such land. 2. That the

land did not become the land of the New York, Lake Erie, & Western Railroad Company, within the meaning of the statute, from the mere fact that that company held most of the shares of stock in the Northwestern Mining and Exchange Company; since the statute laws of Pennsylvania,—referring to Penn. Act, April 15, 1869; P. L. 31,—authorize railroad and canal companies to purchase and hold the stock of corporations authorized by law to develop the coal, iron, lumber, or other material interests of the Commonwealth. 3. That the *shares* in the mining company held by the foreign railroad company were *not land*, and that the foreign railroad company was not the owner of the land sought to be escheated, within the meaning of the statute, because another section of the statute declared that all shares in all incorporated companies should be taken to be personal property. And, 4. Because the question whether a foreign corporation was holding property within the State under a scheme or device concocted to evade the statute, ought not to be submitted to the uncertain discretion of a jury, whereas, in the case at bar, the facts are undisputed; since this would put the title of foreign corporations to their lands in Pennsylvania, in many cases, to the hazard of the uncertain speculations of different juries. The court was also seriously impressed with the view urged upon it in argument, that a vast amount of the real estate in that Commonwealth was held by corporations similar to the Northwestern Mining and Exchange Company, namely, corporations created for the purpose of holding and operating mines, or developing other properties, but whose shares were, in point of

State to allow it so to do.¹ 2. But, in either of these last cases, there is a countervailing principle, constantly applied by the courts, which is this,—that in actions between the foreign corporation and private suitors, or between other private parties, in which the power of the corporation so to acquire and hold real estate is challenged, the courts will hold it to be a question between the State in its political capacity and the foreign corporation or those claiming under it, and, if the State does not interfere to escheat the land to its own uses, will allow the title to be good.² In other words, in the event of the non-action of the State, the courts will not allow the question of the power of the foreign corporation to be *raised collaterally*.³ 3. But where the foreign corporation cannot take and hold real estate under the same circumstances in the State of its creation, it cannot do so in another State.⁴

§ 7914. **Decisions Considering the Question as One of Public Policy.**—Where the question of the power of foreign corporations to acquire, hold, and transmit land has been considered by the State courts on the footing of *public policy*, their answers have generally been *in affirmation of the power*.⁵ To this statement a notable exception arose in Illinois in the year 1873, at a time when there was a great political movement against corporations among the agricultural classes, known as “the Granger

fact, held largely by railroad corporations under the authority granted by the Act of 1869. *Com. v. New York &c. R. Co.*, 132 Pa. St. 591, opinion by Paxson, J.

¹ *Carroll v. East St. Louis*, 67 Ill. 568; *s. c.* 16 Am. Rep. 632; *United States Trust Co. v. Lee*, 73 Ill. 142; *s. c.* 24 Am. Rep. 236; *Hards v. Connecticut Mutual Life Insurance Co.*, 8 Biss. (U. S.) 234.

² *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Runyan v. Coster*, 14 Pet. (U. S.) 122; *Hickory Farm Oil Co. v. Buffalo &c. R. Co.*, 32 Fed. Rep. 22; *s. c.* 2 Rail. & Corp. L. J. 470; *Carlow v. Aultman*, 28 Neb. 672; *s. c.* 44 N.

W. Rep. 873; *American Mortgage Co. v. Tennille*, 87 Ga. 28; *s. c.* 13 S. E. Rep. 158; 12 L. R. A. 529; 33 Am. & Eng. Corp. Cas. 37; *Barnes v. Suddard*, 117 Ill. 237; *s. c.* 4 N. E. Rep. 477.

³ Cases cited in the last note. For analogies, see *ante*, §§ 5795, *et seq.*, 6033, *et seq.*; *post*, § 7918.

⁴ *Starkweather v. American Bible Society*, 72 Ill. 50; *s. c.* 22 Am. Rep. 133; *Boyce v. St. Louis*, 29 Barb. (N. Y.) 650; *Talmadge v. North American Coal Co.*, 3 Head (Tenn.), 337; *post*, § 7920.

⁵ *Ante*, § 7913, cases cited note.

movement," sweeping over some of the western States, turning out some of the elective judges who were supposed to be favorable to corporations, and electing others in their places, and to some extent terrifying the elective courts into the rendering of decisions in line with the new tendency. In the decision in question, the Supreme Court of Illinois held that a foreign corporation cannot buy, hold, or transmit lands in perpetuity in the State of Illinois, for the reason that, to concede such a power would be against the public policy of the State; and consequently, that a title acquired from a foreign corporation was of no validity and would not support ejectment.¹ In a later case in the same State, a corporation existing under the laws of the State of New York, authorized by its charter to hold real estate and to act as trustee, was appointed by a New York court to act as trustee under the will of a deceased citizen of that State. It was held that it had no power to hold the real estate of the testator situated in Illinois.² These decisions surprised the profession. It did not escape the attention of well-informed lawyers that they stood substantially alone in American jurisprudence. The profession never acquiesced in their propriety, and means were speedily found to evade their consequences. One of these *devices* was to *have the title vested in trustees*, to hold the land free from any right of dower or

¹ Carroll v. East St. Louis, 67 Ill. 568; s. c. 16 Am. Rep. 632; Scott and Sheldon, JJ., dissenting. This case was decided at the June term, 1873. It is a part of the public history of that time that Chief Justice Lawrence, a very able judge, had been turned out of the court by the Granger craze, because of a judicial opinion which he had written with reference to the rights of railroad corporations, and that another judge had been elected in his stead. The case was possibly properly decided upon its peculiar facts. The corporation assuming to acquire and transmit the land in controversy was a so-called "land company," incorporated in

Connecticut for the sole purpose of dealing in land; and it might well be regarded against the public policy of a State to allow its lands thus to be dealt in; but, on the other hand, it would seem that a title, so received and transmitted, would be good, and ought to be upheld, in the hands of an *innocent purchaser*, so long as the State, in its political capacity, through its Attorney-General, fails to intervene and put a stop to the operations of such foreign land companies.

² United States Trust Co. v. Lee, 73 Ill. 142; s. c. 24 Am. Rep. 236; McAllister and Sheldon, JJ., dissenting.

partition, in trust for certain beneficiaries named therein. So far as the writer knows, the validity of a trust of this character where the beneficiaries are non-residents, has not been passed upon in that State.¹ The question will probably never arise; for the influence of the profession and the returning good sense of the court resulted in substantially overruling the doctrine of those decisions. The court held, in a later case, that an educational institution incorporated in Wisconsin, and authorized to hold real estate, is competent to take a devise of real estate situated in Illinois. The court regarded the question as one to be decided in accordance with the *public policy* of the State *as made manifest by its legislation*. The court, then, by examination of numerous acts of the legislature, concluded that the legislation of the State was not adverse to corporations organized for educational purposes, but, on the contrary, said: "It is thus seen that the general laws of Illinois, before and at the time this will took effect, were not only not prohibitory of corporations for educational purposes holding land in this State, but that they expressly empowered such corporations to take and hold real estate by grant and devise, and without limit in quantity and value. There is, in the law of this State, no discrimination against foreign corporations, but they are given a hospitable reception, and placed upon an equal footing with our own domestic corporations."² It should be added that in the year 1874, the Legislature of Illinois, no

¹ But see *ante*, § 5808.

² *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 383; *s. c.* 56 Am. Rep. 776, 779; distinguishing *Carroll v. East St. Louis*, 67 Ill. 568; *s. c.* 16 Am. Rep. 632; *Starkweather v. American Bible Society*, 72 Ill. 50; *s. c.* 22 Am. Rep. 133; *United States Trust Co. v. Lee*, 73 Ill. 142; *s. c.* 24 Am. Rep. 236. Referring to the case of *Carroll v. East St. Louis*, *supra*, the court say: "In respect of what was actually decided in those cases, there is no conflict with the decision in this

case, but with certain *obiter dicta* in the *Carroll* case, there is disagreement. The statement which was made, argumentatively, in that case in regard to corporations for educational purposes, that the law of March 6th, 1843, which has been referred to, expressly inhibits such corporations from severally holding more than one hundred and sixty acres of land, was founded on a misconception of fact." *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 386; *s. c.* 56 Am. Rep. 776.

doubt having reference to the decision first above quoted,¹ amended its general statute relating to corporations, so as to make one section read that "foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, *and shall have no other or greater powers.*"² "The manifest and only purpose" of this statute, as understood by the Supreme Court of that State, "was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law."³ Under the operation of this statute, the court reached the just and reasonable conclusion that a foreign corporation may acquire and hold real estate within the State of Illinois, so far as the same may be necessary for the transaction of its business within such State.⁴

§ 7915. Decisions Conceding the Power.—Other courts have found nothing in the public policy of their States opposed to the conclusion that a corporation, empowered by its charter to own real estate for a particular purpose, may purchase and hold such real estate within the State of the forum. Thus, it has been held not inconsistent with the public policy of Michigan, that a corporation chartered in another State, and having power by its charter to purchase and hold lands, should be allowed to exercise the same power in Michigan, without any statute of that State affirmatively authorizing it. The *silence of the legislature* was deemed evidence of the public policy of the State on the question, as well as implications drawn from its expressions.⁵ So, it was held in Vermont that a *railway company* chartered in New Hampshire had the capacity and right to purchase lands in Vermont

¹ *Carroll v. East St. Louis*, 67 Ill. 568; s. c. 16 Am. Rep. 632.

² Rev. Stat. Ill. 1874, ch. 32, § 26.

³ *Stevens v. Pratt*, 101 Ill. 206, 217; reaffirmed in *Barnes v. Sud-*

dard, 117 Ill. 237, 241; s. c. 7 N. E. Rep. 477.

⁴ *Barnes v. Suddard*, 117 Ill. 237.

⁵ *Thompson v. Waters*, 25 Mich. 214; s. c. 12 Am. Rep. 243.

without any act of the legislature of the latter State affirmatively authorizing it, although the land was not taken in payment of, or as security for, a debt to the company, but for the purpose of being used in connection with its road if it should ever be connected with a road authorized in the latter State.¹ So, in New York it has been held that a foreign corporation, authorized by its charter to *make loans on real estate security*, might lawfully *take a mortgage* in New York, no prohibition appearing in the laws of that State.² So, in New Hampshire the right of foreign corporations to take and hold land has been placed on the broad and reasonable ground of an incident of the right to sue, which is universally allowed by comity. The court reasons that to allow a foreign corporation to sue and to refuse to give effect to a judgment obtained against its debtor, by a levy upon his land, would be to make the right to sue valueless in many cases. And if a foreign corporation may obtain title to land by the forcible method of legal procedure, it would seem absurd to withhold from it the privilege of acquiring it by peaceable purchase.³ So, in Nebraska, it is held that a corporation purchasing land at a judicial sale, acquires a title which is valid as against everyone but the State, and which can only be divested by proceedings brought by the State for that purpose.⁴ So, it was early held in Kentucky that a foreign corporation could make any contract in that State, not obnoxious to its laws, which it could make in the State of its creation, and, if authorized by its charter to *take mortgages* for the security of its loans, that right would be recognized in Kentucky. The fact that the citizens of another State chose to conduct their business under a corporate organization did not deprive them of the benefit of those princi-

¹ *State v. Boston &c. R. Co.*, 25 Vt. 433.

² *Bard v. Poole*, 12 N. Y. 495, 505, *per* Denio, J. As to the *status* of a foreign corporation in the State of New York and the policy declared by its courts with reference to them, see *Merrick v. Van Santvoord*, 34 N. Y.

208; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *ante*, § 7895.

³ *Lumbard v. Aldrich*, 8 N. H. 31; *s. c.* 28 Am. Dec. 381. To the same effect is *New York Dry Dock v. Hicks*, 5 McLean (U. S.), 111.

⁴ *Carlow v. Aultman*, 28 Neb. 672; *s. c.* 44 N. W. Rep. 873.

ples of comity which govern the policy of the States towards each other's citizens.¹ So, a foreign corporation, which under the law of its domicile is authorized to purchase and hold real estate in other jurisdictions, has the power to purchase, hold, and operate *mining lands* in Missouri, especially where the corporation was organized to purchase and operate such particular lands.² So, it was held by a court of the United States that there was nothing in the public policy of the State of Illinois prohibiting *insurance companies* created under the laws of other States from *investing* their assets in *mortgages* upon real estate situated in the State of Illinois.³

§ 7916. May Acquire and Hold Real Estate for Office Purposes, etc.—Foreign corporations are allowed the privilege of acquiring and holding so much real estate as may be necessary for the purposes of an *office* to be used for the conducting of their business.⁴ So, in a case in Illinois where the power of a "*land company*," created under the laws of Connecticut, to purchase, hold, or transmit land in the State of Illinois, was denied, it was nevertheless said: "We do not desire that what we have said shall be applied to incorporations, whether domestic or foreign, which have purchased lands for the mere purpose of erecting offices or buildings necessary for the purpose of carrying out the legitimate business for which they were organized, and in purchasing lands in collecting debts. In such cases, where their charters have authorized it, we presume they might purchase and hold real estate to that, but no greater extent."⁵ Still later in the same State, under

¹ Lathrop v. Commercial Bank, 8 Dana (Ky.), 114; s. c. 33 Am. Dec. 481.

² Missouri Lead Mining &c. Co. v. Reinhard, 114 Mo. 218; s. c. 21 S. W. Rep. 488. So, a corporation formed in California for *mining purposes* may hold land in Nevada. Whitman &c. Mining Co. v. Baker, 3 Nev. 386. And this is no doubt the law of all the newer States and Territories, where mining operations are extensively carried on.

³ Hards v. Connecticut Mut. Life Ins. Co., 8 Biss. (U. S.) 234.

⁴ Thus, in Pennsylvania it has been held that a *steamboat company*, incorporated under the laws of another State, may take a lease of an office in that State. Steamboat Co. v. McCutcheon, 13 Pa. St. 13.

⁵ Carroll v. East St. Louis, 67 Ill. 568, 580; s. c. 16 Am. Rep. 632.

the operation of a statute already considered,¹ intended to reduce foreign and domestic corporations to the same level in respect of the operation of the local law, it was held that a foreign corporation could acquire and hold in Illinois such real estate as might be necessary for the transaction of its business within that State.²

§ 7917. Whether This Power Exists in a Foreign Corporation Organized for the Purpose of Dealing in Real Estate. — It will be recalled that the decision of the Supreme Court of Illinois, which we have alluded to as having surprised the legal profession,³ did not surprise them so much because of what it *held*, as because of the *reasoning* of the learned and experienced judge who delivered the opinion.⁴ What the court held was that a "*land company*," that is to say, a company organized for the mere purpose of buying, selling, and otherwise dealing in land for profit, organized under the laws of Connecticut, could not carry on its operations within the State of Illinois. But the court went too far, under any tenable theory, in so far as it held that where such a corporation had been permitted to carry on such operations by the political department of the State government, it could not transmit a good title to an innocent purchaser for value. Contrary to this view, it was held in a Federal case by Mr. Circuit Judge Lowell, but in an opinion which does not disclose that the question was carefully considered, that a corporation organized under the laws of Connecticut, for the purpose of dealing in land as its chief business, but which never did any business in Connecticut, had authority to hold and deal in lands in the State of New Hampshire.⁵ While a general disposition will discover itself on the part of the leg-

¹ *Ante*, § 7914; Rev. Stat. Ill. 1874, ch. 32, § 26.

² *Barnes v. Suddard*, 117 Ill. 237; s. c. 7 N. E. Rep. 477.

³ *Ante*, § 7914.

⁴ Referring to *Carroll v. East St. Louis*, 67 Ill. 568; s. c. 16 Am. Rep. 632. The opinion of the court was

delivered by Mr. Justice Walker, who, even at that time, had enjoyed a long service as a judge of the Supreme Court of Illinois, and whose opinions are deserving of a high measure of respect.

⁵ *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

islatures of the American States to allow foreign corporations coming within their limits for the purpose of developing their resources, to hold as much land as may be necessary for their purposes, yet a disposition will also be discovered to exclude from their limits the operation of foreign corporations organized for the mere purpose of speculating in land.¹

§ 7918. Doctrine that Such Power is Presumed to Exist until the State Interferes. — The doctrine, then, is that the right of a corporation to purchase and hold lands in another State depends upon the assent or permission of such other State, express or implied.² But such is the general law of *comity* which prevails among the States composing the American Union, that the presumption will be judicially indulged in, that a corporation created by one State, if not forbidden by its charter or governing statute, may exercise the powers thereby granted within the other States of the Union, including the power of acquiring land, *unless prohibited* therefrom, either in their legislative enactments, or by their public policy, which public policy is to be discovered in the general course of their legislation or the settled adjudications of their highest courts.³ Where a corporation, organized in one State of the Union, assumes to exercise its power within the limits of another State, the assent of such other State will be *presumed*, in the absence of expressions to the contrary in its statutes or settled adjudications, so long as the State itself refuses to interfere by a direct proceeding in the nature of *quo warranto* brought by its Attorney-General, or otherwise, to escheat the land so acquired by the corporation, or otherwise to oust

¹ Thus, the statute of the State of Washington was amended by the legislature of that State in 1889 so as to add the provision that "no foreign corporation hereafter organized for the purpose of dealing in real estate, by buying and selling the same as a part of its business, shall be permitted to transact said business in this State." Laws Wash. 1889, 1890, ch. 9, § 1;

amending Code Wash., § 2479. This does not apply to a foreign corporation organized *before* the passage of the act. Realty Co. v. Appolonio, 5 Wash. 437; s. c. 32 Pac. Rep. 219.

² Runyan v. Coster, 14 Pet. (U. S.) 122.

³ Christian Union v. Yount, 101 U. S. 352.

it from the exercise of the power.¹ It has been observed that the right of a foreign corporation to take and hold land, without explicit license from the State within whose boundaries such land lies, rests on the same footing as the right of an *alien* so to take and hold land. If an alien attempt to acquire and hold land, his estate is subject to *forfeiture* by the State; yet, until some act is done by the State to divest the title out of the alien and vest it in itself, it remains in the alien, who may convey it and make a good title to a purchaser. In other words, the settled doctrine is that an alien may acquire a transmissible title which is not divested until *office found*.² It should be added that such interventions by the State are almost unknown in this country.³ It may be further added that the doctrine stated in this section applies, not only in respect of the right of a foreign corporation to acquire and hold lands at all, but also in respect of its right to acquire and hold lands *in excess of the amount limited* by its governing statute or by the local law. In either case, until the State proceeds, as already stated, it can transmit a good title to an innocent purchaser.⁴

¹ Runyan v. Coster, 14 Pet. (U. S.) 122; Barnes v. Suddard, 117 Ill. 237, 242; Carlow v. Aultman, 28 Neb. 672; s. c. 44 N. W. Rep. 873; Hickory Farm Oil Co. v. Buffalo &c. R. Co., 32 Fed. Rep. 22; s. c. 2 Rail. & Corp. L. J. 470; American Mortgage Co. v. Tennille, 87 Ga. 28; s. c. 13 S. E. Rep. 158; 12 L. R. A. 529; 33 Am. & Eng. Corp. Cas. 37. This is the well-known doctrine which is applied in cases where the *power of domestic corporations to purchase, hold, and transmit land* has been challenged: Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Hayward v. Davidson, 41 Ind. 212; Baker v. Neff, 73 Ind. 68; Hough v. Cook County Land Co., 73 Ill. 23; s. c. 24 Am. Rep. 230; Alexander v. Tolleston Club, 110 Ill. 65;

National Bank v. Matthews, 98 U. S. 621.

² See Fairfax v. Hunter, 7 Cranch (U. S.), 603, 621, where this doctrine is fully expounded; and compare Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, where the court points out the analogy between this doctrine, so far as it relates to alien individuals, and the same doctrine so far as it relates to alien or foreign corporations.

³ The only one which the writer now recalls has been stated in a preceding note, and was finally unsuccessful: *Ante*, § 7913, note.

⁴ American Mortgage Co. v. Tennille, 87 Ga. 28; s. c. 13 S. E. Rep. 158; 12 L. R. A. 529; 33 Am. & Eng. Corp. Cas. 37.

§ 7919. **Power to Take and Hold Lands by Devise.**—The power of a foreign corporation to take and hold land by devise, and generally the validity of a devise of land to a foreign corporation, is governed by the foregoing principles. According to the prevailing American doctrine, in the absence of local legislation to the contrary, of which legislation there are few traces, a testator may devise lands situated in one State to a corporation existing in another State.¹ But, on the contrary, such a devise will not be good if the foreign corporation has no power, under its own charter or governing statute, to take such a devise within the State of its creation.² If, by reason of a want of power in its charter, or governing statute, or by reason of a prohibition in the local law, the foreign corporation has no power to take a devise of lands, a court of equity cannot so apply the doctrine of *equitable conversion*, as to convert the land so devised to it into money, and turn over to the foreign corporation such money; but the land will *descend to the heirs* of the testator, according to the law of the State in which it is situated.³ Where the terms of the charter of a corporation, created by the legislation of another State, are sufficiently broad to confer upon it a capacity to take and hold real estate by devise, although not *expressly* authorized so to take, a provision of the *statute of wills* of that State, that “no devise of real estate to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise,” is operative only to the extent of disabling the corporation from taking by devise lands situated in the State of its creation, and does not affect its power to take by devise real estate in other States.⁴ The meaning is that, while

¹ *University v. Tucker*, 31 W. Va. 621; *s. c.* 8 S. E. Rep. 410; *Thompson v. Swoope*, 24 Pa. St. 474; *White v. Howard*, 38 Conn. 342.

² *Starkweather v. American Bible Society*, 72 Ill. 50; *s. c.* 22 Am. Rep. 133; *Boyce v. St. Louis*, 29 Barb. (N. Y.) 650.

³ *Starkweather v. American Bible*

Society, 72 Ill. 50; *s. c.* 22 Am. Rep. 133; *Fraser v. General Assembly*, 58 Hun (N. Y.), 30; *s. c.* 33 N. Y. St. Rep. 347; 11 N. Y. Supp. 384; *s. c.* on appeal, 124 N. Y. 479.

⁴ *American Bible Society v. Marshall*, 15 Ohio St. 537. Substantially to the same effect is *White v. Howard*, 38 Conn. 342, 360.

a corporation cannot exercise a power in another State prohibited by *its own charter*, yet if its charter contains no prohibition, but there is a prohibition in the *statute of wills* of the State of its creation, that prohibition is not operative outside of that State, but has merely a *local operation*; so that, if there is no prohibition in the foreign State, the power may be there exercised. "There being no prohibition in the charter," said the Supreme Court of Connecticut, in considering this question with reference to a New York corporation, "and the power to hold and convey real estate being expressly given, we must look to our own statute and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut."¹ And the court held that it could take by devise in Connecticut, although it had been established by judicial decision that it could not take by devise in New York, because of the prohibition in the statute of wills of that State against corporations taking by devise. So, the Supreme Court of Ohio held that, although a corporation, here the American Bible Society, existing under the laws of New York, could not take by devise in that State by reason of the prohibition in the statute of wills of that State, yet this did not prevent it from taking by devise in Ohio, since the statute of wills of New York was not operative in Ohio, and since the corporation had a charter capacity to take and hold land other than by devise.²

§ 7920. Power Limited by Charter of Corporation.—All the preceding cases either state in terms or proceed upon the assumption that a corporation has no power to acquire, hold, or convey lands situated in another State, unless the power is, either in express terms or by necessary implication, conferred on it by its own charter or governing statute. In all these cases two sources of power are to be considered: 1.

¹ *White v. Howard*, 38 Conn. 342, 361.

² *American Bible Society v. Marshall*, 15 Ohio St. 537. Upon the gen-

eral question of the power of corporations to take by devise, see *McCartee v. Orphan Asylum*, 9 Cow. (N. Y.) 437; *s. c.* 18 Am. Dec. 516.

The charter or governing statute of the foreign corporation.
2. The restrictions imposed by the local law. If the first source of power fails, the other need not be considered, but there is an end of the question.¹

§ 7921. Such Charter Construed According to the *Lex Rei Sitæ*.—It is a principle of universal application, to which no exceptions are admitted, that the validity of every disposition of lands, whether the disposition be absolute or qualified, whether it passes an estate or merely imposes a charge, depends exclusively upon the municipal law of the country or State in which the lands are situate.² It is a part of this principle that every instrument conveying land, whether in respect of the *power* of the grantor to make the conveyance, or in respect of the *manner* in which the power is executed, is governed by the law of the *situs*, and that all questions relating to the validity of the conveyance are determined according to that law, and not according to the law of the place of contract, or of the domicile of the contracting parties.³ Ap-

¹ Starkweather v. American Bible Society, 72 Ill. 50; s. c. 22 Am. Rep. 133; Boyce v. St. Louis, 29 Barb. (N. Y.) 650; Talmadge v. North American Coal &c. Co., 3 Head (Tenn.), 337. It was reasoned in this last case that if there was any prohibition in the charter or governing statute of a foreign corporation against mortgaging its real and personal estate, there was nothing in the policy of the laws of Tennessee to authorize the courts of Tennessee to relieve it of that restriction. Upon this theory one judge has reasoned that if "the law creating such a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void; for a corporation can make no contracts and do no acts within or with-

out the State which creates it, except such as are authorized by its charter; and those acts must be done by such officers and agents, and in such manner as the charter authorizes." Bank of Kentucky v. Schuylkill Bank, 1 Par. Sel. Cas. (Pa.) 180, 225; opinion by King, Pres.; citing Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 577.

² Story Conf. Laws, § 428.

³ Thus, it is said by a very able judge: "It is of no consequence where the instrument containing the disposition is made or delivered, nor where the parties reside; since in all cases it is neither the *lex loci contractus* nor the *lex domicilii*, but solely the *lex loci rei sitæ* that governs the construction; and so universal is the rule, that neither in the law of England, nor in our own (although it seems to be otherwise in some foreign countries), has a solitary exception ever been ad-

plying this principle, it has been held that, when the question arises whether a foreign corporation has the power to acquire real estate situated in New York, the decision of the highest court of the State in which the foreign corporation exists will *not be conclusive* as to its power under its charter, but it will be for the courts of New York to construe the charter and to determine whether, under it, such a power exists; in which case a holding of the highest court of the State creating the corporation, in affirmation of the power, will be *persuasive authority* merely.¹

§ 7922. Power to Take and Foreclose Mortgages.—The power to take mortgages of real estate as a security for debts due, and to foreclose the same, is generally conceded by the American courts to corporations created under the laws of other States.² This power has been conceded to corporations

mitted. It is a necessary consequence that no court of law or equity can found a judgment or decree upon the construction that it may give to a grant or conveyance of lands not within its own jurisdiction, unless upon positive evidence that the construction which it adopts is in entire conformity to the local law upon which the validity and effect of the instrument depend." *Nicholson v. Leavitt*, 4 Sandf. (N. Y.) 252, 276, *per* Duer, J.

¹ *Boyce v. St. Louis*, 29 Barb. (N. Y.) 650. In this case Bryan Mullanphy, a wealthy citizen of St. Louis, Mo., made a devise to that city for certain charitable purposes. The power of the city to take the devise was contested, but it was finally decided in favor of the city. Subsequently, in an action by one of the heirs of the decedent in the State of New York, for a partition of certain of his real estate there situated, it was held by Sutherland, J., that, notwithstanding the decision of the Missouri court, no power was possessed by the

city of St. Louis, under its charter, to take as devisee lands *situated in the State of New York*; and this for two reasons: 1. Because, by the charter of the city of St. Louis, it was not authorized to take or hold such real estate either upon the trust, or for the use and purposes mentioned in the will, or for any other use or purpose. 2. Because, by the law of New York in force when the testator died, and when his will took effect, and still in force, no devise to a foreign corporation could be valid unless such corporation was expressly authorized by its charter or governing statute to take the devise. It is thus perceived that the decision, in its nakedness, rests on the inability of the city of St. Louis, under its charter, to take the devise, and it holds that it had no such power, notwithstanding the decision of the Supreme Court of Missouri to the contrary.

² *Christian v. American &c. Co.*, 89 Ala. 198; *Farmers' Loan &c. Co. v. McKinney*, 6 McLean (U. S.), 1;

created under the laws of other States with the power, under their charters, to *loan money on mortgages*;¹ to foreign corporations, having demands against domestic citizens upon which *actions* can be maintained in the domestic forum;² and to foreign corporations taking such mortgages by way of additional security for debts lawfully contracted within the domestic jurisdiction, although their charter may not have authorized the taking of such security upon an original investment.³ And it has been held that the mortgagor is *estopped* from setting up a want of power in the foreign corporation to invest its money upon mortgages in the domestic jurisdiction;⁴ and, — what is equivalent to the last holding, — that only the State can set up such a want of power.⁵

§ 7923. **Power to Mortgage and Incumber their Lands.**—The *jus disponendi* being a universal incident of the beneficial ownership of property, whenever the power of a foreign corporation to acquire land is conceded, the power to dispose of it must also follow; and therefore, it may be concluded from what has preceded,⁶ that foreign corporations have the same power to mortgage, or otherwise incumber their property, that domestic corporations or natural persons would have;⁷ though the legislature of the State in which the lands are situated may, and sometimes does, restrain the exercise of the power, whenever to allow its exercise will prejudice the rights of its own citizens as creditors of the corporation.⁸ But

American &c. Ins. Co. v. Owen, 15 Gray (Mass.), 491; National Trust Co. v. Murphy, 30 N. J. Eq. 408; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Carlow v. Aultman, 28 Neb. 672; s. c. 44 N. W. Rep. 873.

¹ Farmers' Loan and Trust Co. v. McKinney, 6 McLean (U. S.), 1.

² American &c. Ins. Co. v. Owen, 15 Gray (Mass.), 491.

³ National Trust Co. v. Murphy, 30 N. J. Eq. 408.

⁴ Pancoast v. Travelers' Ins. Co., 79 Ind. 172.

⁵ Carlow v. Aultman, 28 Neb. 672; s. c. 44 N. W. Rep. 873. To the same effect is National Bank v. Matthews, 98 U. S. 621.

⁶ Ante, § 6466.

⁷ Stevens v. Pratt, 101 Ill. 206.

⁸ A decision of one of the State courts of *nisi prius* in Colorado has been quoted to the proposition that a foreign corporation cannot incumber its property situated in Colorado, under the Colorado Corporation Law, § 260, to the exclusion of claims asserted by citizens of the State, even

in respect of the mode in which the conveyance is made, the local law governs; though the question whether the directors have received power from the stockholders to authorize the mortgage must be determined by reference to the charter, governing statute, or by-laws of the corporation. For instance, it has been held in Massachusetts that a statute of that State, providing that a corporation shall not convey or mortgage its real estate, or give a lease therefor for more than a year, unless authorized by a vote of the stockholders at a meeting called for the purpose, does not apply to foreign corporations, nor invalidate a mortgage made by a New Hampshire corporation of its lands situated in Massachusetts, where there has been no such vote of the stockholders.¹ So, the question whether such a mortgage was void by reason of the fact that the meeting of the directors at which it was authorized had been held, not in New Hampshire, the State of the *domicile* of the corporation, but in Massachusetts, the State of the *situs* of the land, was determined, with reference to the laws of New Hampshire and the by-laws of the corporation, in favor of the validity of the mortgage.²

though they are not recorded and were unknown to parties advancing money on mortgage of the corporate property, who acted with due diligence. *Holland Trust Co. v. Taos Valley Co.*, 11 Rail. & Corp. L. J. 74.

¹ *Saltmarsh v. Spaulding*, 147 Mass. 224; s. c. 17 N. E. Rep. 316; 4 Rail. & Corp. L. J. 151.

² *Ibid.* A foreign corporation called a mortgage company, created for the sole business of lending money on mortgages, might lend its money in Illinois on mortgages, notwithstanding the fact that the laws of Illinois did not provide for the formation of such companies. Nor is this con-

clusion changed by the language of the incorporation law of that State of 1872, that "corporations may be formed, . . . for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." This statute refers only to the formation of domestic corporations, and is held not to indicate a policy on the part of the legislature to exclude foreign corporations from the State which are organized for the prosecution of business for which domestic corporations cannot be permitted. *Stevens v. Pratt*, 101 Ill. 206.

CHAPTER CXC.V.

STATE LAWS IMPOSING CONDITIONS UPON FOREIGN CORPORATIONS.

ART. I. IN GENERAL. §§ 7928-7944.

II. EFFECT OF VIOLATING THESE RESTRAINTS UPON CONTRACTS, AND RIGHTS OF ACTION THEREON. §§ 7950-7970.

ARTICLE I. IN GENERAL.

SECTION	SECTION
7928. Constitutional limitations upon the State legislatures.	ness" in violation of such prohibitions.
7929. Statutes providing that foreign corporations shall enjoy no greater rights than domestic corporations.	7937. Citizens of the State procuring insurance from foreign companies.
7930. Retaliatory statutes.	7938. Evidence of compliance with such statutes.
7931. Distinction between statutes of retaliation and statutes of reciprocity.	7939. Proceedings against agents for penalties for doing business in violation of such statutes.
7932. Restrictions upon exercising the right of eminent domain.	7940. Restrictions upon foreign insurance companies.
7933. Statutes requiring foreign corporations to file charter, certificate of incorporation, articles of association, etc.	7941. Whether such statutes apply to foreign mutual benefit companies.
7934. Statutes requiring agents of such corporations to file evidence of their authority.	7942. Statutes prohibiting the dealing in bank bills of corporations created in other States.
7935. Statutes requiring such corporations to keep known place of business and resident agent.	7943. State statutes not applicable to corporations vending patented articles.
7936. What constitutes "doing busi-	7944. Ousting foreign corporations by <i>quo warranto</i> .

§ 7928. **Constitutional Limitations upon the State Legislatures.**—We have considered this subject in another connection, in so far as it relates to limitations imposed by the

Federal constitution;¹ and we have seen that there is no prohibition in the Federal constitution which operates to restrain the legislature of a State from exacting from foreign corporations, as a condition precedent to their being admitted to do business within the State, license fees or taxes which are not imposed upon similar domestic corporations.²

§ 7929. Statutes Providing that Foreign Corporations shall Enjoy No Greater Rights than Domestic Corporations. — Constitutional ordinances and statutes in many of the States are to the effect that foreign corporations shall not enjoy greater

¹ *Ante*, § 7875, *et seq.*

² *Pembina Consolidated Silver Mining &c. Co. v. Pennsylvania*, 125 U. S. 181. That a State may in its laws make distinctions between resident and non-resident citizens in regard to the right of action in its courts against foreign corporations, as for instance, in regard to the right of action for an injury resulting in death, — see *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315. But the wisdom of a majority of the Supreme Court of California has discovered a prohibition upon the legislature of that State from passing a law exacting such a tax or fee, in the following constitutional provision: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes; but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes." Const. Cal., art. XI., § 12 This provision, in the view of the court, restrains the legislature from passing an act requiring every agent of a foreign insurance company doing business within the State, to pay into the hands of the treasurer of the city or county, within

which he should do business, a sum equal to one percentum upon the amount of all premiums received, etc., to constitute a fireman's relief fund. *San Francisco v. Liverpool &c. Ins. Co.*, 74 Cal. 113; *s. c.* 5 Am. St. Rep. 425; 15 Pac. Rep. 380. The decision is a strange aberration. The court ignored the only question essentially involved, which was whether the constitutional provision included under the word "inhabitant," foreign corporations, as no other word is embraced in it which, by the utmost stretch of the imagination, could be supposed to refer to such bodies. But a foreign corporation is manifestly not an inhabitant of the State, but according to all theories is an inhabitant of the State in which it was created, though under some theories it is permitted to migrate into other States. *Ante*, § 7890, *et seq.* The judge who wrote the opinion wasted public time over an irrelevant question, whether the imposition was or was not a *tax*. It is past all doubt that the framers of the provision in question never intended to lay an inhibition upon the legislature of the State from imposing taxes and license fees upon foreign corporations, which were not imposed upon domestic corporations.

privileges than those granted to domestic corporations of a similar class.¹ In a proceeding by *quo warranto* in Ohio to oust an insurance company organized under the laws of Michigan from doing business on the assessment plan in Ohio, it appeared that the laws of Michigan did not permit Ohio companies to do business within that State on the same plan, and judgment of ouster was accordingly entered.²

§ 7930. **Retaliatory Statutes.**—These *retaliatory statutes* have been enacted in many of the States. Roughly stated, they provide that whatever restrictions are imposed by the laws of another country or State upon corporations of the domestic State doing business in such other country or State, shall be imposed upon corporations of such country or State within the domestic State.³ The *constitutionality* of these stat-

¹ For instance, the constitution of California provides: "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." Cal. State Const. 1879, art. 12, § 15. A similar provision is found in the constitution of Idaho (Const. Idaho, 1889, art. XI., § 10), of Montana (Const. Montana, 1889, art. XV., § 11), and no doubt in many other States. Const. Ark. 1874, art. XII., § 11; Rev. Stat. Ohio, § 3630 *e*.

² *State v. Western & C. Life Ins. Co.*, 47 Ohio St. 167; *s. c.* 24 N. E. Rep. 392; 8 L. R. A. 129. So, it has been held under the Ohio statute (Rev. Stat. Ohio, § 3630 *e*), as amended by a later act (Ohio Act April 18, 1883; 80 Ohio Laws, 180), that the insurance commissioner of Ohio cannot be compelled by *mandamus* to issue his certificate of authority to do business in that State to a corporation organized under the

laws of New York to insure lives on the assessment plan, where it appears that, by the laws of New York, Ohio companies, organized to do the business contemplated in section 3630 of the Revised Statutes of that State, are not entitled as of right to a certificate of authority to do business therein. *Ohio v. Moore*, 39 Ohio St. 486.

³ The following, from the statute books of Ohio, may also be cited as an example: "When, by the laws of any other State or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this State, doing business in such State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other State or nation doing business within this State, and upon their agents here." Rev. St. Ohio, § 282.

utes has been upheld against the objection that they invalidate the passing of laws which *take effect upon the contingency* of certain legislation in other States;¹ since it is competent for the legislature of a State, in its providence, to enact statutes which become operative only upon the happening of the contingencies named therein. And although the statute may long remain dormant, yet it springs into life and becomes completely operative as an expression of the legislative will as soon as the contingency arises.² Such statutes are also upheld against the objection that they violate constitutional provisions against *unequal taxation*.³ "The legislature may classify," said Brewer, J., "for the purposes of taxation or

¹ Home Ins. Co. v. Swigert, 104 Ill. 653; Phoenix Ins. Co. v. Welch, 29 Kan. 672; People v. Fire Association, 92 N. Y. 311; s. c. 44 Am. Rep. 380.

² Home Ins. Co. v. Swigert, 104 Ill. 653; Phoenix Ins. Co. v. Welch, 29 Kan. 672. Nor is it a valid objection to such a statute that it may have lain dormant for many years until life has been infused into it by the legislature of another State in enacting a statute which creates the contingency upon which it is to take effect; nor does this involve the abdication by the legislature of the State enacting such a statute, of its legislative functions, and a surrender of them to the legislature of a foreign State. Home Ins. Co. v. Swigert, 104 Ill. 653, 664; denying Clark v. Port of Mobile, 10 Ins. L. J. 357.

³ State v. Insurance Co., 115 Ind. 257; Blackmer v. Royal Ins. Co., 115 Ind. 291; s. c. 17 N. E. Rep. 580; Blackmer v. Home Ins. Co., 115 Ind. 596; s. c. 17 N. E. Rep. 583; People v. Fire Association, 92 N. Y. 311; s. c. 44 Am. Rep. 380. See also Goldsmith v. Home Ins. Co., 62 Ga. 379. A statute is valid which provides for a general rate of taxation to be paid by insurance companies, but which makes an exception in the case

where any foreign State imposes upon insurance companies of the domestic State, doing business therein, a higher rate of taxation than is imposed by such general statute,—in which case the domestic State will, by way of retaliation, impose the higher rate of taxation. When the contingency happens, the higher rate of taxation is to be imposed by the proper taxing officer of the State, and taxes collected from the foreign corporation upon the basis of such higher rate cannot be recovered back in an action against the taxing officer. Home Ins. Co. v. Swigert, 104 Ill. 653. Nor is a statute which lays a uniform rate of taxation upon foreign insurance companies, except those organized in a State which imposes a higher rate of taxation upon similar corporations organized in the domestic State, and which provides that, in respect of the corporations of such foreign State, the same rate of taxation shall be imposed which such State imposes upon the corporations of the domestic State, unconstitutional on the ground that it imposes different rates of taxation upon different corporations of the same class, and thereby violates the constitutional mandate that taxes shall be

license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. . . . Here, foreign insurance corporations are classified by the States from which they come; and when we consider the purposes of such classification, it cannot be held that there is anything arbitrary or unjust therein. But, doubtless, this charge is not to be considered as within the constitutional restrictions as to taxation, but rather in the nature of a license or condition of entering this State and transacting business within its limits."¹

§ 7931. Distinction between Statutes of Retaliation and Statutes of Reciprocity.—In the construction of these statutes a distinction has been taken between them and statutes of reciprocity, in that while the statutes of reciprocity are to be *liberally construed*, these statutes of retaliation are to be *strictly construed*; and it has been said that a statute of the latter kind is "not applied to a case that does not fairly fall within its letter."² Upon this principle of strict construction, it has been held that a judgment of ouster, in a proceeding by *quo warranto* against a foreign corporation which has complied with the laws of Minnesota, will not be granted, as a

uniform. It is not, for instance, in violation of a constitutional provision which empowers the legislature to lay certain taxes "in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates." Const. Ill., art. IX, § 1; *Home Ins. Co. v. Swigert*, 104 Ill. 653, 658.

¹ *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, 678. See also *State v. Insurance Co.*, 115 Ind. 257, 267, where this language is quoted with full approval.

² *State v. Insurance Co.*, 49 Ohio St. 440, 444; *s. c.* 34 Am. St. Rep. 573. In respect of the difference between a reciprocal and a retaliatory statute, the statute above quoted was held to be a statute of the latter kind, the

court saying: "Reciprocity expresses the act of an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavours for disfavours. Accurately speaking, we reciprocate favors and retaliate disfavours. This, then, is a retaliatory statute. It treats the companies of other States as Ohio companies are treated in those States; but the moment it is made to appear that Ohio companies are not treated with the same favor in another State that companies of that State are treated in Ohio, a case is made for the application of its provisions, and retaliation follows as a result." *State v. Insurance Co.*, 49 Ohio St. 440, 444; *s. c.* 34 Am. St. Rep. 573.

measure of retaliation, upon the ground that the laws of the State where it was created would exclude corporations of Minnesota from doing business there, unless it is clearly apparent that such is the effect of the foreign law.¹ Upon the same principle, it has been held that to make a case for the application of the reciprocity statute above quoted, it must be made to appear that a company has been formed in the State of Ohio to do substantially the same kind and line of insurance of the foreign corporation which it is sought to oust of the exercise of its franchises within the domestic State, and that such Ohio corporation would, by the laws of the foreign State, be precluded from transacting the same business therein, or be subjected to burdens not imposed by the laws of Ohio on such foreign company.² So, it is held in other courts that the contingency which renders these retaliatory statutes operative, arises when the laws of another State impose the additional burdens and conditions upon corporations of the State enacting the statute, and is not delayed until some corporation of the domestic State is actually subjected to such burdens and conditions.³

¹ State v. Fidelity &c. Ins. Co., 39 Minn. 538; s. c. 41 N. W. Rep. 108; 26 Am. & Eng. Corp. Cas. 11.

² State v. Insurance Company, 49 Ohio St. 440; s. c. 34 Am. St. Rep. 573; 31 N. E. Rep. 655; 21 Ins. L. J. 673; 20 Wash. Law Rep. 485.

³ Phoenix Ins. Co. v. Welch, 29 Kan. 672. Where the retaliatory statute provided that, "when, by the laws of any other State, any taxes, fines, penalties, licenses, fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed or would be imposed, on insurance companies of this State, doing, or that might seek to do, business in such other State, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon

all insurance companies of such other State doing business within this State, or upon their agents here" (Code Iowa, § 1154),—it was held that an insurance company organized in the State of New York, with power to make several different kinds of insurance, cannot do business in Iowa, and would be ousted of its privilege of so doing by *quo warranto*, where it appeared that an Iowa company would not be permitted, in New York, to make more than one line of insurance; and this although no Iowa company may have attempted to make more than one line of insurance in the State of New York. "It is not important nor necessary," said the court, "to the existence of the law here, that an Iowa company should go to New York to test the sincerity of the people in the enforce-

§ 7932. **Restrictions upon Exercising the Right of Eminent Domain.** — The power of a private corporation to acquire private property for the public purposes for which it may have been chartered, is a power which comes to it alone through the delegation of the State of its sovereign right of eminent domain.¹ The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed, in the absence of affirmative legislation, that the State delegates any part of its sovereignty to a foreign corporation. It may be stated with confidence in every case that this power cannot be exercised by a corporation created under the laws of one State or country, within the limits of another State or country, without the consent of the legislature of that other State or country, affirmatively expressed. Nor will the power to take land by the right of eminent domain which has been granted by the legislature of a State to a domestic corporation, pass to a foreign corporation, which succeeds by deed to the rights and powers of the domestic corporation, without the assent of the legislature of the domestic State.² But it is not necessary that such assent should be expressed in a single statute. It may be gathered by implication from a series of acts of the domestic legislature.³

ment of her laws; nor is such a step necessary to the enforcement of the law in this State. A spirit of comity between the States should induce a belief that their laws are made in good faith, and for observance. The sting of the adder may be necessary in some cases, to avoid encroachments, but such necessity is not the result of a law or rule of action." *State v. Fidelity & C. Ins. Co.*, 77 Iowa 648, 653. That the New York statutory provision that where any other State shall impose any obligation on New York corporations doing business in such other State, the like obligations are imposed on similar corporations of such other State

transacting business in New York, applies only to obligations, and not to prohibitions or limitations upon the powers of such corporations, such as a denial of the right to insure persons over sixty years old, — see *Griesa v. Massachusetts Ben. Asso.*, 15 N. Y. Supp. 71.

¹ *Ante*, § 5587, *et seq.*

² *Abbott v. New York & C. R. Co.*, 145 Mass. 450.

³ *Ibid.* The constitution of Arkansas, in a section imposing restrictions upon foreign corporations, adds: "Nor shall they have power to condemn or appropriate private property." Ark. Const. of 1874, art. XII., § 11. The constitution of Nebraska,

§ 7933. Statutes Requiring Foreign Corporations to File Charter, Certificate of Incorporation, Articles of Association, etc.—Statutes exist in many of the States requiring any foreign corporation, seeking to do business within the State, to *file a copy of its charter, certificate of incorporation, or articles of association*, by whatever name called, with the Secretary of State, before doing any business in the State.¹ This is one of

in like manner, provides that no foreign corporation shall exercise the right of eminent domain, or acquire the right of way, etc., in that State. Const. Neb., art. XI, § 8. This provision cannot be *evaded* by the act of one foreign corporation, which has not become a corporation under the laws of Nebraska, availing itself of the services of another corporation: *State v. Scott*, 22 Neb. 628; *Koenig v. Chicago &c. R. Co.*, 27 Neb. 699; *s. c.* 43 N. W. Rep. 423. But a foreign railroad company must, before it can proceed, become incorporated under the laws of the State: *State v. Scott*, *supra*. Until which time a land-owner is entitled to an injunction against the appropriation of his land: *Koenig v. Chicago &c. R. Co.*, *supra*. But where a railroad company, incorporated under the laws of another State, and operating a railroad to a point on the boundary line of the domestic State, *consolidates*, under the laws of the domestic State, with a domestic corporation operating a railroad from that point, so that the two become one corporation, the consolidated company becomes a *domestic corporation*, and not within the above constitutional prohibition: *State v. Chicago &c. R. Co.*, 25 Neb. 156; *s. c.* 41 N. W. Rep. 125; *State v. Missouri Pac. R. Co.*, 25 Neb. 164; *s. c.* 41 N. W. Rep. 127; *State v. Chicago &c. R. Co.*, 25 Neb. 165; *s. c.* 41 N. W. Rep. 128; *ante*, §§ 319, 320, 7891. And it becomes a "domestic corporation," within the meaning of

statutes regulating the condemnation of land: *Re St. Paul &c. R. Co.*, 36 Minn. 85; *s. c.* 30 N. W. Rep. 432. In the Nebraska cases first above cited, the domestic railroad company had leased its property to a foreign railroad company; and the substance of the decisions was that the foreign company could not thereafter employ the domestic company as the means of effecting a condemnation of land to acquire depot facilities: *State v. Scott*, 22 Neb. 628; *Koenig v. Chicago &c. R. Co.*, 27 Neb. 699; *s. c.* 43 N. W. Rep. 423. But contrary to this, it has been held in New York that the fact that a railroad corporation has leased its road for the full term of its corporate existence to a foreign corporation, does not prevent it from acquiring land by proceedings *in invitum*: *Re New York &c. R. Co.*, 35 Hun (N. Y.), 220; *s. c.* affirmed, 99 N. Y. 12. That foreign railroad companies are entitled to the benefit of New York Laws 1881, ch. 249, amending N. Y. Act, April 2, 1850, relating to the condemnation of land,—see *Re Marks*, 6 N. Y. Supp. 105.

¹ See, for instance, Gen. Laws Tex. 1887, ch. 128, p. 116; Gen. Laws Tex. 1889, ch. 78, p. 87; Code Wash., § 2480. Where the statutory provision is that before foreign corporations shall do business in the State or Territory, they shall "file for record with the Secretary of the State or Territory, and also with the recorder of the county in which

the modes adopted by some of the States for *domesticating* foreign corporations.¹ Some of the statutes under consideration not only impose *penalties*² upon the foreign corporation neglecting to comply with their provisions, but also declare that all their *acts* and *contracts* made within the State during the period of their default shall be void.³ If the Secretary of

they are carrying on business, the charter or certificate of incorporation, *duly authenticated*, or a copy of said charter or certificate of incorporation," and the foreign corporation is created in a State, under whose laws the evidence of its incorporation is a certificate issued by the Secretary of State, — it is held that, for the purposes of an action in the State in which it thus engages in business, it *proves its incorporation* by producing a certificate of its incorporation, acknowledged before a notary public of the State issuing it, authenticated by the certificate of the Secretary of such State, under his official seal, as being a correct copy of the duplicate original on file in his office, and also by a certificate under seal of a commissioner of the State or Territory within which the corporation thus engages in business, resident within the State creating it, to the effect that the copy has been found by him to be a correct copy after comparing the same with the original, in the absence of any statute prescribing the mode of proof in such a case. *Hammer v. Garfield Mining &c. Co.*, 130 U. S. 291. The code of the State of Washington prescribes in careful language the manner in which such a certificate shall be authenticated: Code Wash., § 2480, as amended Feb. 3, 1886.

¹ Thus, a statute of Iowa, relating to railroad companies, provides that such a company, organized under the laws of another State, owning and operating a line of road within the

State of Iowa, "shall have and possess all the powers, franchises, rights, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the laws of this State, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this State." Iowa Acts, 18th Gen. Assem., ch. 128. See *State v. Chicago &c. R. Co.*, 80 Iowa, 586; *s. c.* 46 N. W. Rep. 741, — where, in the absence of evidence that a foreign railroad company had complied with the statute, the court held that it was *not entitled to personal service of notice* of a proceeding to establish a road across its track. Even if domestic corporations were entitled to such notice, the foreign corporation could not claim the rights of a domestic corporation without showing compliance with the statute.

² See, for instance, Code Wash., § 2485, making the *agents* of foreign corporations so acting *guilty of a misdemeanor*.

³ It was held, under a statute containing such provisions, that a domestic citizen could not maintain an action against a foreign corporation, on behalf of himself and others similarly situated, to *enjoin* it from erecting certain *telephone poles* in a city, on the ground of its failure to comply with the statute, unless otherwise the petition showed a right to an injunction. *Hershfield v. Rocky Mountain Bell Tel. Co.*, 12 Mont. 102; *s. c.* 29 Pac. Rep. 883. The decision does not

State, or other proper officer, refuses to file the charter, certificate of incorporation, or articles of incorporation, etc., in compliance with the statute, then, according to the weight of judicial opinion,¹ the foreign corporation may have a *mandamus*, compelling him so to do; but not where the corporation is organized for purposes not contemplated by the statute, and consequently not included within the statutory license.²

§ 7934. Statutes Requiring Agents of Such Corporations to File Evidence of their Authority. — So much difficulty in proving the authority of agents of foreign corporations has arisen, and so many frauds upon domestic citizens have been perpetrated by such bodies by denying the authority of those who have acted in their behalf, that some of the States have enacted statutes providing, in substance, that the agents of foreign corporations, before entering upon their business as such, shall *file evidence of their authority* with the clerks of the counties within which they propose to do business.³ A sensible construction placed upon such a statute was that it did not apply to a *manager* engaged in appointing other agents to do the business of the company.⁴

§ 7935. Statutes Requiring Such Corporations to Keep Known Place of Business and Resident Agent. — Many of the States have enacted statutes, for the better protection of their citizens against foreign corporations, requiring such corporations, doing business within the State, to keep a known place of business, and a resident agent therein.⁵ Statutes have

seem to be sound. Although the municipal authorities had authorized the establishment of the telephone service, yet as the defendant corporation had no right to enter the State for the purpose of doing business, its occupation of the public streets was unlawful, and was therefore a *nuisance*, and consequently, any *abutting land-owner* damaged thereby ought to have been allowed an *injunction* to restrain the same. *Ante*, § 7768.

¹ *Ante*, § 7902.

² *Isle Royale Land Corporation v. Osmun*, 76 Mich. 162; *s. c.* 43 N. W. Rep. 14.

³ See, for instance, Rev. Stat. Inb. 1881, 3022, 3023; also Code Wash., § 2481, which contains very minute provisions on this subject.

⁴ *Morgan v. White*, 101 Ind. 413.

⁵ Thus, the constitution of Alabama contains this provision: "No foreign corporation shall do any bus-

been enacted in affirmation of these constitutional provisions.¹ These constitutional provisions, being prohibitory, are properly held to be self-enforcing.² In order to avoid a contract on the ground of its being made in violation of such a constitutional or statutory provision, it must appear that the contract was made by the foreign corporation through an agent *within the State*; therefore a plea which merely sets up the statute, and which alleges that *at the time when the contract* was made the foreign corporation had no authorized agent or known place of business within the State, exhibits no defense to the action.³ But where the contract is made within the State, the agent of the foreign insurance company, if it has not complied with the constitutional or statutory prohibition,

iness in this State, without having at least one known place of business and an authorized agent or agents therein." Alabama Const. 1875, art. XIV, § 4. In the constitution of Colorado this language is slightly varied, thus: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served." Col. Const. of 1876, art. XV, § 10. Similar is Const. Idaho, 1889, art. XI, § 10; Nev. Stats. 1889, ch. 44, p. 47; Const. Mont. 1889, art. XV, § 11. In the constitution of Arkansas, the language is: "Provided that no such corporation shall do any business in this State except while it maintains therein one or more known places of business, and an authorized agent, or agents, in the same, upon whom process may be served." Ark. Const. 1872, art. XII, § 11. The language of the Pennsylvania constitution is: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be

served." Penn. Const. of 1874, art. XVI, § 5.

¹ See, for instance, Alabama Act, Feb. 28, 1887; Ala. Acts 1886-87, § 60, p. 102. As to what was a sufficient compliance with the Alabama constitutional provision above quoted, *prior* to the passage of this statute, see *New England Mortgage &c. Co. v. Ingram*, 91 Ala. 337; *s. c.* 3 South. Rep. 140.

² *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26; *s. c.* 42 Am. Rep. 90; *Beard v. Union &c. Publishing Co.*, 71 Ala. 60; *Sherwood v. Alvis*, 83 Ala. 115; *s. c.* 3 Am. St. Rep. 695; *Dudley v. Collier*, 87 Ala. 431; *Farrior v. New England Mortgage &c. Co.*, 88 Ala. 275; *Mullens v. American &c. Ins. Co.*, 88 Ala. 280; *Craddock v. American &c. Ins. Co.*, 88 Ala. 281; *Christian v. American Freehold &c. Co.*, 89 Ala. 198; *New England Mortgage &c. Co. v. Ingram*, 91 Ala. 337.

³ *Collier v. Davis*, 94 Ala. 456; *s. c.* 10 South. Rep. 1086; distinguishing *Dudley v. Collier*, 87 Ala. 431; *s. c.* 13 Am. St. Rep. 55.

cannot maintain an action against a borrower with whom he has negotiated a loan on behalf of the company, to *recover his commission*.¹

§ 7936. What Constitutes "doing Business" in Violation of Such Prohibitions.—Many of the constitutional provisions and statutes under consideration prohibit foreign corporations from *doing or carrying on business within the State*, unless they have previously complied with the conditions therein named; and the question has frequently arisen under them, what constitutes a doing or carrying on of business, within their meaning. The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one State and citizens of another State, are not a doing or carrying on of business by the foreign corporation within the latter State; but that these prohibitions are leveled against the act of foreign corporations entering the domestic State by their agents, and engaging in the general prosecution of their ordinary business therein.² Therefore, such prohibitions do not restrain foreign corporations from exercising the general right to make contracts within the domestic States, nor are they allowed to restrict the ordinary operations of commerce, although conducted by corporations, across the boundary lines of the States of the Union; because, to give them this effect, would bring them into conflict with the settled interpretation put upon the *commerce clause* of the Federal constitution.³ For

¹ *Dudley v. Collier*, 87 Ala. 431; *s. c.* 13 Am. St. Rep. 55.

² *Cooper Man. Co. v. Ferguson*, 113 U. S. 727; *Gilchrist v. Helena & C. R. Co.*, 47 Fed. Rep. 593; *American Loan & C. Co. v. East & C. R. Co.*, 37 Fed. Rep. 242; *Beard v. Union & C. Pub. Co.*, 71 Ala. 60; *Galveston City R. Co. v. Hook*, 40 Ill. App. 547; *Ware v. Hamilton-Brown Shoe Co.*, 92 Ala. 145; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 507;

s. c. 22 Am. St. Rep. 433; 25 Pac. Rep. 325; 9 Rail. & Corp. L. J. 118.

³ *Cooper Man. Co. v. Ferguson*, 113 U. S. 727. *Ante*, § 5463. Compare *Farrior v. New England Mortgage & C. Co.*, 88 Ala. 275, 278, where this case is distinguished, on the ground that the prohibition of the Colorado constitution is against the *carrying on* of business by foreign corporations; whereas the prohibition in the Alabama constitution is against "doing

a publishing company to canvass for subscribers to a newspaper;¹ for a foreign corporation to contract for the sale of goods to a domestic citizen;² for a foreign financial company to act as trustee in a mortgage of a domestic railway property, and to bring a suit to foreclose the same without having taken possession of the property, or attempting to operate it under the powers in the deed;³ for a foreign fire insurance company to bring an action against a domestic railway company to recover damages for the loss of goods by fire;⁴ for such a company to make a single purchase of railroad bonds within the domestic State, and to take a mortgage of property to secure the same;⁵ or to make an agreement to lend money on the security of a mortgage upon land within the domestic State when the agreement was made in another State;⁶ for the president of a foreign corporation, while temporarily within the domestic State upon his private business, to send a telegram offering to receive a proposition relating to the business of his company;⁷ for a foreign insurance company to take security for debts due to it from residents of the States;⁸ for the agent of such a company to perform the single act of examining a house within the domestic State with a view to its insurance;⁹ for a domestic citizen to take an application for a policy in a foreign insurance company, and to forward it to the home office of such company;¹⁰ for the

any business in this State" without compliance with the specified conditions.

¹ Beard v. Union &c. Pub. Co., 71 Ala. 60.

² Ware v. Hamilton-Brown Shoe Co., 92 Ala. 145. Since in such an application the statute would be *unconstitutional*: Cooper Man. Co. v. Ferguson, 113 U. S. 727; Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499; s. c. 22 Am. St. Rep. 433; 9 Rail. & Corp. L. J. 113; 25 Pac. Rep. 325; Wile &c. Co. v. Onsel (Pa. C. P.), 10 Pa. County Ct. 659; *ante*, § 7878.

³ American Loan & Trust Co. v. East & West R. Co., 37 Fed. Rep. 242.

⁴ St. Louis Railway Co. v. Fire Association, 55 Ark. 163; s. c. 18 S. W. Rep. 43.

⁵ Gilchrist v. Helena &c. R. Co., 47 Fed. Rep. 593.

⁶ Scruggs v. Scottish Mortgage Co., 54 Ark. 566; s. c. 16 S. W. Rep. 563.

⁷ Galveston City R. Co. v. Hook, 40 Ill. App. 547.

⁸ Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387.

⁹ Jackson v. State, 50 Ala. 141.

¹⁰ Hacheny v. Leary, 12 Or. 40.

unlicensed agent of a foreign insurance company to adjust a loss of property insured by such company within the domestic State;¹ for an insurance company, domiciled in one State, to issue a policy upon property situated in another State;² for a foreign insurance company to take subscriptions to its capital stock within the domestic State,—all these acts have been held, under statutes and under conditions more or less similar,—not to be a doing, transacting, or carrying on of business within the domestic State in violation of such statutory prohibitions.³ But where the constitutional provision was against “doing *any* business in this State,” without complying with the specified conditions, it was held that the doing of a single act of business, if it be in the exercise of a corporate function, was as much prohibited as the doing of a hundred such acts, and was just as much opposed to the policy of the constitution, which was to protect the domestic citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process in the domestic courts, in the event of any existing necessity to bring suit against them to vindicate a legal right, or to contest the validity of any contract made by or with them. The making of a single loan secured by mortgage, by a corporation which had not complied with the conditions, was therefore within the prohibition, in such a sense that an action to foreclose the mortgage could not be maintained in the domestic courts.⁴

§ 7937. Citizens of the State Procuring Insurance from Foreign Companies.—It must not be inferred from any of the

¹ *People v. Gilbert*, 44 Hun (N. Y.), 522.

² *Marine Ins. Co. v. St. Louis & C. Co.*, 41 Fed. Rep. 643.

³ *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369. That a foreign corporation which has not complied with the Pennsylvania Act of April 22, 1874, forbidding such corporations to do business in the State until such compliance, will not be allowed to com-

pete for the furnishing of State supplies, especially when its bid is not in accordance with the specifications published, but proposes a substitute,—see *Office Specialty Man. Co. v. Fenton Metallic Man. Co.* (Pa. Exec. Dept.), 1 Pa. Dist. R. 576.

⁴ *Farrior v. New England Mortgage & C. Co.*, 88 Ala. 275; *Mullens v. American Freehold & C. Co.*, 88 Ala. 280.

foregoing decisions, that it will be safe for an insurance company to write a single policy upon life or property within another State without complying with the laws of such other State, where it sends out its agent to solicit the risk, or in any case, except where the risk is freely and directly solicited by the person desiring the policy. The distinction is between the case where the company procures a risk within the foreign State by its own affirmative action, or where it allows some broker to procure a risk for it for his own pecuniary gain,—and the case where a resident of a foreign State, of his own mere volition, solicits the writing of a policy upon his life or property. In such a case the *situs* of the contract is the State of the residence of the insurance company, and not the State of the residence of the insured.¹ But, without reference to the theoretical question of the *situs* of the contract, it has been reasonably concluded that a restrictive statute against foreign insurance companies, such as those under consideration, was not designed to prevent the citizens of the State from going out of the State to procure insurance on their property, if they should see fit, but was designed merely to prevent irresponsible and insolvent insurance companies from invading the State with their solicitors and defrauding its citizens.² The distinction lies between writing a single policy on property situated within another State, and procuring risks through an agency established there.³

¹ *Lamb v. Bowser*, 7 Biss. (U. S.) 315, 372; *Clay Fire & Ins. Co. v. Huron Salt & Co.*, 31 Mich. 346.

² *Clay Fire & Ins. Co. v. Huron Salt & Co.*, 31 Mich. 346. So, in effect, is *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33. But it is not a sound conclusion, as held in the Federal case next cited, nor in accordance with the weight of authority, that where the foreign insurance company has an agency in another State, and has not complied with the restrictive statutes of such other State, and its agent in that State has received an

application and premium note, and transmitted them to the home office, where they have been accepted, and a policy has been written out and returned, this policy is valid, although the agent within the foreign State has not complied with its statutes. *Lamb v. Bowser*, 7 Biss. (U. S.) 315, 372.

³ But it has been conceded in a judicial opinion that it might be competent for the State, by its legislation, to invalidate, in its own courts, an insurance contract, made in good faith in another State, on property

§ 7938. **Evidence of Compliance with Such Statutes.**— Nearly, but not all the statutes under consideration, provide for the granting of a license by the Secretary of State, the Commissioner, or Superintendent of Insurance, or other officer of the executive department of the State, to the foreign corporation, upon its complying with the statutory conditions. Such a license or certificate is *prima facie* evidence that the conditions precedent have been complied with,—the presumption being that the State officer properly performs his duty.¹ But this does not necessarily exclude other evidence.²

§ 7939. **Proceedings against Agents for Penalties for doing Business in Violation of Such Statutes.**— Nearly all the statutes of the class under consideration impose *penalties* upon the *agents* of foreign insurance companies for doing business within the domestic State in violation of their provisions. Some of the statutes authorize a criminal proceeding by indictment or information; others give *actions qui tam* at the suit of private informers; and under some cumbrous statu-

located within the domestic State. But it was reasoned that it would be so contrary to the comity which should be observed between the States, that such an intention would not be imputed to the legislature, in the absence of language which would bear no other interpretation. *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33.

¹ *Gutzeit v. Pennie*, 95 Cal. 598; *s. c.* 30 Pac. Rep. 836.

² Compare *American Ins. Co. v. Butler*, 70 Ind. 1. Where a constitutional provision and statute required a foreign corporation to have at least one known place of business, and an authorized agent in the State, compliance was shown by the uncontradicted testimony of the agent, to the effect that he was appointed agent of the corporation by power of attorney under its corporate seal, signed by its president and attested by its secre-

tary, which instrument, after referring to the constitutional provision, recited that he was appointed agent for the purpose of complying with its requirements, and designated his office in the city of Selma, within that State, as its known place of business; which testimony was to the further effect that the agent accepted the appointment, and put up a placard on the wall of his office stating the name of the corporation, and his own name as agent, and also a sign-board over the door of his office stating the nature of his business. The court reasoned that the mandate that a foreign corporation shall have a *known* place of business within the State had been complied with, by its having a place of business thus designated in the usual way. *New England Mortgage &c. Co. v. Ingram*, 91 Ala. 337.

tory systems, double sanctions are given, and there may be a proceeding under either, unless the two statutes are inconsistent,—as where one statute authorizes an action to recover a penalty brought by the Attorney-General, or circuit attorney, in the name of the State, a moiety of the penalty to go to the informer; and another statute gives an ordinary criminal proceeding by indictment.¹

§ 7940. Restrictions upon Foreign Insurance Companies.

The business of *insurance is not commerce*,² and a policy of insurance written by a corporation existing in one State upon property existing in another State, or upon the life of a resident of another State, is *not interstate commerce*. It follows from this that it is competent for any State to impose such restrictions upon foreign insurance companies seeking to do business within its limits, as may to its legislature seem necessary or desirable, and that if foreign insurance companies cannot do business under the restrictions, or comply with the conditions, they must keep out.³

¹ *State v. Stewart*, 47 Mo. 382. That it is not the duty of the Commissioner of Insurance to prosecute insurance companies, or their agents, for penalties incurred by them under Wis. Rev. Stat., § 1974,—see *State v. Spooner*, 47 Wis. 438. That agents of foreign insurance companies are not required to obtain licenses, under Missouri statutes as they stood in 1873, and are not liable to statutory penalties,—see *State v. Beazley*, 60 Mo. 220. Under the *Missouri statute*, the penalty is recoverable from the wrong-doing agent and not from the corporation. *State v. Charter Oak Life Insurance Co.*, 9 Mo. App. 364; *State v. New York Life Ins. Co.*, 10 Mo. App. 580; *s. c.* affirmed, 81 Mo. 89. The Supreme Court adopt the opinion and conclusions of the St. Louis Court of Appeals in the opinion delivered by Lewis, P. J., on the par-

ticular question, and also as to the construction to be placed upon the decision of the Supreme Court in the prior case of *State v. Mathews*, 44 Mo. 523. Who included in the word “agent” within the meaning of such a statute: *People v. People’s Ins. Exch.*, 126 Ill. 466. That *persons insuring* in such companies are not liable to such penalties: *Com. v. Biddle*, 139 Pa. St. 605; *s. c.* 21 Atl. Rep. 134. *Pleading and evidence* in an action for such a penalty sufficient to negative domestic incorporation and non-compliance with statute: *Fay v. Brewster*, 45 N. J. L. 432.

² *Ante*, § 7880.

³ *Ante*, § 7887; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *State v. Phipps*, 50 Kan. 609; *s. c.* 34 Am. St. Rep. 152; 31 Pac. Rep. 1097; 18 L. R. A. 657; *List v. Com.*, 118 Pa. St. 322; *State*

§ 7941. **Whether Such Statutes Apply to Foreign Mutual Benefit Companies.**—The question has arisen in several cases, whether *benevolent orders*, or mutual benefit societies, which combine with social features the feature of mutual life and health insurance, are life insurance companies within the meaning of statutes subjecting foreign insurance companies to local supervision. A *mutual aid association* of the State of Ohio is not a *foreign insurance company* within the meaning of a Pennsylvania statute,¹ and is not liable to the penalty imposed by that act on foreign insurance companies for transacting business within the State without authority of law, but is within the exception of another statute² which divests the control of the Insurance Commissioner over *beneficial associations*.³ A foreign mutual benefit association having no

v. United States Mut. Acc. Asso., 67 Wis. 624; *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285, 291; *State v. Root*, 83 Wis. 667, 680. The State may, for instance, require a foreign insurance company to *make a deposit* with an officer for the better security of domestic citizens who may become its policy-holders. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379. In some of the States the business of life insurance is minutely regulated by statute, and foreign insurance companies are not permitted to do business within the State without complying with the statutes. Such is the case in Ohio. It has been held in that State that a company organized under the laws of Pennsylvania for the purpose of "insuring lives on the plan of *assessment* upon surviving members," without any limitation, does not come within the class of life insurance companies provided for in section 3630 in the Revised Statutes of Ohio, which section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs. A *mandamus* would not, therefore, be granted against the Su-

perintendent of Insurance to compel the registration of such a foreign insurance company. *State v. Moore*, 38 Ohio St. 7; re-affirmed in *Ohio v. Moore*, 39 Ohio St. 486, in respect of a New York insurance company.

¹ Penn. Act, April 4, 1873.

² Penn. Act, May 1, 1876, § 54.

³ *Com. v. National Mut. &c. Asso.*, 94 Pa. St. 481. So, it was held in Ohio that associations of persons incorporated under the act of April 20, 1872 (69 Ohio Laws, 82), "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," are not subject to the laws of that State relating to life insurance companies: *State v. Mutual Protection Asso.*, 26 Ohio St. 19. So, in Missouri there are a number of decisions upon the question whether societies of this kind are subject to the insurance laws of the State. It was held that where one of the main objects of a corporation was to aid the families of its deceased members, the payment of a small stipend to the helpless children of a deceased mem-

“legal reserve,” but merely an “emergency fund,” with a reservation in its benefit certificates of a power to raise or lower the specified rates of assessment, has been held to be an association providing insurance “*upon the assessment plan*,” and as such entitled to do business under the laws of Wisconsin upon complying therewith; and a peremptory *mandamus* was accordingly granted by the Supreme Court of that State to the Commissioner of Insurance, to compel him to grant a license to such a company.¹

§ 7942. Statutes Prohibiting the Dealing in Bank Bills of Corporations Created in Other States. — Many of the statutes of the kind now under consideration took the form of prohibiting, under penal sanctions, the dealing in the bank bills or circulating notes of banking corporations, created in other States. The purpose of these statutes was to protect the domestic citizens from the loss entailed upon them through the currency of bankrupt circulating notes issued by the banks of other States, or through the insolvency of such banks. Where these statutes prohibited each act of *purchase, reservation, payment, or discount*, then, upon unavoidable principles,² a note or other contract dischargeable in such money was void, in such a sense that no recovery could be had in the courts of a State having such a statute on its books; otherwise, “the

ber was not a violation of a provision of the charter against carrying on the business of insurance: *Barbaro v. Occidental Grove*, 4 Mo. App. 429. But where the main object of the corporation was to do the business of insurance, and it had salaried officers, and paid commissions upon risks obtained, it could not evade the insurance laws by calling itself a benevolent society, and obtain a charter as such: *State v. Citizens' Benefit Assn.*, 6 Mo. App. 163. Similarly, see *State v. Brawner*, 15 Mo. App. 597; *State v. Merchants' Exchange Mut. Benefit Society*, 72 Mo. 146. Compare *State v. Central St. Louis Masonic Hall Assn.*, 14 Mo.

App. 597. Under statutes of Vermont (Rev. Laws Vt., § 3607, as amended by Vt. Acts 1884, No. 45), a *mutual or co-operative insurance association*, not organized under the laws of that State, is not entitled to a license to transact business therein, unless it has assets to the amount of \$100,000 and so much more as may be necessary to balance its liabilities, — such liabilities to be computed and such assets to be invested as provided by the statute. *Granite State Mut. Aid Assn. v. Porter*, 58 Vt. 581.

¹ *State v. Root*, 83 Wis. 667; *s. c.* 54 N. W. Rep. 33; 19 L. R. A. 271.

² *Ante*, § 5744.

judiciary power," it was observed, "may, to a very great extent, defeat the manifest intent of the legislature. For although the penalty may be sued for and recovered, yet circulation may be given to bills received upon such illegal contracts, and the penalty may never be exacted."¹ But such a statute has been held not to avoid a promissory note executed in another State, and payable there, though the parties knew that the note was to be indorsed and used in the State containing the prohibitory legislation.²

¹ *Springfield Bank v. Merrick*, 14 Mass. 322, 325. Thus, a statute of Massachusetts (Mass. Stat. 1839, ch. 38, subsequently repealed), made it unlawful for any bank to loan, negotiate, receive in payment, or otherwise to deal in the bank bills of other States, and imposed a heavy penalty on any who should transgress its provisions. With this statute in force, a bank of that State discounted a note payable "in facilities." It was proved that facilities meant certain notes of some of the banks of the State of Connecticut, which were made payable two years after the close of the war of 1812, and which were at a considerable discount. It was held that the bank could not recover upon the note, and that it made no difference that, subsequently to the transaction, and before the trial, the statute had been repealed; for "as well might a contract, made for the purpose of trade with an enemy during the war, be purged of its illegality by the return of peace." *Springfield Bank v. Merrick*, 14 Mass. 322, 325. This decision proceeds upon the principle that where the purpose of the legislature is to prohibit the making of the particular contract, and the contract is nevertheless made in violation of the prohibition, it cannot be made the foundation of an action in the courts of the same sovereignty.

² *Merchants' Bank v. Spalding*, 9 N. Y. 53. The court, after an examination of the question, were "of opinion that when the act to be done in another State, the knowledge of which is sought to affect the contract, is simply a violation of a positive law, having in it nothing of an immoral nature, and when it is not shown that the parties were cognizant that the act was forbidden by the local law of such other State, and they therefore chargeable with a confederacy to defeat those laws, the contract is valid and should be enforced in such other State." *Merchants' Bank v. Spalding*, 9 N. Y. 53, 63. The court conceded the principle that where parties make a contract to be performed in a foreign country, it is reasonable that they should be presumed to know the law of that country with reference to the subject of the contract. *Holman v. Johnson*, Cowper, 341. They also conceded the proposition that should parties abroad conspire to do an act within the domestic State, forbidden by its laws, a foreign contract, unobjectionable in its provisions, but made in furtherance of the general design, would be regarded as void in the domestic State, upon its connection with the illegal enterprise being shown: *Lightfoot v. Tenant*, 1 Bos. & Pul. 551. But they referred, for a justification of their conclusion, to decisions of the

§ 7943. State Statutes not Applicable to Corporations Vending Patented Articles. — The Constitution of the United States provides that “the Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right

English courts to the effect that a foreigner selling and delivering goods abroad may recover the price in the English courts, though he knows, at the time of the sale and delivery, that the buyer intends to *smuggle* them into England: *Pellecat v. Angell*, 2 Comp. Mees. & Ros. 311; *Holman v. Johnson*, Cowper, 341. They also refer to a decision in Massachusetts to the effect that a sale of *lottery tickets* made in another State, where such sale was lawful, to a citizen of Massachusetts, was a valid transaction, though the seller knew that the purchaser bought them for the purpose of selling them in Massachusetts, where such sale was prohibited by statute: *M'Intyre v. Parks*, 5 Met. (Mass.) 207. They distinguished *Pratt v. Adams*, 7 Paige (N. Y.), 615, where it was one of the express provisions of the loan that the small bills of the foreign bank should be taken, and the cashier of the bank actually bought and delivered them to the borrower in the city of New York. Construction of *Missouri statute excluding foreign banking and loan associations* from that State: *Bank of Louisiana v. Young*, 37 Mo. 398; *Connecticut Mutual Life Ins. Co. v. Albert*, 39 Mo. 181; *Long v. Long*, 79 Mo. 645; *Ferguson v. Soden*, 11 Mo. 208; *s. c.* 19 S. W. Rep. 727; 33 Am. St. Rep. 512; overruling *dicta* in the last preceding case. That an *express company* doing a *banking business* is not within the meaning of such statutes: *Wells Fargo & Co. v. North-*

ern Pac. R. Co., 23 Fed. Rep. 469; *s. c.* 10 Sawy. (U. S.) 441. What is a “banking” or a “loan and investment” business, within the meaning of the Massachusetts Act, 1889, ch. 452, prohibiting a foreign corporation from engaging in the banking or loan and investment business *under a name similar to that of a domestic corporation*: *International Trust Co. v. International Loan & Co.*, 153 Mass. 271; *s. c.* 26 N. E. Rep. 693; 9 Rail. & Corp. L. J. 510; 10 L. R. A. 578. Construction of *early statutes of New York* leveled against *foreign banking corporations*: — That the statute prohibited *lending money upon a mortgage*, under the designation of the business of banking: *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370. That an *agreement to redeem* notes issued in violation of the statute was void: *De Groot v. Van Duzer*, 20 Wend. (N. Y.) 390; reversing *s. c.* 17 Wend. (N. Y.) 170. That statutes prohibiting foreign corporations from *keeping office of discount and deposit* within the State did not prohibit a single loan: *Suydam v. Morris Canal Co.*, 6 Hill (N. Y.), 217; affirming *s. c.* 5 Hill (N. Y.), 491. That it was a violation of the statute for an agent of a foreign banking company to attend, from time to time, at a place in New York to receive deposits and discount notes: *Taylor v. Bruen*, 2 Barb. Ch. (N. Y.) 301. That a national bank was within the prohibition of the statute: *National Bank v. Phoenix Warehousing Co.*, 6 Hun (N. Y.), 71.

to their respective writings and discoveries.”¹ Under this constitutional provision and acts of Congress in pursuance thereof, it is generally provided that the letters patent granted to inventors shall contain, among other things, a grant to the patentee, his heirs or assigns, for a specified and limited period, of the exclusive right to make, use, and vend the invention or discovery, throughout the United States and the Territories thereof.² This right, in the patentee or his assignee, to vend the patented article throughout the limits of the United States, cannot, obviously, be restrained by unfriendly State legislation. “The property in inventions,” said Mr. Justice Davis at circuit, “exists by virtue of the laws of Congress, and no State has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the constitution.”³ This exclusive right of the *assignee* of the patentee to vend the patented article, throughout the limits of the United States and Territories, must, according to one view, be as large, where the assignee is a *corporation*, as where it is an *individual*; and it cannot be abridged by State legislation founded on the theory of imposing the terms on which a *foreign corporation* shall be permitted to do business within the State. The Supreme Court of Indiana have accordingly held that a statute of that State which requires foreign corporations, as a condition precedent to the transaction of their business in any county of the State, to deposit in the office of the county clerk, a *power of attorney* authorizing their agents to transact busi-

¹ Const. U. S., art. 1, § 8.

² To this effect, see Rev. Stat. U. S., § 4884.

³ *Ex parte Robinson*, 2 Biss. (U. S.) 309; quoted with approval in *Helm v.*

First Nat. Bank, 43 Ind. 167; *s. c.* 13 Am. Rep. 395; and in *Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454; *s. c.* 21 Am. Rep. 200, 204.

ness for them, and to accept service of process in actions against them, is inoperative in respect of foreign corporations engaged in the manufacture and sale of articles covered by letters patent of the United States.¹

§ 7944. **Ousting Foreign Corporations by Quo Warranto.** The information in the nature of *quo warranto* is now frequently resorted to for the purpose of ousting foreign corporations from the exercise of their franchises within the domestic State, and it is held to be an appropriate remedy.² The issuing of a license to a foreign corporation to do business within the domestic State, by the Superintendent of Insurance or other officer of such domestic State, is a *ministerial*, and not a judicial act, and is therefore not a bar to a proceeding by *quo warranto* to oust the foreign corporation from exercising franchises which it is not entitled to exercise under the domestic law.³

ARTICLE II. EFFECT OF VIOLATING THESE RESTRAINTS UPON CONTRACTS, AND RIGHTS OF ACTION THEREON.

SECTION

7950. Foreign corporations cannot recover on contracts made in violation of such restrictions.

7951. Doctrine that domestic citizen may treat the contract as void and recover what he has advanced thereon.

7952. Doctrine that domestic citizen

SECTION

may defend against the contract so far as unexecuted on his part.

7953. Illustration in the case of premium notes of foreign insurance companies.

7954. Exception in case of *bona fide* holders of such notes for value.

¹ Grover & Baker Sewing Machine Co. v. Butler, 53 Ind. 454; s. c. 21 Am. Rep. 200; Wood Mowing Machine Co. v. Caldwell, 54 Ind. 270; s. c. 23 Am. Rep. 641; Shook v. Singer Man. Co., 61 Ind. 520.

² State v. Boston & C. R. Co., 25 Vt. 433; State v. Fidelity & C. Ins. Co., 39 Minn. 538; s. c. 41 N. W. Rep. 108; 26 Am. & Eng. Corp. Cas. 11; State v. Western U. Life Ins. Co., 47 Ohio St.

167; s. c. 24 N. E. Rep. 392; 8 L. R. A. 129; State v. Insurance Co., 49 Ohio St. 440; s. c. 34 Am. St. Rep. 573; 31 N. E. Rep. 655; 20 Wash. Law Rep. 485; 21 Ins. L. J. 673; State v. Fidelity & C. Ins. Co., 77 Iowa, 648.

³ State v. Insurance Co., 49 Ohio St. 440; s. c. 34 Am. St. Rep. 573; 31 N. E. Rep. 655; 21 Ins. L. J. 673; 20 Wash. L. Rep. 485.

SECTION

- 7955. Illustration in the case of mortgages taken by foreign corporations.
- 7956. Doctrine that the failure of the foreign corporation to comply with domestic statutes merely suspends its remedy on contracts until compliance.
- 7957. Doctrine that failure to comply with such statutes does not render contracts void.
- 7958. Doctrine where the statute gives a specific penalty.
- 7959. Doctrine that neither party can set up his own violation of law.
- 7960. Corporation estopped to set up its want of compliance with such statutes in avoidance of its own contracts.
- 7961. Whether agent of foreign corporation can defend on this ground against an action by the corporation on his bond.

SECTION

- 7962. Non-compliance with such statutes prevents agent from recovering commissions.
- 7963. Legislature may validate such contracts.
- 7964. Foreign corporation can acquire and transmit valid titles without complying with local law.
- 7965. Whether necessary for foreign corporation plaintiff to aver and prove compliance with such statutes.
- 7966. Further of this subject.
- 7967. Rule where the foreign corporation is sued.
- 7968. Effect of non-compliance upon the interpretation of contracts.
- 7969. Effect of withdrawing agency from the State.
- 7970. *Situs* of the contracts of foreign corporations for purposes of jurisdiction.

§ 7950. Foreign Corporations cannot Recover on Contracts Made in Violation of Such Restrictions.— Upon the question whether the failure of a foreign insurance company to comply with restrictive statutes, such as those under consideration, before undertaking to do business in the domestic State, will render its contracts, made with the citizens of that State, voidable, the decisions are in a state of irreconcilable contradiction. So far as practicable, an effort will now be made to group them, and to state what doctrine is held by the respective groups, and to give the reasons adduced therefor. And first, of those decisions which hold that such contracts are *void as against the corporation*. A numerous class of holdings are to the effect that where a statute of a State provides that foreign corporations shall not do business within the State except upon compliance with certain conditions, and such a corporation does do business in the State in violation of the statute, and, through the business so done, a *contract* accrues

to it which would otherwise be enforceable in the courts of the State, *the corporation cannot*, because of the statutory prohibition, maintain an action upon such contract in the courts of the State.¹ This conclusion is regarded as clear where the prohibition of the statute is unaccompanied with any specific *penalty*; since in such cases this is the only way by which the prohibition can be enforced.²

§ 7951. Doctrine that Domestic Citizen may Treat the Contract as Void and Recover What He has Advanced thereon.—The Supreme Court of Indiana have held that, where a life insurance company created and existing under the laws of another State, has assumed to do business and write policies upon lives within the State of Indiana, one whose life has been thus insured by it, may, a year and a half after accepting the policy, elect to treat the contract as void, and may maintain an action to recover back the cash premium paid thereon. The court sought to avoid the effect of the objection that the contract was *partly executed*, and that, during at least a year, the plaintiff had been in fact insured

¹ Cincinnati Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 85; s. c. 8 Am. Rep. 626; Thorne v. Travelers' Ins. Co., 80 Pa. St. 15; s. c. 21 Am. Rep. 89; Bank of British Columbia v. Page, 6 Or. 431; Farrior v. New England Mortgage &c. Co., 88 Ala. 275 (distinguishing Sherwood v. Alvis, 83 Ala. 115; s. c. 3 Am. St. Rep. 695, 698); Mullens v. American Freehold &c. Co., 88 Ala. 280; Christian v. American Freehold &c. Co., 89 Ala. 198; Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369, 372, *per* Elbert, J., *arguendo*; Re Comstock, 3 Sawy. (U. S.) 218; s. c. 11 Nat. Bank. Reg. 169; Semple v. Bank of British Columbia, 5 Sawy. (U. S.) 88; Hoffman v. Banks, 41 Ind. 1; Union Central Life Ins. Co. v. Thomas, 46 Ind. 44; Farmers' &c. Ins. Co. v. Harrah, 47 Ind. 236; Franklin Ins. Co. v. Louis-

ville &c. Packet Co., 9 Bush (Ky.), 590; Barbor v. Boehm, 21 Neb. 450; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Lamb v. Lamb, 13 Nat. Bank. Reg. 17; Stewart v. Northampton Mut. &c. Ins. Co., 38 N. J. L. 436; New Hope &c. Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.) 648; Washington County Mut. Ins. Co. v. Hastings, 2 Allen (Mass.), 398; Williams v. Cheney, 8 Gray (Mass.), 206; Jones v. Smith, 3 Gray (Mass.), 500; Ætna Ins. Co. v. Harvey, 11 Wis. 394; National Bank v. Phoenix Warehousing Co., 6 Hun (N. Y.), 71. That such contracts are void even when questioned collaterally, see Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520 (a plain aberration).

² Bank of British Columbia v. Page, 6 Or. 431. Compare *post*, § 7958.

by a contract which, under all judicial theories, estopped the foreign corporation, by saying that "as the contract was *void*, we do not see any place for the doctrine relating to the *rescission* of contracts."¹ The decision is believed to be unsound. The true theory of such statutes is that they are intended for the protection of the domestic citizen with whom foreign corporations seek to enter into executory contracts; and this theory is of special force in respect of foreign insurance companies. The failure of the foreign insurance company, after complying with the provisions of the domestic statutes, to give the domestic citizen, with whom it has made a contract, that security for the performance of the contract to which he is entitled, is manifestly a protection which he is at liberty to *wave*. He must then make his *election*; and, as in every other case, he cannot affirm and disaffirm,—affirm in part and avoid in part—affirm so far as the contract is beneficial to him, and avoid it when it becomes onerous to him. He cannot, for instance, after procuring a solvent life insurance company of another State to write a premium upon his life, wait a year, during which time the beneficiary in the policy has had the benefit of the insurance, and then, when the next premium is called for, not merely refuse further to execute the contract, but maintain an action to recover back the consideration of that part of it which has already been *executed*. Decisions of this kind do not do credit to the courts which render them.

§ 7952. Doctrine that Domestic Citizen may Defend against the Contract so far as Unexecuted on his Part.—Another very numerous class of cases is to the effect that contracts made under the circumstances which we have under consideration, are voidable at the election of the domestic citizen, in such a sense that he can elect to treat the contract as void whenever an action is brought against him by the foreign corporation to enforce it, and that he can successfully defend against such an action, by merely pleading and prov-

¹ Union Central Life Ins. Co. v. Thomas, 46 Ind. 44.

ing the failure of the foreign corporation, prior to making the contract with him, to comply with the laws of the State entitling it to do business therein.¹

§ 7953. **Illustration in the Case of Premium Notes of Foreign Insurance Companies.** — A large number of these cases hold that foreign insurance companies, which have not complied with such local statutes, cannot maintain actions against domestic citizens upon what are called "*premium notes*,"—that is to say, upon notes given for the settlement, in whole or in part, of amounts agreed to be paid for insurance, fire or life; or on notes given by the members of *mutual insurance companies* to make up the *joint fund* upon which they do business, whereby their members stand as the insurers of each other.² On the same ground, it has been held that a foreign insur-

¹ *Franklin Ins. Co. v. Louisville &c. Co.*, 9 Bush (Ky.), 590; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Washington County &c. Ins. Co. v. Dawes*, 6 Gray (Mass.), 376. The governing principle of the text is more or less discussed in the following cases: *Hyde v. Goodnow*, 3 N. Y. 266; *People v. Imlay*, 20 Barb. (N. Y.) 68; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626. There is an analogous decision to the effect that a foreign corporation keeping an office in New York, of discount and deposit, *when prohibited by statute to do so*, cannot maintain an action for money loaned on a note or other security taken on such loan, or on a count for money lent. *New Hope Co. v. Poughkeepsie Silk Co.*, 25 Wend. (N. Y.) 648. Another decision is to the effect that a statute providing that if a foreign corporation do any act forbidden by the laws of the State to be done by a home corporation, "it shall not be authorized to maintain any action founded on such act,"—merely debars it from maintaining any action on a contract prohibited to domestic corporations, but leaves the *contract*

good for other purposes. *Wright v. Douglass*, 10 Barb. (N. Y.) 97, 105.

² *Jones v. Smith*, 3 Gray (Mass.), 500; *Washington County &c. Ins. Co. v. Dawes*, 6 Gray (Mass.), 376; *Williams v. Cheney*, 8 Gray (Mass.), 206; *Washington County Mutual Ins. Co. v. Hastings*, 2 Allen (Mass.), 398; *Ætna Ins. Co. v. Harvey*, 11 Wis. 412; *Farmers' &c. Ins. Co. v. Harrah*, 47 Ind. 236; *Hoffman v. Banks*, 41 Ind. 1; *Barbor v. Boehm*, 21 Neb. 450; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill. 85; *s. c.* 8 Am. Rep. 626; *Franklin Ins. Co. v. Louisville &c. Packet Co.*, 9 Bush (Ky.), 580; *Lamb v. Lamb*, 13 Nat. Bank. Reg. 17; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *s. c.* 80 Am. Dec. 123; distinguished in *Union Ins. Co. v. Smart*, 60 N. H. 458; and *overruled*, it is believed, in subsequent cases. In *Haverhill Ins. Co. v. Prescott*, *supra*, a Massachusetts corporation failed to comply with a New Hampshire statute imposing *the same burdens* upon corporations or-

ance company, not having complied with such a domestic statute, cannot recover an *assessment* made against a member who is a citizen of the domestic State.¹

§ 7954. Exception in Case of Bona Fide Holders of Such Notes for Value.— But, as in the case of other *ultra vires* contracts,² such notes, if *negotiable*, are good in the hands of *bona fide holders for value*.³

§ 7955. Illustration in the Case of Mortgages Taken by Foreign Corporations.— Another class of decisions illustrating the proposition⁴ that the domestic citizen may elect to treat such contracts void when sued by the foreign corporation thereon, is found in cases where foreign corporations, without having so complied with domestic statutes as to entitle them to do business within the domestic State, have loaned money to citizens of such State upon *mortgages* of their property situated therein, or have sold goods to them on credit and taken security in the form of such mortgages, in which case these decisions allow the domestic citizen, when an action is brought by the foreign corporation against him to *foreclose the mortgage*, to set up as a defense the fact that the contract was void because the foreign corporation had not complied with the statute.⁵ It cannot escape attention that these decisions ignore the distinction, often taken by enlightened courts in respect of the validity of contracts, between contracts which are merely *malum prohibitum*, and contracts

ganized under the laws of another State as should be imposed, within that State, upon New Hampshire corporations seeking to do business there, — in other words, a *retaliatory statute*; and it was held that it could not recover on a premium note.

¹ *Stewart v. Northampton Mut. & Ins. Co.*, 38 N. J. L. 436.

² *Ante*, §§ 5737, 6068.

³ *Williams v. Cheney*, 3 Gray (Mass.), 215, 222; *Williams v. Cheney*, 8 Gray (Mass.), 206. Upon the question *who is a bona fide holder for value*, it has been held proper to charge a jury that if the indorsee of a premium note given to a foreign insurance company which has not complied with the

laws of the State, knew, or had reasonable cause to know, when he took the note, that the company had not complied with such laws, he could not recover; and the fact that such indorsee was a director, the treasurer, and one of the executive committee of the foreign insurance company, was *sufficient evidence* that he had reasonable cause to know such fact. *Williams v. Cheney*, 8 Gray (Mass.), 206.

⁴ *Ante*, § 7951.

⁵ *Farrior v. New England Mortgage & Co.*, 88 Ala. 275; *Mullens v. American Freehold & Co.*, 88 Ala. 280; *Christian v. American Freehold & Co.*, 89 Ala. 198.

which are *malum in se*. Such decisions put the contracts under consideration, although perfectly innocent and meritorious in themselves, on the footing of contracts which are essentially criminal, corrupt, or fraught with moral turpitude, or otherwise opposed to the public policy of the State. In leveling such contracts to this ground, and in allowing their own citizens to repudiate them on such a plea while keeping the consideration, the courts degrade the commercial morals of the people, encourage general dishonesty, expel capital from the State, and bring its judiciary into deserved disrepute. A better view is that such a statutory restraint upon foreign corporations, in the absence of express language declaring the contract void, merely operates to *suspend the remedy* thereon, until such time as the corporation complies with the statute;¹ and that the legislature may validate such a mortgage by a *retrospective statute*.²

§ 7956. Doctrine that the Failure of the Foreign Corporation to Comply with Domestic Statutes merely Suspends its Remedy on Contracts until Compliance.—The spectacle of the demoralization produced by judicial decisions which uphold the citizens of the State in repudiating their honest engagements with foreign corporations, on grounds having no relation to the merits of those engagements, was evidently the circumstance which drove the Supreme Court of Indiana to a reconsideration of this question, so as to hold that the statute of that State relating to foreign corporations and their agents, which put such foreign corporations and their agents under a restraint enforced by a penalty, against doing business in the State until they complied with certain named conditions,—did not operate to render the contracts made by such corporations with citizens of the State before complying with such conditions, absolutely *void*, but merely operated to *suspend the remedy* of the foreign corporation in the courts of the State upon such contracts, until it should have complied with the statutory conditions.³ The new theory was that, until such compliance, any *action by the*

¹ *Daly v. National Life Ins. Co.*, 64 Ind. 1; *post*, § 7956.

² *Post*, § 7963.

³ *Wood Mowing &c. Co. v. Cald-*

well, 54 Ind. 270; *s. c.* 23 Am. Rep. 641; *Daly v. National Life Ins. Co.*, 64 Ind. 1; *Singer Man. Co. v. Brown*, 64 Ind. 548.

foreign corporation to enforce the contract was *prematurely brought*; so that an answer setting up the non-compliance of the foreign corporation with the statute would be an answer in the nature of a *plea in abatement*, and judgment upon it in favor of the defendant would operate merely to *abate the suit*.¹

§ 7957. Doctrine that Failure to Comply with Such Statutes does not Render Contracts Void.—We now come to a numerous class of holdings contrary to the foregoing, to the effect that the failure of the foreign corporation to comply with the domestic statutes prescribing the conditions upon which it shall be permitted to do business within the State, does not render its contracts made therein void and non-enforceable, or prevent it from maintaining an action against the domestic citizen thereon, unless the statute so states in express language.² If a foreign insurance company writes a

¹ *Wood Mowing &c. Co. v. Caldwell*, 54 Ind. 270, 281; *s. c.* 23 Am. Rep. 641. But the court conceded that if the fact that the company had not complied with the statute should appear in the complaint, it could be taken advantage of by demurrer. *Ibid.* It is therefore not sufficient, in defending on this ground, for the defendant to allege that the foreign corporation had failed to comply with the statutory requirements, at or prior to the execution of the contract sued on, but it must allege that it had not complied with them at or prior to the commencement of the action. *Singer Man. Co. v. Brown*, 64 Ind. 543. When, therefore, an insurance company, created by an act of Congress within the District of Columbia, made a loan upon lands in Indiana, without complying with the statute prescribing the condition upon which foreign corporations might do business in that State, and brought an action to foreclose the mortgage, and the defendants, in their answer, set

up the want of compliance of the plaintiff with the statute,—it was held that the *answer was good merely as a plea in abatement*; since the failure of the plaintiff to comply with the statute did not render the mortgage void, but merely suspended the right to foreclose it until it should have so complied. *Daly v. National Life Ins. Co.*, 64 Ind. 1.

² *Sherwood v. Alvis*, 83 Ala. 115; *s. c.* 3 South. Rep. 307; 3 Am. St. Rep. 695 (overruled by subsequent decisions in that State, *ante*, § 7955); *American Loan & Trust Co. v. East & West R. Co.*, 37 Fed. Rep. 242, 245; *s. c.* 5 Rail. & Corp. L. J. 110 (following *Sherwood v. Alvis*, *supra*); *Northwestern &c. Life Ins. Co. v. Overholt*, 4 Dill. (U. S.) 287; *Toledo Tie &c. Co. v. Thomas*, 33 W. Va. 566; *s. c.* 11 S. E. Rep. 37; 25 Am. St. Rep. 925; *Wright v. Lee*, 4 S. Dak. 237; *s. c.* 51 N. W. Rep. 706; *Rogers &c. Corp. v. Simmons*, 155 Mass. 259; *s. c.* 29 N. E. Rep. 580; *Connecticut &c. Fire Ins. Co. v. Whipple*, 61 N. H. 61;

policy upon the life of a domestic citizen before complying with the provisions of such a statute, the assured cannot make that the ground of *refusal to pay premiums*; but if the policy contains the usual provision of forfeiture for non-payment of premiums, it will *lapse* by reason of such non-payment, although the company may not have complied with the statute. In other words, if the policy remains in force at all, it remains in force according to its terms; it is not valid in so far as it operates against the company, while at the same time

Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; Dearborn Foundry Co. v. Augustine, 5 Wash. 67; s. c. 31 Pac. Rep. 327; Scruggs v. Scottish Mortgage Co., 54 Ark. 566; s. c. 16 S. W. Rep. 563; American Ins. Co. v. Butler, 70 Ind. 1; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; Union Ins. Co. v. Smart, 60 N. H. 458; The Manistee, 5 Biss. (U. S.) 381; Ehrman v. Teutonia Ins. Co., 1 McCrary (U. S.), 123; Columbus Ins. Co. v. Walsh, 18 Mo. 229; Washburn Mill Co. v. Bartlett, 3 N. Dak. 138; s. c. 54 N. W. Rep. 544, where there is a learned and intelligent discussion of the question by Bartholomew, J. Some of the statutes expressly so provide. See Mass. Stat. 1884, ch. 330, § 3; also Rogers &c. Corp. v. Simmons, 155 Mass. 259; s. c. 29 N. E. Rep. 580. Thus, it has been held that the failure of a foreign corporation to comply with the conditions prescribed by the constitution and statutes of the State upon which such corporations might be admitted to do business within the State, does not prevent an *assignee for the creditors* of such corporation from recovering its property within the domestic State. Wright v. Lee, 4 S. Dak. 237; s. c. 51 N. W. Rep. 706. So, contrary to holdings already noted (*ante*, § 7953), the courts which take this view uphold actions by foreign insurance

companies upon *premium notes* given by domestic citizens, although the company may not have complied with such a restrictive statute. Connecticut River Mut. F. Ins. Co. v. Whipple, 61 N. H. 61; Connecticut River Mut. F. Ins. Co. v. Way, 62 N. H. 622; Union Ins. Co. v. Smart, 60 N. H. 458 (distinguishing Haverhill Ins. Co. v. Prescott, 42 N. H. 547; s. c. 80 Am. Dec. 123). The Supreme Court of Indiana, evidently realizing the difficulty of adhering strictly to its former theory (*ante*, § 7951), has more recently held that, where a foreign insurance company, prior to making contracts of insurance in that State, has *substantially* complied with the provisions of such statutes, the failure of the *Auditor* of the State to furnish the agent of such company with a certified copy of its act of incorporation, whereby he is disabled from filing, in the office of the clerk of the county court, the statement required by the statute, will not avoid such contracts, nor prevent a recovery by the company upon promissory notes taken in settlement thereof. American Ins. Co. v. Butler, 70 Ind. 1. This is tantamount to holdings previously noted (*ante*, § 7938), to the effect that the certified copy by the State officer is *not the only evidence* of compliance with the statute.

being void in so far as it imposes a burden upon the assured or the beneficiary.¹

§ 7958. **Doctrine where the Statute Gives a Specific Penalty.**—Some of the decisions cited in the preceding section have been influenced by the consideration that the statute imposes a distinct *penalty* upon the foreign corporation and upon its agents for doing business within the State in violation of the statutory restrictions; and the courts have reasoned in such cases that it was the intention of the legislature that the penal or criminal sanction should afford the only remedy for the violation of the statute, and that it did not intend that a violation of the statute should operate to avoid contracts made before its conditions were complied with.² There is no hard and fast rule of statutory construction which requires the courts, in every case, to hold that the corporation is disabled from bringing an action upon a contract which it has made with a domestic citizen, while doing business in the State in violation of the provisions of such a statute. The question will, in every case, depend upon a fair construction of the statute; and cases will arise where the reasonable interpretation will be that, in annexing the penalty, the legislature intended that that should be the exclusive sanction of the statute.³

¹ Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67, 79. The court hold, *arguendo*, in compliance with the doctrine of the text, that the policy is *not voidable by either party. Ibid.*

² Fritts v. Palmer, 132 U. S. 282; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; Ehrman v. Teutonia Ins. Co., 1 McCrary (U. S.), 123; The Manistee, 5 Biss. (U. S.) 381; Toledo &c. Co. v. Thomas, 33 W. Va. 566; s. c. 25 Am. St. Rep. 925; 11 S. E. Rep. 37; Sherwood v. Alvis, 83 Ala. 115; s. c. 3 Am. St. Rep. 695; 3 South. Rep. 307; Pennypacker v. Capital Ins. Co., 80 Iowa, 56; s. c. 20 Am. St. Rep. 395. To the doctrine that where the

statute annexes a penalty to the doing of an act, it does not always imply that the prohibition will render the act void,—see Pangborn v. Westlake, 36 Iowa, 546, 548.

³ Thus, in a case in Alabama, where the court had under consideration the construction of a statute giving effect to a constitutional provision imposing restrictions upon foreign corporations, which statute annexed heavy penalties upon such corporations and their agents for engaging in business without complying with its provisions, it was said that the imposition of those provisions would not have the effect of making contracts void which were entered into, but that the

Many judicial decisions could, no doubt, be adduced in support of the principle that where an act is neither *malum in se* nor *malum prohibitum*,—for instance, the act of *dealing in bills of exchange*,—the mere fact that the legislature has imposed the condition of a *license* upon the doing of the business, does not avoid contracts made with such a dealer before he has taken out the license.¹ But it must be kept in mind that the rule is totally different where the business is in itself *immoral* or *dangerous to the public*, in which cases, the fact that there is a penal or even a criminal sanction in the statute cannot operate to render valid contracts made in violation of its provisions.²

offenders would be *merely liable to the statutory penalties*. *Sherwood v. Alvis*, 83 Ala. 115; *s. c.* 3 Am. St. Rep. 695, 698. The court cited: *Sedgw. Stat. & Const. Law*, 2d ed., 339, 341; *Alabama &c. R. Co. v. McAlpine*, 71 Ala. 545. But the theory of this decision (in *Sherwood v. Alvis*, *supra*), was overturned in subsequent cases in that State, the court holding that contracts made by foreign corporations without complying with the constitutional provisions, were void in such a sense that they could neither be enforced by the foreign corporation nor by its agent for the purpose of recovering his commissions: *Farrior v. New England Mortgage &c. Co.*, 88 Ala. 275; *Mul-lens v. American Freehold &c. Co.*, 88 Ala. 280; *Christian v. American Freehold &c. Co.*, 89 Ala. 198; *Dudley v. Collier*, 87 Ala. 431; *s. c.* 13 Am. St. Rep. 55. These decisions distinguish the case of *Sherwood v. Alvis*, *supra*, upon its facts, by pointing out that that was a case where a mortgage executed in favor of a foreign corporation had been foreclosed and the purchaser had brought *ejectment*; so that the contract was *executed*. That the *soliciting of subscriptions to the capital stock* of a foreign corporation is

not an act or agreement intended to be rendered inoperative by such a statute, see *Payson v. Withers*, 5 Biss. (U. S.) 269.

¹ See *Lindsey v. Rutherford*, 17 B. Mon. (Ky.) 245.

² For instance, where the plaintiff was the owner of a *lottery* scheme, and employed the defendant as his agent to sell his lottery tickets, empowering him to receive and retain the proceeds of such sales until satisfied that the drawing was fairly conducted, and requiring him then to account therefor,—it was held that he could not recover on a note given by the defendant for the amount of the proceeds of lottery tickets thus sold by him. *Lemon v. Grosskopf*, 22 Wis. 447; *s. c.* 99 Am. Dec. 58. So, the sale of *intoxicating liquors* is generally recognized as an evil to be repressed by legislation, rather than encouraged or tolerated; and therefore the sale of intoxicating liquors without a license, or on Sunday, against the prohibition of a statute, is a contract of such a nature that an action cannot ordinarily be maintained thereon (*Melchoir v. McCarty*, 31 Wis. 252; *s. c.* 11 Am. Rep. 605), although it is well known that in many cases such statutes are re-

§ 7959. Doctrine that Neither Party can Set up his Own Violation of Law.—Where the prohibitory statute also annexes a penalty, there is more room for doubt; but even in the latter case many courts take the view that the corporation will not be allowed to make its own violation of the law the ground of an action in the courts of the sovereignty whose law it has violated, so as to maintain an action upon the contract.¹ The *general theory* probably is, that no action can be maintained, grounded upon the doing of that which is prohibited by law, and that the mere fact that the statute imposes a penalty or a criminal sanction does not alter the principle.²

garded merely as *revenue laws*, so that the violation of them does not invalidate the contract. The law is *not* in such a state as the Supreme Court of Wisconsin say in the last case, that "it is quite immaterial whether such illegal contract be *malum in se*, or only *malum prohibitum*. In either case the maxim, *ex turpi causâ non oritur actio*, is applicable." That may be the law in particular jurisdictions, and judges may inadvertently have declared it in broad terms in many cases; but decisions can be cited, even from the Supreme Court of Wisconsin, disputing the proposition. It may not be amiss, however, to note the cases which the Supreme Court of Wisconsin cite in support of it: *Schwartz v. Gillett*, 1 Chand. (Wis.) 207; *Kellogg v. Larkin*, 3 Chand. (Wis.) 133; *Bryan v. Reynolds*, 5 Wis. 200; *s. c.* 68 Am. Dec. 55; *Fay v. Oatley*, 6 Wis. 42; *Maxwell v. Reed*, 7 Wis. 582; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Miller v. Larson*, 19 Wis. 463; *Phalen v. Clark*, 19 Conn. 421; *s. c.* 50 Am. Dec. 253; *Finn v. Donahue*, 35 Conn. 216; *Gray v. Hook*, 4 N. Y. 449; *Nellis v. Clark*, 4 Hill (N. Y.), 424; *Mills v. Rice*, 6 Gray (Mass.), 458; *Dodson v. Harris*, 10 Ala. 566; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Martin v. Wade*, 37 Cal. 168; *Hoover v. Pierce*, 27 Miss.

13; *Day v. McAllister*, 15 Gray (Mass.), 433; *Toler v. Armstrong*, 4 Wash. (U. S.) 297. That these holdings do not express any hard and fast rule of law may be proved by the mere reference to the decisions in the next section, and especially to such cases as *Chase's Patent Elevator Co. v. Boston Tow-Boat Co.*, 152 Mass. 428, where a statute provided the manner in which corporations of a certain kind might be organized, and forbade every such corporation to "commence the transaction of the business for which it was organized" until those things are done. Here it was held that a contract made by such a corporation, in the course of its business, before "those things" had been done, was nevertheless valid. And see the reasoning in *Rogers & Co. Corp. v. Simmons*, 155 Mass. 259, 260.

¹ *Cincinnati & Co. v. Rosenthal*, 55 Ill. 85; *s. c.* 8 Am. Rep. 626; *Thorne v. Travelers' Insurance Co.*, 80 Pa. St. 15; *s. c.* 21 Am. Rep. 89.

² See *Mitchell v. Smith*, 1 Binn. (Pa.) 110, 118; *s. c.* 2 Am. Dec. 417; *Seidenbender v. Charles*, 4 Serg. & R. (Pa.) 151; *s. c.* 8 Am. Dec. 682; *Swan v. Scott*, 11 Serg. & R. (Pa.) 155; *Columbia Bank v. Haldeman*, 7 Watts & S. (Pa.) 233; *s. c.* 42 Am. Dec. 229;

But the rule is not universal, either in respect of actions *ex contractu* or *ex delicto*. Properly restrained, the rule is that a plaintiff cannot recover *where he derives his title to maintain his action from his own breach of the law*.¹ But the mere fact that, at the time when the cause of action arose, whether it be a cause of action *ex contractu* or *ex delicto*, the plaintiff was engaged in a *collateral violation of law*, will not, under the rule, disable him from maintaining his action. For illustration, coming into the domain of the law of torts, if a man is driving with his team on the wrong side of the road,² or is allowing his wagon to stand transversely across the street, instead of lengthwise upon it as required by a city ordinance,³—and in that condition another traveler negligently drives upon his team and vehicle, he may have an action for the resulting damages.⁴ On this principle, although the corporation cannot make its own violation of the law the ground of an action, yet the other contracting party is not precluded thereby from maintaining *his* action to enforce the contract; for the prohibition of the statute is not against him, but in so far as he participates in its violation, his act is not of such a character that his right of action arises proximately out of his own wrongful act, but if his act is wrongful at all, its wrongfulness is collateral to his right of action. He may, indeed, know that the corporation has no right to do business in the State without complying with certain statutory conditions; indeed he is bound to know this if he is bound to know the law; but he may not know whether or not, in the particular case, the corporation has complied with those conditions; and where

Thomas v. Brady, 10 Pa. St. 164; Scott v. Duffy, 14 Pa. St. 18, 20; Holt v. Green, 73 Pa. St. 198; s. c. 13 Am. Rep. 737; Law v. Hodgson, 2 Camp. 147; s. c. 11 East, 300; Langton v. Hughes, 1 Maule & S. 593.

¹ Gregg v. Wyman, 4 Cush. (Mass.) 322; Way v. Foster, 1 Allen (Mass.), 408; Woodman v. Hubbard, 25 N. H. 67; s. c. 57 Am. Dec. 310; Phalen v. Clark, 19 Conn. 421; s. c. 50 Am. Dec.

253; Simpson v. Bloss, 7 Taunt. 246; Bosworth v. Swansey, 10 Met. (Mass.) 363; s. c. 43 Am. Dec. 441.

² Spofford v. Harlow, 3 Allen (Mass.), 176.

³ Steele v. Burkhardt, 104 Mass. 59; s. c. 6 Am. Rep. 191.

⁴ See, for further illustrations of this principle, 2 Thomp. Neg. (1st ed.), p. 1161, § 11, and p. 1201, § 49.

the State neglects to proceed against it to oust it from so violating its sovereignty, he may innocently and rightfully conclude that it has complied with the law. In such a case it would be a perversion of the statute if the courts of the State were to use it to strike down the rights of their own citizens, they being guilty of no wrong; and it would be a violation of a well understood principle,¹ to allow the foreign corporation, by way of defense to a meritorious action brought by a domestic citizen, to set up its own turpitude and violation of the domestic law. Such, it is confidently believed, is not the law.²

§ 7960. Corporation Estopped to Set up its Want of Compliance with Such Statutes in Avoidance of its Own Contracts.—If the State does intervene, and if the domestic citizen, for whose protection the statute was framed, does not elect to rescind it, then, upon every sound principle, the foreign corporation will not be heard to set up its own violation of the domestic law in avoidance of its contract made with a citizen of the domestic State. It will not be allowed, when sued by such citizen to enforce such a contract, to defend on the ground that it has failed to comply with the statutes of the State requiring certain things to be done as a condition precedent to its right to do business within the State. It will not be suffered thus to set up its own turpitude

¹ *Ante*, § 6015.

² When, therefore, there was a constitutional provision prohibiting foreign corporations from doing business within the State without having at least one known place of business, and an authorized agent, or agents, therein, the New England Mortgage Security Company, a corporation organized under the laws of Connecticut, made a loan of money and received from the borrower a mortgage on certain real estate situated in Alabama, to secure the repayment of the loan.—In an action to recover possession of the land by one who

had purchased it at a trustee's sale under the mortgage, the mortgagor set up the defense that the mortgagee was a foreign corporation, that the loan was made and the mortgage executed in Alabama, and that, at the time when the contract was made, the corporation had no place of business in Alabama and no agent or agents therein. It was held that this was not a good defense to the action: the mortgagor was estopped from setting up these facts to defeat the mortgagee after having received the benefits of the contract. *Sherwood v. Alvis*, 83 Ala. 115; s. c. 3 Am. St. Rep. 695.

in avoidance of its contracts otherwise fairly made.¹ For instance, although a *foreign insurance company* enters the domestic jurisdiction, and there does business by writing policies upon the property or lives of domestic citizens in violation of such a restrictive statute, it will not be able to defend on this ground, when an action is brought against it to recover the amount assured in the policy.² The reason is that the plaintiff and the defendant are not *in pari delicto*. The plaintiff may rightfully presume that the defendant has complied with the statutes entitling it to do business within the State. It has been observed that one of the objects of such statutes is the protection of the people against worthless foreign companies; and that, as the domestic citizen is not required to see that the foreign corporation has observed the laws before he enters into a contract with it, there is no reason, founded in public policy, which will enable a solvent foreign corporation which has violated the domestic law in making contracts and receiving the consideration therefor from an innocent citizen, to escape liability for its performance by setting up its own turpitude. "Such defense will not avail for merit of him who pleads it. Against an innocent party 'no man shall set up his own iniquity as a defense any more than as a cause of action.'"³

§ 7961. Whether Agent of Foreign Corporation can Defend on This Ground against an Action by the Corporation on his Bond.—Some of the cases hold that where a foreign corporation enters a State by means of its agent, and does

¹ *Lasher v. Stimson*, 145 Pa. St. 30; *s. c.* 23 Atl. Rep. 522.

² *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; *s. c.* 20 Am. St. Rep. 395; 45 N. W. Rep. 408; 8 L. R. A. 230; *Union Mutual Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37; *Watertown Fire Ins. Co. v. Simons*, 96 Pa. St. 520;

Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; *Clay Fire & Ins. Co. v. Huron Salt & Co.*, 31 Mich. 346; *The Manistee*, 5 Biss. (U. S.) 381; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85; affirming *s. c.* 40 Ill. App. 119.

³ *Watertown Fire Ins. Co. v. Simons*, 96 Pa. St. 520, 526.

business there, in violation of restrictive statutes such as those under consideration, it cannot maintain an action against its agent upon the bond given by him to the corporation to secure the faithful fulfillment of his duties, for the reason that, the doing of the business by the agent being expressly prohibited by the local statute, no recovery can be had without proving that both the plaintiff and the defendant have violated the law.¹

§ 7962. Non-compliance with Such Statutes Prevents Agent from Recovering Commissions. — On the same ground, it has been held that an agent who does business within a State for a foreign corporation, which is there in violation of the laws of the State, cannot maintain an action against a citizen of the State to recover his *commission* for a loan of money procured for such citizen from the foreign corporation.²

§ 7963. Legislature may Validate Such Contracts. — Moreover, it has been held competent for the legislature by a *retrospective statute to validate contracts* made between domestic

¹ *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15; *s. c.* 21 Am. Rep. 89; *Mutual Benefit Life Ins. Co. v. Bates*, 92 Pa. St. 352; *Dudley v. Collier*, 87 Ala. 431; *s. c.* 13 Am. St. Rep. 55; *United States Life Ins. Co. v. Adams*, 7 Biss. (U. S.) 30. Concurring with these decisions see *Lemon v. Grosskopf*, 22 Wis. 447; *s. c.* 99 Am. Dec. 58, — where the plaintiff was not allowed to recover of his agent money collected by the latter in running a *lottery scheme*. Similarly, see *Hunt v. Knickerbocker*, 5 Johns. (N. Y.) 326. Some of the cases suggest a distinction between the right to recover money collected by the agent, and the right to recover back money paid into his hands by the principal, allowing a recovery in the latter case. See *Lemon v. Grosskopf*, 22 Wis. 447, 453; *s. c.* 99 Am. Dec. 58. For an action on the bond of an agent

of a foreign insurance company, where the question was whether the agent acted without a license, and the case was determined on the theory that his license was not shown to have expired, — see *Scottish Commercial Ins. Co. v. Plummer*, 70 Me. 540. Other courts hold that in such a case the agent will not be allowed to set up his own violation of the law as a reason why he should not keep the contract which he has made with his principal (*Penn Mut. Life Ins. Co. v. Bradley*, 21 N. Y. Supp. 876); and that, as his sureties have no better rights in this respect than himself, they cannot set up such a defense. *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388.

² *Dudley v. Collier*, 87 Ala. 431; *s. c.* 13 Am. St. Rep. 55; 27 Am. & Eng. Corp. Cas. 440; 6 South. Rep. 304.

citizens and foreign corporations in violation of a previous prohibitory statute; since such *curative legislation* does not have the effect of divesting vested rights, or of impairing the obligation of contracts, but merely of preventing men, upon reasons which concern the State alone, from repudiating the honest engagements into which they have entered.¹

§ 7964. Foreign Corporation can Acquire and Transmit Valid Titles without Complying with Local Law.— We have already had occasion to note the principle that, although a corporation has no power, except upon a principle of comity, to acquire and hold lands within the limits of another sovereignty, yet if it does acquire such lands, it may hold them until the State intervenes and escheats them, and consequently that, prior to such intervention by the State, it may transmit a good title to such lands to a third person.² This principle operates in respect to the question we are considering; so that, although the constitution of Colorado provided that no foreign corporation should do business in that State without having a known place of business and an agent upon whom process might be served; and although a statute of that State provided for the filing by such corporation with the Secretary of State, of a certificate showing their place of business, and designating such agent, or agents, and also a copy of their charter or certificate of incorporation, and providing that, in case of their failure to do so, their officers and stockholders should be jointly and severally liable on their contracts made while in default; and although another statute provided that “no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided for in this act,” — yet, where a resident of Colorado conveyed real estate to a corporation organized under the law of Missouri, which had not taken the steps above prescribed to entitle it to do business in Colorado, and such corporation afterwards conveyed the land to another, its

¹ United States Mortgage Co. v. Gross, 93 Ill. 483, 494.

² *Ante*, § 7918.

grantee could hold it against a subsequent grantee of the original grantor. In other words, notwithstanding the foregoing constitutional and statutory provisions, a foreign corporation could acquire a title to land in Colorado which it was capable of transmitting to a third party so long as the State did not intervene.¹

¹ *Fritts v. Palmer*, 132 U. S. 282. Mr. Justice Miller dissented, on the ground that the foreign corporation could not acquire land in Colorado in the face of the prohibition of the statute last quoted. So, under a statute of Pennsylvania (1 Purd. Pa. Dig. 361), which forbids a foreign corporation "to acquire and hold" real estate, a deed of conveyance of land to such a foreign corporation is void, but it passes a title which a corporation may hold subject to the right of escheat in the Commonwealth,—its title being merely defeasible at the election of the State like that of an *alien*. *Hickory Farm Oil Co. v. Buffalo &c. R. Co.*, 32 Fed. Rep. 22; and see *ante*, § 7913, note. The principle of these decisions is elsewhere alluded to (*ante*, § 7918). See, in affirmation of the principle, *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Runyan v. Coster*, 4 Pet. (U. S.) 122; *Bone v. Delaware Canal Co. (Pa.)*, 5 Atl. Rep. 751; *Chicago, Burlington &c. R. Co. v. Lewis*, 53 Iowa, 101; *s. c.* 4 N. W. Rep. 842; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *s. c.* 8 N. W. Rep. 389; *Jones v. Habersham*, 107 U. S. 174; *s. c.* 2 Sup. Ct. Rep. 336; *Barnes v. Suddard*, 117 Ill. 237; *s. c.* 7 N. E. Rep. 477; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Swope v. Leffingwell*, 105 U. S. 3; *Reynolds v. Crawfordville Bank*,

112 U. S. 405. There is an analogous proposition of law to the effect that a corporation which exists by usurpation and a violation of positive law, is, nevertheless, capable of receiving and transmitting a good title to real estate, so long as the government does not intervene to oust it of the franchise which it usurps: *Smith v. Sheeley*, 12 Wall. (U. S.) 358, 361. See also *Myers v. Croft*, 13 Wall. (U. S.) 291, 295; *Jones v. Guaranty &c. Co.*, 101 U. S. 622, 628; *Fortier v. New Orleans &c. Bank*, 112 U. S. 439, 451. It was also pointed out by Mr. Justice Harlan, in giving the opinion of the court in *Fritts v. Palmer*, 132 U. S. 282, 293, that an analogy of the principle is found in cases holding that the question whether a corporation having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated, and cannot be raised collaterally by private persons, unless there be something in the statute expressly, or by necessary implication, authorizing them so to do: *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Jones v. Habersham*, 107 U. S. 174, 188. The analogy to the cases of titles held and transmitted by *aliens* has already been alluded to: *Cross v. De Valle*, 1 Wall.

§ 7965. Whether Necessary for Foreign Corporation Plaintiff to Aver and Prove Compliance with Such Statutes.—

Judicial authority is likewise divided upon the question whether it is necessary, in an action by a foreign corporation to enforce a contract made in the domestic State, to *aver and prove compliance* on its part with the statutes of the State entitling it to do business therein. We have elsewhere seen that the general *presumption of right-acting* applies to corporations, both domestic¹ and foreign,² and that it will be presumed that a given act was within the powers of the corporation until the contrary appear. We have also met with cases which hold that it is a presumption, in the absence of evidence to the contrary, that a foreign corporation suing to enforce a contract made in the domestic jurisdiction, has complied with the local laws which entitle it to make that contract.³ If these principles are sound, then it must follow as a necessary conclusion to be adduced from them, that the foreign corporation need not aver and prove, in the first instance, in order to maintain an action upon a contract made within the domestic State, that it had complied with the domestic law entitling it to do business within the State, and to make that contract.⁴ But we find decisions directly to the contrary, which proceed upon the principle that compliance with the

(U. S.) 5; Doe v. Robertson, 11 Wheat. (U. S.) 332; Phillips v. Moore, 100 U. S. 208.

¹ *Ante*, §§ 5642, 5967.

² *Ante*, § 7883.

³ *Ante*, § 7883; American Ins. Co. v. Smith, 73 Mo. 368; Railway Company v. Fire Association, 55 Ark. 163; s. c. 18 S. W. Rep. 43; White River Lumber Co. v. Southwestern Imp. Asso., 55 Ark. 625; s. c. 18 S. W. Rep. 1055; Sprague v. Cutler & Co. Lumber Co., 106 Ind. 242.

⁴ Many illustrations of the principle could be adduced. Thus, in an action for *libel* by the manager of an opera, against the proprietor of a newspaper, it was held wholly unnec-

essary for the plaintiff to aver and prove that he had taken out a *license* under certain statutes to give operative representations: Fry v. Bennett, 28 N. Y. 324. So, if a *foreign insurance company* brings an action upon a *premium note* given by a policy-holder, it need not prove, in the first instance, that it has complied with the statutes of the State which entitle it to do business therein, but proof of the note will make a *prima facie* case, and the authority to take it will be presumed, in the absence of affirmative allegations and proof to the contrary by the defendant. American Ins. Co. v. Smith, 73 Mo. 368; American Ins. Co. v. Cutler, 36 Mich. 261.

local statute is a condition precedent to the right to maintain an action in the local courts, which, like other conditions precedent, must be averred and proved by the plaintiff as the foundation of its right of action.¹ These holdings are unphilosophical and contrary to the analogies of good pleading. To illustrate this, let us suppose a single case. The excise laws of the United States prohibit the sale of intoxicating liquors without the taking out of a license, and make every single act of sale a criminal offense; and it may be assumed that the same is true of the excise laws of every State, and of the ordinances of every considerable municipal corporation. Although there is the highest judicial authority for the proposition that, where it has shown in defense of an action by such a dealer to recover the price of a bill of such goods sold, that he has not complied with such laws, he cannot recover,²—yet it has never been held, as a question of pleading, that he must, in order to maintain such an action, aver and prove that he has complied with such laws. Who, for instance, ever heard of the proposition that a liquor dealer, in order to recover the price of a bill of liquors sold, must aver and prove that he has taken out a license as required by the ordinance of the city within which he carries on his business? And yet we have the authority of the highest national tribunal to the effect that the failure to take out such a license is matter of defense, which being shown, he cannot recover the price of the goods sold. The best opinion, therefore, is, that, in an action by a foreign corporation to enforce a domestic contract, it is not only not necessary for the corporation to aver and prove in the first instance its compliance with the domestic statutes entitling it to do business within the domestic State, but that, unless the defendant makes an averment of non-compliance in distinct terms, he cannot introduce evidence to show that such was the fact.³

¹ *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Christian v. American Freehold &c. Co.*, 89 Ala. 198; *Farrior v. New England Mortgage &c. Co.*, 88

Ala. 275; *Mullens v. American Freehold &c. Co.*, 88 Ala. 280.

² *Miller v. Ammon*, 145 U. S. 421.

³ *White River Lumber Co. v.*

§ 7966. **Further of This Subject.**—When, therefore, a bill in equity by a foreign corporation to foreclose a mortgage, failed to allege such compliance, it was held that a *demurrer* to it ought to have been sustained.¹ But if the bill had not shown that its prayer for relief was predicated on a transaction which took place in Alabama, then the objection would be matter of defense which could only be taken by answer or plea.² And the rule is analogous in an action at law; so that where the complaint does not show that the contract sued on was made within the domestic State, if it was made by the plaintiff in violation of such a provision, that is matter of defense which must be set up in answer.³ For stronger reasons, the authority of the foreign insurance company, thus suing on a contract, to make the contract within the domestic State, *cannot be questioned for the first time on appeal*,⁴ nor can such a defense be set up by a *plea in abatement* to an action by a foreign corporation for trespass.⁵

Southwestern Imp. Asso., 55 Ark. 625; s. c. 18 S. W. Rep. 1055.

¹ *Christian v. American Freehold &c. Co.*, 89 Ala. 198; *Farrior v. New England Mortgage &c. Co.*, 88 Ala. 275; *Mullens v. American Freehold &c. Co.*, 88 Ala. 280.

² *Ibid.*

³ *Railway Co. v. Fire Association*, 55 Ark. 163; s. c. 18 S. W. Rep. 43.

⁴ *Uteley v. Clark-Gardner Lode Mining Co.*, 4 Colo. 369.

⁵ *Ibid.* A bill in equity, in a court of Alabama, by a foreign corporation, to foreclose a mortgage which merely avers that the complainant "has complied with the laws of Alabama which authorize foreign corporations to do business in this State," is considered as averring that the company had a duly constituted agent and known place of business in that State *only at the time when the suit was commenced*, and not at the time when the money was loaned or

the mortgage taken,—upon the principle that doubtful averments are to be taken most strongly against the pleader. It is, therefore, not an averment that the corporation had a duly constituted agent and known place of business at the time when the transaction took place, as required by the constitution and the statute; and for that reason such a bill is demurrable. *Farrior v. New England Mortgage &c. Co.*, 88 Ala. 275; *Mullens v. American Freehold &c. Co.*, 88 Ala. 280. Under the Indiana rule already set out (*ante*, § 7956), an answer defending on this ground, which merely alleges that the agent of the plaintiff corporation failed to comply with the requirements of the statute, is insufficient; but it is necessary to allege that it had failed to comply with such provisions, *at or prior to the commencement of the action*. *Singer Man. Co. v. Brown*, 64 Ind. 548.

§ 7967. **Rule where the Foreign Corporation is Sued.**—Turning the question around, and taking the case where an action is brought, we will say, by a domestic citizen against a foreign corporation, to enforce a contract made with the corporation while it was doing business within the State without having complied with the statutes of the State entitling it to do business there, and remembering that all the cases, so far as discovered, hold that *the company is estopped* to defend on this ground,¹—it follows, as a rule of pleading, that it is *not necessary for the plaintiff to allege and prove compliance* on the part of the defendant with such local statutes.²

§ 7968. **Effect of Non-compliance upon the Interpretation of Contracts.**—Although there is judicial opinion to the effect that the *situs of a contract of insurance* made by a corporation in one State, insuring property situated in another State, is the former, and not the latter State,³—yet the contrary seems to be the better view. It is that the *situs* of such a contract is not the place where it is formally written, but the place where it is *delivered and accepted*.⁴ This is especially true, where, as is generally the case with such policies, the policy, by its own terms, is not to be valid until it is *counter-signed* by the local agent within the State where it is delivered.⁵ The rule is the same, although there is no local agent who can rightfully sign it and deliver it, by reason of the fact that the foreign insurance company has not complied with the conditions of the local statutes which entitle it to do business within the domestic State.⁶

§ 7969. **Effect of Withdrawing Agency from State.**—It has been held by the Court of Appeals of Maryland, in a case where a Pennsylvania insurance company had an agency in Maryland, and while so doing business in Maryland, and through its Maryland agency made a contract of insurance

¹ *Ante*, § 7960.

Gray (Mass.), 131; s. c. 69 Am. Dec.

² *Clay Fire &c. Ins. Co. v. Huron*

308.

Salt &c. Co., 31 Mich. 346.

⁵ *Ibid.*

³ *Post*, § 7970.

⁶ *Thwing v. Great Western Ins. Co.*,

⁴ *Heebner v. Eagle Ins. Co.*, 10

111 Mass. 93, 109.

upon property situated in Virginia, and afterwards withdrew its agency from the State of Maryland,—that the holder of the *policy* in Virginia could nevertheless *maintain an action* thereon in the courts of Maryland. The decision proceeded upon the ground that at the time when the contract was made, and also at the time when the suit was brought, a non-resident of the State of Maryland had, by an express provision of its statute law, the right to maintain an action against any foreign corporation doing business in that State. Under another statute, process against foreign insurance companies might be served upon the State Insurance Commissioner. The court reasoned, in view of these statutes, that the foreign insurance company could not, by withdrawing its agency from the State, defeat the remedy upon the contract which it had made within the State, through its agency there.¹

§ 7970. Situs of the Contracts of Foreign Corporations for Purposes of Jurisdiction.—In view of what has preceded it is evident that this becomes in many cases, though not in all, an important and controlling question; for although the *situs* of such a contract may, for some purposes, be the State of the home office of the company, yet if it appear that it procured the contract by sending its agent into the State of the forum to solicit business there, before having complied with the laws of that State entitling it to do so, it will not, under many theories,² be allowed to recover in that forum. In other cases the question whether the contract was made in violation of the laws of the domestic forum has been made to depend upon the technical question of its *situs*. Thus, it has been held that while a single purchase of machinery within the State of Colorado, by a foreign mining corporation, to be transported to and set up in the State of its domicile, is not within the prohibition of the statute of that State restraining corporations from doing business therein until they have filed with the Secretary of State a certificate designating their principal

¹ Ben Franklin Ins. Co. v. Gillett,
54 Md. 212.

² *Ante*, § 7950; and see especially
ante, § 7968.

place of business within the State, and appointed an agent upon whom process may be served, — yet such a purchase is a sufficient *doing of business within the State* as to render the foreign corporation amenable to the jurisdiction of the courts of the State for the purpose of enforcing against it the payment of the purchase price, if jurisdiction can be obtained in the manner provided by the laws of the State.¹ It has been held that where the agent of a foreign insurance company through whom the insurance is effected has no larger authority from the company than to receive and transmit to the home office applications for insurance, and to receive from that office and deliver the insurance policies which are issued and transmitted in pursuance of such applications, then the *situs* of the policy is in the State of the home office, and it is held to take effect as a contract as soon as it is signed by the proper officers at the home office and put in the mail for transmission; for from that moment it becomes a binding and irrevocable contract between the parties; and inasmuch as the acceptance of the application, the signing, issuing, and mailing of the policy all take place within the State of the home office, the *situs* of the contract is deemed to be in that State, and not in the State of the agent to whom it is transmitted for delivery.² The same rule has been held to apply where the policy, instead of being sent to the assured directly by mail, is sent to the company's agent at the domicile of the assured to be by him delivered to the assured.³ Whether the

¹ Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499; s. c. 22 Am. St. Rep. 433; 9 Rail. & Corp. L. J. 113; 25 Pac. Rep. 325.

² Hyde v. Goodnow, 3 N. Y. 266; Western v. Genesee Mut. Ins. Co., 12 N. Y. 253; Huntley v. Merrill, 32 Barb. (N. Y.) 626.

³ Western v. Genesee Mut. Ins. Co., *supra*; Huntley v. Merrill, *supra*. In the former of these cases it was said: "When the application was received and approved by the company, and the policy executed and put in

course of transmission to the insured, the contract was complete, and both parties became bound; so that if a loss had occurred before its actual receipt by the insured, the company would have been responsible. The contract was consummated by the final assent on the part of the company, and upon that event, and not upon its delivery to the assured, became operative. The validity of the contract is therefore to be determined by the law of New York. Here it was made, and here it was to be performed."

last proposition is sound must depend upon the predicate that the authority of the agent, when the policy is received by him from the home office, is limited to a delivery of it to the insured. Where, under similar circumstances, by the terms of the policy itself it is not to be valid unless *countersigned* by the local agent, and where it is so countersigned and delivered by him, the *situs* of the contract, according to the view taken in Massachusetts and in Maryland, is the State within which it is so countersigned and delivered.¹

¹ *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 422; *s. c.* 59 Am. Dec. 192; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.), 131; *s. c.* 69 Am. Dec. 308; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *s. c.* 33 Am. Rep. 258. See also *Thwing v. Great Western Ins. Co.*, 111 Mass. 109, where it was held that, as the policy was delivered and accepted and the *premium note signed* by the assured at Boston, the *situs* of the contract was therefore in Massachusetts. Where a citizen of South Carolina made, in

that State, an application for membership in a Maryland mutual assessment life insurance association, and the rules of the association required proof of death and assessments to be made in Maryland, it was held that the contract was to be performed in Maryland, and that the corporation having neither office, officer, nor property in South Carolina, a suit for a breach of contract could not be maintained against it in South Carolina. *Rodgers v. Mutual Endowment &c. Asso.*, 17 S. C. 406.

CHAPTER CXCVI.

ACTIONS BY FOREIGN CORPORATIONS.

SECTION	SECTION
7977. Power of foreign corporations to sue.	corporations to do business within the State.
7978. For what causes of action.	7982. Pleading statutes invalidating contracts of foreign corporations not authorized to do business in the State.
7979. Rights of action how affected by failing to comply with statutes prescribing conditions upon which it may enter the State to do business.	7983. Power to buy at execution sales.
7980. Further of this subject.	7984. Allegation of corporate existence in actions by and against foreign corporations.
7981. Alleging compliance with statute permitting foreign cor-	

§ 7977. **Power of Foreign Corporations to Sue.**—The power of a corporation to make and take contracts in a State other than the State or country of its creation, would be utterly ineffectual and illusory if it did not carry with it the power to avail itself of the ordinary *remedies* afforded by the law of such other State to its own citizens and corporations for the vindication of rights and the redress of wrongs. It may, therefore, be laid down, as a general principle, that wherever a foreign corporation has, within the domestic jurisdiction, the power to become the obligee in a given contract, it has the same right of action to enforce the performance of that contract, or recover damages for its breach, which is afforded by the laws of such State to domestic persons or corporations.¹ This doctrine is often roughly expressed in

¹ Connecticut &c. Ins. Co. v. Cross, 18 Wis. 109; Hines v. North Carolina, 10 Smedes & M. (Miss.) 529; St. Louis Perpet. Ins. Co. v. Cohen, 9 Mo. 421; New York Floating Derrick Co. v. New Jersey Oil

Co., 3 Duer (N. Y.), 648; Talmadge v. North American Coal &c. Co., 3 Head (Tenn.), 337; Bank v. Simon-ton, 2 Tex. 531; Bank of Cape Fear v. Stinemetz, 1 Hill (S. C.), 44; Bank of Michigan v. Williams, 5 Wend.

the proposition that a corporation created by the laws of one State may maintain an action in another State or country, unless restrained from so doing by the local laws of such State or country.¹ Statutory restraints upon this power have been imposed by the legislatures of many of the States. These have already been considered.²

§ 797S. For What Causes of Action.—The principle being conceded that a foreign corporation may sue for the redress of injuries in the domestic jurisdiction, it must follow, in the absence of statutory restraints, that it may sue *upon any cause of action for which a domestic person or corporation might sue.*³

(N. Y.) 478; New Jersey &c. Bank v. Thorp, 6 Cow. (N. Y.) 46; Society &c. v. Wheeler, 2 Gall. (U. S.) 105; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171; Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 576, 584; Bank of Marietta v. Pindall, 2 Rand. (Va.) 465; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Bank of Edwardsville v. Simpson, 1 Mo. 184; Rees v. Conococheague Bank, 5 Rand. (Va.) 323; s. c. 16 Am. Dec. 755; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Mechanics' Bank v. Godwin, 14 N. J. L. 439; Wellersburg &c. Plank Road Co. v. Young, 12 Md. 476; Clarke v. New Jersey Steam Nav. Co., 1 Story (U. S.), 531; British American Land Co. v. Ames, 6 Mete. (Mass.) 391; Savage Man. Co. v. Armstrong, 17 Me. 34; s. c. 35 Am. Dec. 227; Day v. Essex Co. Bank, 13 Vt. 97; Bank of Washtenaw v. Montgomery, 3 Ill. 422; Taylor v. Bank of Alexandria, 5 Leigh (Va.), 471; Libbey v. Hodgdon, 9 N. H. 394; Guaga Iron Co. v. Dawson, 4 Blackf. (Ind.) 202; Tombigbee R. Co. v. Kneeland, 4 How. (U. S.) 16; New York Dry Dock v. Hicks, 5 McLean (U. S.), 111;

Lucas v. Bank of Georgia, 2 Stew. (Ala.) 147.

¹ Bank of Edwardsville v. Simpson, 1 Mo. 184; Bank of United States v. Deveaux, 5 Cranch (U. S.), 61, 91; Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; s. c. 2 Strange, 807; Dutch West India Co. v. Van Moyses, 1 Strange, 612; s. c. 2 Ld. Raym. 1535, note. This is very old law; and the meaning is that a foreign corporation, having the right of action against a resident of the domestic forum, is allowed to sue and recover judgment thereon *in its corporate name*. Thus, the Dutch West India Company were allowed to sue in its corporate name in the English King's Bench for money which had been borrowed from them at Amsterdam, which was payable in bank there, and to recover judgment for the same. Dutch West India Co. v. Van Moyses, 1 Strange, 612; s. c. 2 Ld. Raym. 1535, note; Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; s. c. 2 Strange, 807.

² *Ante*, § 7928, *et seq.*; § 7950, *et seq.*

³ As to which, see *ante*, § 7380, *et seq.*; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Henriques v. Dutch West India Co., 2 Ld. Raym. 1532; s. c. 2 Strange, 807.

Accordingly, it has been held that a foreign corporation can maintain an action for a *libel* in the courts of Illinois.¹

§ 7979. **Rights of Action how Affected by Failing to Comply with Statutes Prescribing Conditions upon Which It may Enter the State to do Business.** — We have already had occasion to consider the effect upon the *contracts* of foreign corporations made within the domestic State, of its failure to comply with the provisions of the statute law of such State prescribing the conditions upon which it may enter the State and do business therein, and we have seen that the courts are divided upon the question whether such a statute avoids such contracts unless it says so in explicit terms.² Coming now to consider the question of the failure to comply with such statutes upon the *right of the foreign corporation to maintain actions* in the courts of the State, it is plain that this distinction must be taken: If the foreign corporation is suing upon a contract which it has made within the domestic State before it had complied with the laws of such State prescribing the conditions upon which it may enter and do business therein, then its right to maintain the action will depend upon the view which the courts of the particular State take of the controverted question whether the effect of its failure to comply with such a statute is to render any *contract* made by the foreign corporation within the domestic State *void* in the sense that it cannot be enforced by an action in the domestic tribunal; and, as that question has already been gone over, it will not again be considered. Outside of that question, there is a mass of authority to the effect that, although a foreign corporation may have neglected to comply with the provisions of the domestic statutes prescribing the terms and conditions upon which it may enter the domestic State for the purpose of doing business therein, yet it nevertheless *does not forfeit the general right of action*, in the courts of the State, which is conceded alike to non-resident persons and corporations.³

¹ *Jewellers' Mercantile Agency v. Douglass*, 35 Ill. App. 627.

² *Ante*, §§ 7950, 7956, 7957.

³ The following cases hold that the failure to comply with such statutory conditions does not oust the foreign

The meaning of the rule is that a foreign corporation is *not*, by reason of its failure to comply with such a statute, to be *outlawed*. It may still bring an action to recover possession of its real¹ or personal property.² It is a just conclusion that the *failure of a foreign corporation to comply with a local statute*, as, for instance, to *file its articles of incorporation* in the county where it has property, does not entitle the domestic citizens or others to confiscate such property, but that it may nevertheless defend a suit brought to recover for work and labor alleged to have been done on such property, although it has not complied with such a statutory requirement, except in so far as prohibited by the positive language of the statute.³

corporation of its right to maintain actions in the tribunals of the domestic State:—*Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369; *Christian v. American &c. Co.*, 89 Ala. 198; *s. c.* 7 South. Rep. 427; *Haley Livestock Co. v. Routt County*, 2 Denver Legal News, 275; *Tabor v. Goss &c. Man. Co.*, 11 Colo. 419; *s. c.* 18 Pac. Rep. 537; *Smith v. Little*, 67 Ind. 549; *Probst v. Board of Domestic Missions*, 3 New Mex. 237; *s. c.* 5 Pac. Rep. 702; *Rogers v. Simmons*, 155 Mass. 259; *s. c.* 29 N. E. Rep. 580; *Fuller &c. Man. Co. v. Foster*, 4 Dak. 329; *s. c.* 30 N. W. Rep. 166; *Northwestern &c. Ins. Co. v. Brown*, 36 Minn. 108; *s. c. sub nom.* *Northwestern &c. Ins. Co. v. Stone*, 31 N. W. Rep. 54; *Powder River Cattle Co. v. Custer County*, 9 Mont. 145; *s. c.* 22 Pac. Rep. 383; *Gull River Lumber Co. v. Keefe*, 6 Dak. 160; *s. c.* 41 N. W. Rep. 743; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 428; *American Button Hole &c. Co. v. Moore*, 2 Dak. 280; *s. c.* 8 N. W. Rep. 131. In the following of these cases, the cause of action, upon which the foreign corporation was permitted to sue in the domestic State, arose out of a contract

made by it within that State before it had complied with the laws of the State so as to be entitled to do business therein:—*Tabor v. Goss &c. Man. Co.*, 11 Colo. 419; *s. c.* 18 Pac. Rep. 537; *Rogers v. Simmons*, 155 Mass. 259; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 428; *Fuller &c. Man. Co. v. Foster*, 4 Dak. 329; *s. c.* 30 N. W. Rep. 166; *Northwestern &c. Ins. Co. v. Brown*, 36 Minn. 108; *s. c. sub nom.* *Northwestern &c. Ins. Co. v. Stone*, 31 N. W. Rep. 54; *American Button Hole &c. Co. v. Moore*, 2 Dak. 280; *s. c.* 8 N. W. Rep. 131.

¹ *Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369; *Probst v. Board of Domestic Missions*, 3 N. M. 237; *s. c.* 5 Pac. Rep. 702.

² *Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369; *Smith v. Little*, 67 Ind. 549. In this case the ruling was that the statute requiring the filing of an instrument by the foreign corporation authorizing service of process on an agent in actions against it, referred only to actions on contracts made by it, and did not refer to an action of *replevin* for the recovery of the possession of its personal property.

³ *Weeks v. Garibaldi South Gold*

§ 7980. **Further of This Subject.** — If it have property in the State it may *insure* the same, and in case of loss may maintain an action against the insurance company; and if the insurance company becomes *insolvent*, it may enforce its judgment against its *stockholders* in such State.¹ If it has taken a *mortgage* upon real property in the State, it may, according to the best opinion, maintain an action in its courts to *foreclose* the same.² And so, if an *illegal tax* is laid and enforced against its property, it may maintain an action to recover the same.³ Some of the decisions lay stress upon the fact that the statute prescribes a *penalty* for the omission, where such is its language, and still others say that the *statute* is *directory* merely.⁴ Others proceed upon the ground already gone over, that the object of the statute is not to prevent the foreign corporation from making isolated contracts within the domestic State, but to prevent it from acquiring a *domicile* there for the purpose of business without taking the statutory steps of submission to the jurisdiction of the domestic courts.⁵ Where this view is taken, it follows, as a rule of *pleading*, that it is not necessary for the foreign corporation, in order to sustain its action, to set forth in its complaint that it has com-

Mining Co., 73 Cal. 599. The prohibition of the statute in this case was: "Any corporation failing to comply with the provisions of this section shall not maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, shall be filed at the places directed by the general law and this section." Cal. Civ. Code, § 299. The court held that the case was not embraced within it. *Weeks v. Garibaldi South Gold Mining Co.*, *supra*.

¹ *Tabor v. Goss &c. Man. Co.*, 11 Colo. 419; *s. c.* 18 Pac. Rep. 537.

² *Northwestern &c. Ins. Co. v.*

Brown, 36 Minn. 108; *s. c. sub nom. Northwestern &c. Ins. Co. v. Stone*, 31 N. W. Rep. 54. *Contra, ante*, § 7955. So, a foreign corporation may *foreclose a mortgage* given to secure a loan of money in Pennsylvania, in the face of the statute law of that State forbidding foreign corporations to acquire and hold real estate therein: *Leasure v. Union Mut. Life Ins. Co.*, 91 Pa. St. 491.

³ *Powder River Cattle Co. v. Custer County*, 9 Mont. 145; *s. c.* 22 Pac. Rep. 383.

⁴ *Rogers v. Simmons*, 155 Mass. 259.

⁵ *Fuller &c. Man. Co. v. Foster*, 4 Dak. 329; *s. c.* 30 N. W. Rep. 166; following *Cooper Man. Co. v. Ferguson*, 113 U. S. 727.

plied with the laws of the State or Territory, entitling it to do business therein, by filing its articles of incorporation and appointing an agent upon whom process may be served;¹ but this, even if available, is matter of defense to be pleaded and proved by the defendant.²

§ 7981. Alleging Compliance with Statute Permitting Foreign Corporations to do Business within the State.—Where the view is taken that a *foreign corporation* cannot maintain an action upon a contract made within the domestic State, without alleging and proving that it has complied with the laws of such State imposing the doing of certain acts as the condition upon which alone it is permitted to do business within the State,—such as having a duly constituted agent and known place of business in the State, it will not be sufficient for it to allege, in general terms, that it has complied with the laws of the State authorizing foreign corporations to do business therein, because that is merely stating a *conclusion of law*; but it must aver that it has *done the acts* which the statute requires, stating what acts it has done.³

§ 7982. Pleading Statutes Invalidating Contracts of Foreign Corporations not Authorized to do Business in the State.—Where there is a statute avoiding the contracts of

¹ American Button Hole &c. Co. v. Moore, 2 Dak. 280; s. c. 8 N. W. Rep. 131.

² For a case where it was not sufficiently pleaded and proved, see Gull River Lumber Co. v. Keefe, 6 Dak. 160; s. c. 41 N. W. Rep. 743.

³ Mullens v. American Freehold Co., 88 Ala. 280; s. c. 7 South. Rep. 201. So, in the Texas procedure, it seems to be not necessary, in an action against a foreign corporation doing business in the State, to allege the facts upon which the governing statute predicates jurisdiction of actions against foreign corporations; and under such a statute (Tex. Act Mar. 31,

1885, as corrected by an amendment enacted April 4, 1887), to allege that it had, at the time the suit was brought, an agent or representative in the county, or that its principal office was in the county,—either allegation being sufficient. Bradstreet Co. v. Gill, 72 Tex. 115; s. c. 13 Am. St. Rep. 768; 2 L. R. A. 405; 9 S. W. Rep. 753. An allegation in a *special plea to the jurisdiction*,—or rather to the *venue*,—that the defendant corporation had a local agent in another county of the State, other than the one in which it is sued, sufficiently shows that it is doing business within the State, within the meaning of a

foreign corporations which have failed to comply with certain statutory conditions precedent before doing business within the domestic State,¹ if such a corporation sues to enforce a contract, and this statutory defense is set up, the answer by which it is set up must show that the contract was made within the domestic State,² or it will be bad on demurrer;³ and the rule of pleading is the same where the broker of a *foreign corporation* sues a citizen to recover commissions on a loan which he has negotiated for the defendant with a foreign corporation.⁴

§ 7983. **Power to Buy at Execution Sales.**—The power of a corporation to sue for the collection of its just debts, or the enforcement of its other rights, might be ineffectual in many cases, unless the power were conceded to it, which is possessed by ordinary plaintiffs, of bidding and buying in sales of property under executions sued out upon judgments in its favor; and accordingly this power has been judicially conceded.⁵ So, the power, conceded to a foreign corporation, of *lending* its money upon a *mortgage* security,⁶ carries with it, by necessary implication, a concession of the power to *foreclose the mortgage*, and to protect its rights by becoming the *purchaser* at the judicial sale which takes place in the foreclosure proceedings.⁷

§ 7984. **Allegation of Corporate Existence in Actions by and against Foreign Corporations.**—It is believed that the rules obtaining in many jurisdictions, already considered, which *dispense entirely* with the allegation that the plaintiff

statute relating to jurisdiction of actions against foreign corporations. *St. Louis &c. R. Co. v. Whitley*, 77 Tex. 126; s. c. 13 S. W. Rep. 853.

¹ *Ante*, § 7928, *et seq.*; § 7950, *et seq.*

² As to the *situs* of contracts with reference to such statutes, see *ante*, §§ 7968, 7970.

³ *Finch v. Travelers' Ins. Co.*, 87 Ind. 302.

⁴ *Collier v. Davis*, 94 Ala. 456; s. c. 10 South. Rep. 86; distinguishing *Dudley v. Collier*, 87 Ala. 431; s. c. 13 Am. St. Rep. 55.

⁵ *Elston v. Piggott*, 94 Ind. 14; *Columbus Buggy Co. v. Graves*, 108 Ill. 459, 463.

⁶ *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

⁷ *Elston v. Piggott*, 94 Ind. 14, 19.

or defendant is a corporation,¹ or which permit that allegation to be *made in the most general language*, without pleading the charter or incorporating statute, or explaining how it came to be a corporation,²—apply to foreign as well as to domestic corporations.³ Unless there is a local statute which, by its terms, or by the construction placed upon it by the highest court of the State, imports otherwise, a foreign corporation, suing in a court of the domestic State or Territory, need not allege in its complaint that it has *filed with the Secretary of the State a copy of its articles* of incorporation, and appointed an agent to receive service of process,⁴ though there are statutes, and holdings thereunder, which make this a *condition precedent* to its right of action, which must be alleged.⁵

¹ *Ante*, § 7658.

² *Ante*, § 7661.

³ For instance, a *foreign* corporation, suing in the courts of Ohio, is not required to set out in its petition the terms of its charter, showing its capacity to maintain the action. *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 562. So, it has been held, in Indiana, in the case of a corporation *formed by the concurrent legislation of two States*, that it is not neces-

sary, to enable such a corporation, when suing, to put in evidence its act of incorporation granted by the legislature of the foreign State, that it should have pleaded such statute, since to require this would lead to great prolixity in pleading: *Paine v. Lake Erie &c. R. Co.*, 31 Ind. 283, 354.

⁴ *American Button Hole &c. Co. v. Moore*, 2 Dak. 280; *s. c.* 8 N. W. Rep. 131.

⁵ *Ante*, §§ 7965, 7966.

CHAPTER CXC VII.

ACTIONS AGAINST FOREIGN CORPORATIONS.

SECTION

- 7988. Summary statement of the cases in which a foreign corporation may be sued.
- 7989. Early doctrine that actions *in personam* did not lie against foreign corporations.
- 7990. How under the English law.
- 7991. Doctrine that express legislative sanction is necessary.
- 7992. Corporation can contract for service of process in a foreign country.
- 7993. Progress of statutory changes domesticating foreign corporations for jurisdictional purposes.
- 7994. May be sued through their agents in any State into which they migrate.
- 7995. Must do business within the State and be served by an authorized agent.
- 7996. Jurisdiction as depending upon the amount and kind of business done by the officer or agent within the State.
- 7997. Statutes creating or extending the right of action against foreign corporations.
- 7998. Modern doctrine that corporations may establish domiciles in other States.
- 7999. Modern rule as to residence of corporations for purposes of jurisdiction.

SECTION

- 8000. Modern rule that trading corporation may be sued wherever it has a place of trade.
- 8001. Non-residents have no constitutional right of action against foreign corporations.
- 8002. Further as to actions by non-residents against foreign corporations.
- 8003. Foreign corporations not suable by non-residents on foreign contracts.
- 8004. *Contra*, that non-residents may sue foreign corporations on foreign contracts.
- 8005. Foreign corporations not suable for torts committed in foreign States.
- 8006. But suable for torts committed in domestic States.
- 8007. For what causes residents may sue foreign corporations.
- 8008. Foreign corporations not suable *ex contractu* except upon domestic contracts.
- 8009. Actions against foreign corporations, under N. Y. Code.
- 8010. Actions against foreign corporations which have migrated from the domestic State.
- 8011. Jurisdiction of actions by stockholders to redress grievances in corporate management.
- 8012. Actions against corporations created by the concurrent legislation of several States.

§ 7988. Summary Statement of the Cases in Which a Foreign Corporation may be Sued.—The principle of juris-

prudence remains that a corporation cannot, any more than a natural person, be sued in an action *in personam* in a State within whose limits it has never been found. But from what has preceded it appears that there are three leading exceptions to this rule; that a corporation can be sued in another State or country: 1. When it has *established a permanent agency for the prosecution of its business in such other State or country*, and in many instances, by force of statute, as hereafter seen, by service on subordinate agents;¹ 2. When it has *agreed with the State* into which it thus migrates for the purposes of its business, that it may be sued within the State, and that process may be served upon it by service upon an officer appointed and empowered by it, or designated by the State;² 3. When it has *agreed with the opposite party* to the contract that an action may be brought against it to enforce the contract in a State or country other than that of its particular domicile;³—in which cases it creates by contract, and for the purposes of the particular contract, an artificial domicile different from that ascribed by the law, under the operation of the principle *modus et conventio vincunt legem*.⁴

§ 7989. Early Doctrine that Actions in Personam did not Lie against Foreign Corporations.—In the earlier stages of American jurisprudence, the judicial conception was that an action could not be prosecuted *by summons*,—in other words, that an action *in personam* could not be prosecuted against a foreign corporation. The reason was that already gone over in former chapters in this title,—that a corporation is a distinct entity or person in the eye of the law; that it is the creature of the sovereign State by or under whose laws it is created; that it cannot migrate, but must dwell in the place

¹ *Post*, § 8024, *et seq.*

² *Post*, §§ 7992, 8025, *et seq.*

³ *Post*, § 7992.

⁴ That the existence of a foreign corporation is a *question of fact* for a jury, see *Lindauer v. Delaware &c. Ins. Co.*, 13 Ark. 461. Analogous

rule that a *foreign law* is a question of fact, see 1 Thomp. Trials, § 1054. Not necessary to allege in complaint facts showing that foreign corporation is suable within the State under the State statute: *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 349.

of its creation;¹—from which premises the conclusion logically followed that it could not get over the boundaries of the State creating it, into another State, in such a sense as to be there served with a summons in a civil action. This was the law of Massachusetts as late as 1834;² the law of Connecticut as late as 1841;³ was seemingly the law of New York in 1819;⁴ and seems to have been, in a qualified sense, the law of that State as late as 1859;⁵ and of New Jersey as late as 1853;⁶ and of Minnesota as late as 1865.⁷ Although some of the stockholders of the foreign corporation resided in the domestic State, and although service of summons was had upon its secretary while temporarily there, yet this would not support an action against it *in personam*.⁸ These holdings were grossly illogical and unjust. A foreign corporation could enter the domestic State by its agents, and incur obligations there in favor of the domestic citizen, and yet it could not be held answerable for the performance of those obligations, in actions

¹ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 521.

² *Peckham v. North Parish*, 16 Pick. (Mass.) 274. That a foreign corporation can only be sued in Massachusetts by means of an *attachment* of its property, in the absence of a statutory authorization, see *Andrews v. Michigan Central R. Co.*, 98 Mass. 534; *s. c.* 97 Am. Dec. 51; and compare *First National Bank v. Huntington*, 129 Mass. 444, 446, where the previous case is distinguished.

³ *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301.

⁴ *M'Queen v. Middletown Man. Co.*, 16 Johns. (N. Y.) 5, *dictum* by Spencer, C. J.

⁵ *Cumberland &c. Co. v. Hoffman &c. Co.*, 30 Barb. (N. Y.) 159. In this case it was reasoned that a foreign corporation could not be sued in New York, except upon some principle of necessity or fitness suggested by peculiar circumstances. The cause,

or at least the subject of action, must have arisen in the State of New York, or some property must be there situated which could be acted upon by the action. The courts of New York would not entertain jurisdiction of a suit between two corporations, both chartered under the laws of Maryland, respecting lands lying within the State of Maryland, the object of which suit was to annul a conveyance of such lands, made to the defendant corporation on the ground of fraud, which conveyance was executed and acknowledged in Maryland, and put upon record there. From this conclusion, which, on the facts presented, seems sound and proper, *Davies, J.*, dissented.

⁶ *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222.

⁷ *Sullivan v. La Crosse &c. Co.*, 10 Minn. 386.

⁸ *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301.

founded upon process served upon its agent through whom it incurred them. On the other hand, if the domestic citizen failed to perform the obligation on *his* part, the foreign corporation had a complete right of action against him in the forum of his residence. The same doctrine, applied to the modern species of corporation known as the "*tramp corporation*," would enable the citizens of a State to elude the jurisdiction of the courts of that State over their business transactions, by organizing themselves into a pretended corporation under the laws of another State, to do business in their own State. A foreign corporation was thus a species of *alien enemy*, which could enter the domestic State, and strike without being struck, and incur obligations without being made to answer for them in the place where they were incurred. Moreover, the premise on which the ancient doctrine was founded,—that a corporation cannot migrate, but must dwell in the place of its creation,—was a mere subtlety and opposed in many cases to the real fact. The only corporations which cannot migrate are those fixed corporations, established for governmental, and other like purposes. Trading corporations, which can send their ships to all parts of the world, and establish their agencies in every country, can, and constantly do, migrate; and one of the most ordinary spectacles of modern business life is the formation of corporations in States and countries where they never intend to carry on their business, for the purpose of carrying on that business in other States and countries, under a hospitality extended to them by the comity of such other States or countries. *Business corporations*, then, *can migrate* and acquire domiciles in States or countries other than that of their origin. They can in those domiciles, make, take, and break contracts, and commit torts; and it is hence a reasonable conclusion that they can be sued wherever they establish a permanent domicile for the purposes of their business, and this without the aid of the local statute law. This is now the law both in England and America.¹ The anom-

¹ As to the American law, see *ante*, Carrugi, 41 Ga. 660; Western Union § 7889, *et seq.*; City &c. Ins. Co. v. Tel. Co. v. Pleasants, 46 Ala. 641. And 6362

alous and unjust rule of law which denied actions against foreign corporations has been uprooted, it may be assumed, in every State of the American Union, by statutes, already considered,¹ imposing upon foreign corporations, as a condition precedent to their right to do business within the State, the necessity of establishing a permanent agent in the State, and of empowering him to receive service of process in actions against them.²

§ 7990. **How under the English Law.**—Down to the year 1885 the opinion was expressed by the Lord Chief Justice of England, that there was no case in which it was held that a foreign corporation could be sued in that country.³ It is true that, prior to that time, there were *dicta* tending to the contrary conclusion.⁴ The very stress of justice has operated to change this rule in that country. Under statutory authorization, the judges in that country have made a rule to the effect that if a foreign corporation carries on business in a definite way in England, then it is suable there, and can be served there, if service can be effected upon any person who sufficiently answers the description of a "head officer" in charge of its business within the jurisdiction;⁵ and another rule that a foreign

compare *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *s. c.* 3 Am. St. Rep. 758; 3 South. Rep. 449. "If, upon principles of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for the one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities, and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here." *Libbey v. Hodgdon*, 9 N. H. 394, opinion by Wilcox, J. See also *March v. Eastern R. Co.*, 40 N. H. 548, 579; *s. c.* 77 Am. Dec. 732; *St.*

Louis &c. Ins. Co. v. Cohen, 9 Mo. 416, 446.

¹ *Ante*, § 7935.

² Statutes affirming the principle of the text, and decisions thereon, such as *National Bank v. Huntington*, 129 Mass. 444,—are too numerous for a collected citation. They are dealt with distributively in this and in a former chapter.

³ *Nutter v. Messageries Maritimes* (Q. B. Div.), 54 L. J. 527.

⁴ *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *s. c.* 26 L. T. Rep. (N. S.) 164, *per* Blackburn, J.; *Westman v. Snickarefabrik*, 1 Ex. Div. 237, 240, *per* Bramwell, B.; *Palmer v. Gould's Man. Co.*, Week. Notes [1884], p. 63, *per* Field, J. The writer is indebted to a brief editorial in the *Law Times* (London), for these references.

⁵ Order IX, rule 8.

corporation can, in certain cases, be served out of the jurisdiction with the writ, or notice of the writ, in the same way as a natural person. The English Court of Appeal finally decided, in two notable cases, that whenever a foreign corporation comes into England, and establishes a *permanent branch or agency* there for the purpose of carrying on its business, it may be sued in the courts of England by a process served upon the manager of that branch or agency, in like manner as though it were a domestic corporation.¹

§ 7991. Doctrine that Express Legislative Sanction is Necessary.—Where the doctrine has acquired a footing in its full meaning, that a corporation cannot be sued *in personam*, except within the State of its creation, then, it logically follows that, in order to sustain such an action, there must be a *statute authorizing it*.² That it is within the *power of the legislature* of a State to enact such a statute in respect of foreign corporations coming within the limits of the State to do business, has been affirmed,³ and has never been seriously doubted; though the effect of such a *judgment as evidence* in the courts of other jurisdictions rests upon a different footing. Indeed, an assumption of jurisdiction in this respect has taken place in most of the States, generally through affirmative legislative action, extending the process of the State over foreign corporations coming within its limits.⁴

¹ *Haggin v. Comptoir d'Escompte* (Q. B. Div.), 58 L. J. (Q. B.) 508; *s. c.* 7 Rail. & Corp. L. J. 167; *Mason v. Comptoir d'Escompte* (Q. B. Div.), 58 L. J. (Q. B.) 508; approving *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *s. c.* 26 L. T. Rep. (N. S.) 164, and *Lhoneux v. Hong Kong & Co. Bank Corp.*, 33 Ch. Div. 446; *s. c.* 54 L. T. Rep. (N. S.) 856. See also *Berland v. Roxburn Co.*, 60 L. T. Rep. (N. S.) 586, where leave was granted to serve a writ out of the jurisdiction upon a Scotch company, having branches in England. Compare *Watkins v. Scottish Imp. Ins. Co.*, 23 Q. B. Div. 285; and *Jones v. Scottish Accident Ins. Co.*, 17 Q. B. Div. 421; *s. c.* 55 L. T. Rep. (N. S.) 218. As to service of

process upon *foreign partnerships having branches in England*,—see *Western Nat. Bank v. Perez* (C. A.), (1891) 1 Q. B. 304; *Lysaght v. Clark & Co.*, (1891) 1 Q. B. 552; *Shepherd v. Hirsch*, 45 Ch. Div. 231.

² *Lathrop v. Union Pacific R. Co.*, 1 MacArthur (U. S.), 234; *Barnett v. Chicago & C. R. Co.*, 6 Thomp. & C. (N. Y.) 359; *s. c.* 4 Hun (N. Y.), 114.

³ *Barnett v. Chicago & C. R. Co.*, 6 Thomp. & C. (N. Y.) 359; *s. c.* 4 Hun (N. Y.), 114. Further as to the *jurisdiction* of the courts of New York over foreign corporations doing business within the limits of the State,—see *Redmond v. Hoge*, 5 Thomp. & C. (N. Y.) 386; *s. c.* 3 Hun (N. Y.), 171.

⁴ Thus, in 1877 the courts of Mis-

§ 7992. **Corporation can Contract for Service of Process in a Foreign Country.**—The opinion has been recognized,¹ and acted upon, that a foreign corporation may, by a stipulation in a *contract with a private person*, subject itself to the jurisdiction of the courts of England for the purpose of an action to enforce the contract.² For equal reasons, it may *contract with the State*, in consideration of being admitted to do business therein, for service of process upon it, within the State, upon a resident agent appointed and empowered for that purpose.³ It is also settled in the American law that a State has the right to exclude foreign corporations from settling within its limits, and consequently the right to prescribe the terms upon which they may come and settle there; from which the conclusion follows that the State may, as one of its terms, require the foreign corporation to submit to the jurisdiction of its courts, by appointing and empowering an agent within its limits upon whom process in actions against it may be served, or by designating an officer of the State for that purpose;⁴ and that when a corporation does so consent, and process in an action against it is served upon a person thus

missouri could not acquire by summons jurisdiction of an action against a foreign corporation whose *chief office* was not within the State of Missouri, but the process could only be by attachment: *Hill v. Wheeler & Co.*, 4 Mo. App. 595. But this rule has been changed by *statute* in that State, as we shall presently see: *post*, § 7993.

¹ By Mr. Justice North in *Société des Metaux v. Companhia Portuguesa &c.* Huelva, Weekly Notes (1889), p. 32.

² *Tharsis Co. v. Société des Metaux* (Q. B. Div.), 60 L. T. Rep. (N. S.) 924. The case was this: The Tharsis Copper Company entered into a contract with the Société des Metaux. The contract contained a clause that, for the purposes thereof, the Société sub-

mitted to the jurisdiction of the High Court in England and elected a domicile in England, and it was further agreed that a certain firm in Threadneedle Street, or any member thereof for the time being, should be the Société's agents upon whom service of any writ or process should be effected, and, being so effected, should be good against the Société. The Tharsis Company instituted an action against the Société in respect of a matter arising out of the contract, and effected service upon the firm in Threadneedle Street in the manner so provided by the contract. It was held by Lord Coleridge and Mr. Justice Field that the service was good.

³ *Ante*, § 7935.

⁴ *Ante*, § 7935.

designated, and a judgment rendered against it *in personam* in such an action, the judgment is *good everywhere*.¹

§ 7993. Progress of Statutory Changes Domesticating Foreign Corporations for Jurisdictional Purposes.—Let us trace, for a moment, the progress of some of the statutory changes which have been gradually taking place in the States whereby foreign corporations have been *domesticated*, so to speak, for the purpose of the jurisdiction of their courts, — in other words, where the *process* of the domestic courts, in actions *in personam*, has been extended over them through service acquired upon their ordinary agents. The construction of the statutes of Missouri was, for many years, uniform to the effect that, if the *chief office or place of business* of a company incorporated under the laws of another State was situated in the State of Missouri, then the corporation was regarded as a *domestic corporation* and amenable to the jurisdiction of the courts of Missouri by the common process of *summons*. Where, however, its chief office or place of business was not in Missouri, then it was necessary to proceed against it as a non-resident by *attachment*.² When, therefore, the defendant was a foreign corporation and had not its chief office or place of business in Missouri, and was nevertheless proceeded against by summons, the suit would be dismissed for want of jurisdiction.³ The Missouri statute was, however, amended, and these decisions superseded by the Revision of 1879, which provided: "A summons shall be executed, except as otherwise provided by law, either . . . fourth, where the defendant is a corporation or joint-stock company, organized under the laws of any other State or country, and having an office or doing business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation

¹ *Post*, § 8028.

² *Farnsworth v. Terre Haute R. Co.*, 29 Mo. 75; *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *Robb v. Chicago & C. R. Co.*, 47 Mo. 540; *Middough v. St. Joseph & C. R. Co.*, 51

Mo. 520; *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617.

³ *Middough v. St. Joseph & C. R. Co.*, *supra*; *Baile v. Equitable Fire Ins. Co.*, *supra*.

or company, in charge of any office or place of business; or if it have no office or place of business, then to any officer, agent, or employé in any county where such service may be obtained.”¹ Under this statute service of summons upon a non-resident corporation, having an office or doing business in Missouri in the manner therein provided, has the effect of *personal service*, and gives the court jurisdiction to enter a *general judgment*.²

§ 7994. May be Sued through their Agents in Any State into Which They Migrate. — The ancient doctrine that a foreign corporation cannot be sued is a just doctrine so long as it is strictly confined to a corporation which remains at home. This will be obvious if we reflect for a moment how anomalous it would be for a court to hold that a *municipal corporation*, created and existing in one State, might be sued in the courts of another State. But, on the contrary, as the modern principle has been established that a corporation may, for qualified purposes, and especially for the purposes of its business, establish a *residence* in States and countries other than that in which its chief domicile is, it is a reasonable and just conclusion that when it does, by its officers and agents, enter another State or country for the purpose of carrying on its business there, it becomes amenable to the process of such State or country, in like manner as though such State or country had been the State or country of its own domicile; that it is affected with notice through the service of process upon the agents whom it ap-

¹ R. S. Mo. 1879, § 3489; 1 R. S. Mo. 1889, § 2017.

² McNichol v. United States &c. Agency, 74 Mo. 457; reversing s. c. 9 Mo. App. 599. The effect of this statute has been practically to *domesticate* non-resident corporations which have an office or agent within the State of Missouri, so far as legal procedure is concerned. Such a corporation may therefore be proceeded against by *garnishment*, although such might not have been the case prior to the

change of the statute. When so proceeded against before a justice of the peace, the non-resident corporation must take an *appeal* within ten days of the judgment, as required by the statute, or its appeal will be dismissed, though if it could be regarded as a non-resident it would have twenty days within which to appeal. Harding v. Chicago &c. R. Co., 80 Mo. 659; Crutsinger v. Missouri &c. R. Co., 82 Mo. 64. See also Slavens v. Pacific R. Co., 51 Mo. 308.

points to transact its business in such State or country, as much as it would be by the service of process upon its own principal officers in the State or country of its residence; and that a *judgment* against it, *in personam*, founded upon such service, will have the same *conclusive* effect against it, and will be equally *evidence* against it in the courts of every other State or country.¹ The distinction is clearly this: If the foreign corporation confines its operations to the State within which it was created, it cannot be sued in a State where it has no office or transacts no business, by *serving process* on its *president* or *other officer* when *accidentally present* within such State. Such officer does not represent the corporation, or carry with him his official character into a State where the corporation has done no business and has not established any office.² But when a foreign corporation sends its officers and agents into another State, and establishes its business there, it is liable to be brought into the courts of such State by a service of process upon such officers, so acting for it, and a *judgment* founded upon such service will be *good everywhere*.³

§ 7995. Must do Business within the State and be Served by an Authorized Agent.—This conducts us very nearly to the governing principle,—a principle which has been thrown into the clearest light by an opinion of the Supreme Court of the United States written by Mr. Justice Field. That principle is twofold: 1. That the foreign corporation must have entered the domestic State for the purpose of carrying on its business there. 2. That process must have been served upon an agent sustaining such a relation to it that notice to the agent might well be deemed notice to the principal, without a violation of the principles of natural justice. In the opinion thus referred to, the conclusion of the court, support-

¹ This doctrine is clearly brought out by Mr. Justice Field in giving the opinion of the Supreme Court in *St. Clair v. Cox*, 106 U. S. 350, 355. See also *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

² *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222; *Newell v. Great Western R. Co.*, 19 Mich. 336; *post*, § 8028.

³ *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222.

ing these two propositions, was thus summed up: "We are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, — either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."¹

¹ *St. Clair v. Cox*, 106 U. S. 350, 359. Speaking with reference to these two questions, it has been held in New Jersey, upon a demurrer to a plea to the jurisdiction of a court of that State in an action of *assumpsit* against a foreign corporation, — "that if a foreign corporation, at the time of the commencement of suit, does not do business, and has not any office or place of business in this State, the contract sued on, not having been entered into in this State, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any court of this State. Under such circumstances, the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions, and are not to be esteemed, out of the sovereignty by the laws of which the corporate body exists, the

representatives for the purpose of responding to suits of law of such corporate bodies." *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15, 17. "This," adds the court, "is the principle upon which the case of *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222, is founded." In respect of the doctrine of the case last referred to, it is conceived by the author to make no difference whatever, whether the contract were a foreign or a domestic contract. The failure of the jurisdiction lay in the fact that the corporation had never come into the State for any jurisdictional purpose; but, on the ground that the contract was a foreign contract, the court held that a *statute* providing that *process* against foreign corporations might be *served* on any officer, director, agent, or engineer of such corporation, or body politic, either personally or by leaving a copy there-

§ 7996. **Jurisdiction as Depending upon the Amount and Kind of Business done by the Officer or Agent within the State.**—It has been held that a foreign corporation which has done no business within the domestic State beyond negotiating a mortgage on its property, and having the bonds thereby secured listed upon a stock exchange, is *not engaged in business* within the State, in such a sense that jurisdiction over it is acquired by *service of summons* upon its president while temporarily within the State for those purposes;¹ and on the other hand,² that service may be made on a corporation having an office in the same State where a substantial portion of its business is transacted, by a person designated as its agent *in charge of a particular department* of its business, by *serving process* upon such agent.³

§ 7997. **Statutes Creating or Extending the Right of Action against Foreign Corporations.**—The original conception of the courts, that an action *in personam* would not lie against a corporation, has, then, it may be assumed, been overturned in all the States, by *statutory enactments* which make the liability of such a corporation to answer in the domestic tribunals *coextensive with its right to make contracts in the domestic State*.⁴ It will be shown here-

of at the dwelling-house or usual place of business of such officer, *director, agent, clerk, or engineer*, or by leaving a true copy of such process at the office, depot, or usual place of business of such foreign corporation, etc.,—merely provided for a method of serving process upon foreign corporations in cases where the domestic tribunals had jurisdiction, and did operate to amplify their jurisdiction over the subject-matter against such bodies. See also the much-quoted case of *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17, opinion by Jackson, J.

¹ *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31; *s. c.* 9 Rail. & Corp. L. J. 63.

² Under N. Y. Code Civ. Proc., § 432.

³ *Tuchband v. Chicago &c. R. Co.*, 115 N. Y. 437; *s. c.* 7 Rail. & Corp. L. J. 49; 40 Am. & Eng. R. Cas. 612; 26 N. Y. St. Rep. 440; 22 N. E. Rep. 360.

⁴ Thus, in New York, where it was originally held, as seen in the preceding section, that an action *in personam* would not lie against a foreign corporation, the legislature of that State have enacted that an action against a foreign corporation may be maintained by a resident of the State *for any cause of action*. N. Y. Code Civ. Proc., § 1781. Upon this statutory ground, the courts of that State have jurisdiction, considered as rightful power, to proceed in an *action brought by domestic stockholders* in a foreign corporation to *enjoin* threatened breaches of trust on the part of

after,¹ that many of the States have, in their legislation upon this subject, proceeded upon the obvious rule of justice, that any agent of a foreign corporation who is sufficiently empowered to make and take contracts for his principal within the domestic jurisdiction, may, by the domestic legislature, be empowered to *receive service of process* in actions in domestic tribunals against such foreign corporation for the enforcement of those obligations; and accordingly we shall find that statutes are now very numerous providing for the service of process in actions *in personam* upon the local and other agents of foreign corporations doing business within the particular State. These statutes are founded on the logical and just conception that wherever a foreign corporation can go by an agent for the purpose of making and taking contracts, it can be fastened upon, through that agent, for the purpose of being made answerable in ordinary actions for the enforcement of those contracts. The judgments rendered in such actions are held good as judgments *in personam* against the corporation within the State which rendered them, in such a sense that any property of the corporation, found anywhere within the State, may be seized in satisfaction of them; but whether they will be upheld as judgments *in personam* against the corporation in other jurisdictions presents a different question.

the *directors* (Ives v. Smith, 19 N. Y. St. Rep. 556; s. c. 3 N. Y. Supp. 645); though it will not be proper or expedient to exercise such jurisdiction in all cases, owing to the difficulty of doing complete justice. It has been held in that State that, to enable a stockholder, suing as such, to maintain an action against a foreign corporation, it is not necessary that his stock should be registered. Ervin v. Oregon Railway &c. Co., 62 How. Pr. (N. Y.) 490. So, the statutes of Texas, defining the venue of actions against private corporations, associations, and joint-stock companies, which use such expressions as "private corporation," "unincorporated company," etc., have been held large enough to include foreign corporations. Angerhoefer v. Bradstreet Co., 22 Fed. Rep. 305. The operation of

these statutes is clearly exhibited by a case in Massachusetts, in which State, as we have seen (*ante*, § 7989), the early conception was that an action *in personam* could not be prosecuted against a foreign corporation. Here, under the operation of a statute requiring such a corporation, in order to be entitled to do business within the Commonwealth, to appoint, in writing, the *Commissioner of Corporations* as its attorney, upon whom process against it might be served, jurisdiction *in personam* against it may be acquired, and a *personal judgment* may be rendered against it, valid in other jurisdictions as well as in Massachusetts. Wilson v. Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24.

¹ Post, § 8029.

§ 7998. **Modern Doctrine that Corporations may Establish Domiciles in Other States for Jurisdictional Purposes.**—To the old theory that a corporation cannot migrate, but must dwell in the place of its creation,¹ the modern qualification has been added that it may acquire a domicile in another State for the purpose of business and jurisdiction by entering such other State, and establishing an agency there for the transaction of its business.² It is a sound conclusion that “a corporation which seeks, by its agents, to establish a domicile of business in a State other than that of its creation, must take that domicile, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there.”³ When, therefore, the statutes of the domestic State impose upon foreign corporations coming within the State and having usual places of business therein, the general statutes relating to *domestic corporations, the same remedies which are available to domestic citizens against domestic corporations are available against them*, and they may be sued in the domestic State in like manner as domestic corporations may.⁴

¹ Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

² National Bank v. Huntington, 129 Mass. 444; St. Clair v. Cox, 106 U. S. 350, 355; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Ex parte Schollenberger, 96 U. S. 369; Hayden v. Androscoggin Mills, 1 Fed. Rep. 93; Newby v. Von Oppen, L. R. 7 Q. B. 293; Lord St. Leonards in Carron Iron Co. v. Maclaren, 5 H. L. Cas. 416, 459; Moulin v. Trenton Mut. Ins. Co., 24 N. J. L. 222; Libbey v. Hodgdon, 9 N. H. 394; Selma &c. R. Co. v. Tyson, 48 Ga. 351; Farnsworth v. Terre Haute &c. R. Co., 29 Mo. 75; Lawrence v. Ballou, 50 Cal. 258; Western Union Tel. Co. v. Pleasants, 46 Ala. 641. Compare Rhodes v. Salem Turnp. Co., 98 Mass. 95.

³ Attorney-General v. Bay State Min. Co., 99 Mass. 148, 153; National

Bank v. Huntington, 129 Mass. 444, 449.

⁴ Upon this principle, it has been held in Massachusetts that a railroad corporation created by the laws of another State, which has an office in that Commonwealth for the convenience of its stockholders, and for the better management of its finances and other business, where its principal officers are to be found, and where it carries on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, may be summoned as *trustee*, that is to say, as *garnishee*, by process served upon its treasurer there found, under a statute subjecting foreign corporations, having a usual place of business in the Commonwealth, to the statutes relating to domestic corporations. National Bank v. Hunt-

§ 7999. **Modern Rule as to Residence of Corporations for Purposes of Jurisdiction.**— From the foregoing, and other authorities, we may deduce the *modern rule* that a corporation is a *resident* subject or citizen of the State in which it is created, no matter where its members or shareholders may happen to reside; and though it must be constituted of some place within the dominion of the government which creates it, and can have no legal existence beyond the boundaries of that State, must dwell in the place of its creation, and cannot migrate to another State, yet it may act by agents beyond the bounds where it thus exists.¹ It is also clear that, within the limits of the State which grants the charter, a corporation may have a *special constructive residence in more places than one*, so as to be charged with *taxes* and dues, and be subjected to the local *jurisdiction* where its officers and agencies are actually present in the exercise of its franchises and in carrying on its business; and the *local residence* of a corporation is not necessarily confined to the locality of its *principal office* or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done.² This doc-

ington, 129 Mass. 444. As pointed out in the opinion in this case by Endicott, J., a person residing in another State cannot be summoned as *trustee (garnishee)*, although service of process was made upon him within the Commonwealth. Tingley v. Bateman, 10 Mass. 343; Ray v. Underwood, 3 Pick. (Mass.) 302; Nye v. Liscombe, 21 Pick. (Mass.) 263; Hart v. Anthony, 15 Pick. (Mass.) 445. It was also pointed out that corporations could not be summoned as trustee or garnishee in Massachusetts until the passage of the statute of 1832, ch. 164; and that it had been held in that State, following the cases above cited, that this statute had no application to foreign corporations, although the principal officers of such

a corporation resided in Massachusetts, and although the corporation had leased property and had its agents in Massachusetts to manage its affairs. Danforth v. Penny, 3 Metc. (Mass.) 564; Gold v. Housatonic R. Co., 1 Gray (Mass.), 424; Larkin v. Wilson, 106 Mass. 120. This rule is now changed in that State under the operation of the statute of 1870, ch. 194. National Bank v. Huntington, 129 Mass. 444.

¹ St. Louis v. Wiggins Ferry Co., 40 Mo. 580, 586; Blackstone Man. Co. v. Blackstone, 13 Gray (Mass.), 488.

² St. Louis v. Wiggins Ferry Co., 40 Mo. 580 (citing Glaize v. South Carolina R. Co., 1 Strobb. (S. C.) 170; Cromwell v. Charleston Ins. Co., 2 Rich. L. (S. C.) 512. The case of St.

trine is said to be, in general, confined to the territorial limits of the State from which the corporation derives its charter; but it is also said that the effect of particular statutes may be such as to make a corporation, though chartered abroad, a resident of the State, not only for the purpose of suing and being sued by ordinary process or by attachment, but for all the purposes of ownership of personal property and of taxation, if the same be actually situated within the prescribed limits.¹ One of the simplest and probably the best established

Louis v. Wiggins Ferry Co., 40 Mo. 580, is *overruled*, not on the above theory, but on the application of it, in St. Louis v. Ferry Co., 11 Wall. (U. S.) 423.

¹ St. Louis v. Wiggins Ferry Co., 40 Mo. 580. The observations of Lord St. Leonards in support of the jurisdiction obtained by service of process upon an agent of a foreign corporation, which carries on a permanent and extensive business within the domestic jurisdiction, have been more than once cited with approval by American judges, notwithstanding the fact that they were made in an opinion in which he dissented on the merits. The case was that of a company chartered in Scotland for the manufacture of iron, which had its manufactory and chief office of management there, but had agents for the sale of its goods in different parts of Scotland and England, possessed real estate in both countries, and, in short, did business in England as well as in Scotland. Lord St. Leonards conceded that there would not be a jurisdiction of an action against such a company in England, merely because its agent resided in England. He placed his view in support of the jurisdiction upon the ground that *the company itself resided in England*. He said: "The jurisdiction, if it exists, is because the appellants are here by

their houses of business and by their agents, just as they are in Scotland by their house of business and their agents. They carried on as great a business here as in Scotland. They manufactured in Scotland and sold in England. What would be the use of manufacturing if they could not sell the goods they manufactured? I have been unable to discover which is the particular residence of this company. The money of the appellants is made by returns coming from England. They manufacture in Scotland. The members of this corporation do not make the iron; they do not reside in the house. They are nobody; in fact, they are represented by their seller, but they are not, in other respects, persons dealing as individuals. Their business is carried on in London, just as much as it is carried on in Scotland. It is not therefore a question of attacking the agent as agent. If the service upon the agent is right, it is because, in respect of their house of business in England, they have a domicile in England. And in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland, and one in England, and for the purpose of carrying on their business one is

illustrations of this principle is found in the case where a *railroad company*, created under the laws of one State, enters another State, and builds a part of its railroad there by permission or recognition of the legislature of the latter State, in which case, whether such permission or recognition is held to have the effect of making it a domestic corporation in the latter State, or of leaving it a foreign corporation, merely licensed in the latter State, it is perfectly well settled that it is subject to be sued in the latter State by residents thereof upon any cause of action arising therein. The license to enter the other State and to exercise what have sometimes been called *prerogative franchises* therein, has justly been held to carry with it, by necessary implication, a liability to be so sued by residents of the latter State.¹

§ 8000. Modern Rule that Trading Corporation may be Sued wherever It has a Place of Trade.—The doctrine so clearly stated by Lord St. Leonards,² has found an echo in subsequent judicial opinions delivered in England and America. That doctrine, briefly stated, is that a trading corporation is personally present for the purposes of jurisdiction wherever it has established a place of trade.³

just as much the domicile of the corporation as the other.” *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 458. Compare *National Bank v. Huntington*, 129 Mass. 444, where these observations are cited as law.

¹ *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, 83; *Baltimore &c. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254. Compare *Goshorn v. Supervisors*, 1 W. Va. 308, 326; *Baltimore &c. R. Co. v. Supervisors*, 3 W. Va. 319. The *Baltimore & Ohio Railroad Company*, originally chartered by the Legislature of Maryland, extended its railroad into the State of Virginia with the consent of the legislature of that State, and into the District of Columbia, with the consent of Congress. It thereby became suable as *garnishee*

under the attachment laws of Virginia (*Baltimore &c. R. Co. v. Gallahue*, *supra*), and in the District of Columbia, for an *injury happening to a passenger* upon its railroad in the State of Virginia, without reference to the question of the residence of the plaintiff, — the court holding that the company was an *inhabitant* of the District of Columbia, and that it was *found* within that District when the writ was served upon it. *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65.

² *Ante*, § 7999.

³ *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93, where a corporation established in the State of Maine, and doing business in Boston, was sued in the latter place in a court of the United States, and the jurisdiction

§ 8001. **Non-residents have No Constitutional Right of Action against Foreign Corporations.**—There is no principle of *constitutional law* which obliges the courts of a State to open their doors to actions brought by *non-residents* against foreign corporations. A constitutional provision reciting that “all courts shall be public, and every person, for any injury that he may receive in his lands, goods, person, or reputation, shall have remedy by due course of law and justice,” — does not give a right of action to non-residents against foreign corporations, but was intended to secure to residents of the State access to its courts for the redress of injuries.¹ The provisions of a statute,² making *discriminations*, in respect of the right of action against foreign corporations, between domestic persons and corporations and non-resident persons and corporations, is *not unconstitutional* as denying to the citizens of each State all the privileges and immunities of citizens of the several States, — because the statute makes no discrimination between citizens, but only between residents and non-residents.³

§ 8002. **Further as to Actions by Non-residents against Foreign Corporations.** — If a foreign corporation has entered the domestic State for the purpose of doing business, in such a manner and to such an extent as will give the courts of the

was upheld. This was also decided in England in the case of *Newby v. Von Oppen*, L. R. 7 Q. B. 293, where the Colt Patent Arms Co., an American corporation, had established a house in London for the sale of its manufactures. But in another English case it was held that the *ticket office of a railroad company* was not such a place of trade as to give jurisdiction, and the court said that the question is one of fact in each case. *Mackereith v. Glasgow &c. R. Co.*, L. R. 8 Ex. 149.

¹ *Central R. Co. v. Georgia Construction &c. Co.*, 32 S. C. 319; *s. c.* 11 S. E. Rep. 192.

² N. Y. Code Civ. Proc., § 1780.

³ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 324. The court cited, in support of this theory: *Adams v. Penn Bank*, 35 Hun (N. Y.), 393; *Frost v. Brisbin*, 19 Wend. (N. Y.) 11; *s. c.* 32 Am. Dec. 423; *Lemon v. People*, 20 N. Y. 562; *Haney v. Marshall*, 9 Md. 194; *Campbell v. Morris*, 3 Har. & McH. (Md.) 535; *Chemung Canal Bank v. Lowery*, 93 U. S. 72; *McCready v. Virginia*, 94 U. S. 396; *Missouri v. Lewis*, 101 U. S. 22. The same was held in *Duquesne Club v. Penn Bank*, 35 Hun (N. Y.), 390.

domestic State jurisdiction over it in actions *in personam*,—then another question will frequently arise,—under what circumstances may such actions be brought against it in the domestic tribunals by non-resident persons or corporations? This matter has been, in some cases, the subject of statutory regulation. Thus, by section 427 of the former Code of Civil Procedure of New York, an action against a foreign corporation might be brought in the courts of that State: 1. By a resident of that State for any cause of action; 2. By a plaintiff, not a resident of that State, when the cause of action arose, or when the subject of the action was situated within that State.¹ So, under a provision of the code of South Carolina, which is a transcript of that of the former code of New York, an action can be brought against a foreign corporation by a resident of the State for any cause of action, but by a non-resident only when the cause of action shall have arisen within the State, or when the subject of it is situated within the State.²

¹ Under this statute, the courts of New York would not entertain jurisdiction of an action respecting *lands* situated in another State, between two corporations, both chartered in such other State. *Cumberland Coal &c. Co. v. Hoffman Steam Coal Co.*, 30 Barb. (N. Y.) 149. Nor would they entertain an action claiming *equitable relief* on behalf of a foreign corporation brought in the name of its *stockholders* against another foreign corporation, joining as defendant a corporation formed under the laws of New York, and several individuals who did not appear to be residents of New York, so as to entitle them to maintain an action against a foreign corporation for any cause under the first clause of the statute, — it not appearing that the cause of action arose, or that the subject of it was situated within the State of New York. *House v. Cooper*, 30 Barb. (N. Y.) 157.

² *Central R. Co. v. Georgia Construction &c. Co.*, 32 S. C. 319; *s. c.* 11 S. E. Rep. 192. In that State an *attachment* is merely a provisional remedy *in aid of an action*, and can only issue where an action has been commenced. Therefore, where an action fails for want of jurisdiction, an attachment issued in aid of it fails with it. But where the cause of action arose partly within the State of South Carolina, and partly within another State, consisting of work done upon a railroad situated partly within that State and partly within another State, — it was held that the cause of action arose within the State, for the purpose of satisfying the statute and sustaining an attachment. *Ibid.* The above statute does not conflict with a *constitutional provision* (Const. S. C., art. 1, § 15), that all courts shall be public, and that any person, for any injury that he may receive in his

§ 8003. **Foreign Corporations not Suable by Non-residents on Foreign Contracts.**—In the absence of statutes otherwise providing, many of the courts have held that actions cannot be maintained by non-resident persons or corporations against foreign corporations upon contracts made and to be performed outside of the State of the forum, although the foreign corporation has an agent within the State, upon whom process may be served in actions *in personam*.¹ Statutes which prescribe the terms upon which foreign corporations may be permitted to do business within the domestic State, and which, among other conditions, make them amenable to the judicial process of the State, and require them to empower an agent within the State to receive service of process, are not construed as authorizing such actions, unless they say so in terms.² The question of jurisdiction in such a case relates not merely to jurisdiction over the person of the defendant, but also *jurisdiction over the subject-matter* of the suit; and it is for the reason that the domestic tribunals have no jurisdiction over the subject-matter of the suit in such a case, that the plaintiff is repelled.³ Nor does a statutory provision that process may be served on the agent of a foreign corporation "with like effect as if the company existed in this State," accompanied by the stipulation that such service "shall be of the same force and validity as if served on said company," operate to transfer to the tribunals of the domestic State any power which would not be acquired by the mere fact of actual ser-

lands, goods, person, etc., shall have remedy by due process of law. *Ibid.* Nor does it violate that provision of the Constitution of the United States (art. 4, § 2) securing to the citizens of each State all the *privileges and immunities* of citizens of the several States; nor does it impair the *obligation of contracts* within the meaning of the same instrument (art. 1, § 10). *Ibid.*

¹ *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697; *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336.

Nearly to the same effect, see *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15. Compare *post*, § 8065. But see, *contra*, *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

² *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697; *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336. *Contra*, *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

³ *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336, 339; citing *Story Confl. L.*, § 586; *Bissell v. Briggs*, 9 Mass. 462; *s. c.* 6 Am. Dec. 88.

vice, or waiver of service, upon the defendant; nor obliterate the fact, nor change the consequences which result from the fact, of the non-resident character of the defendant, so as to give the domestic tribunals jurisdiction over causes of action against it.¹

§ 8004. **Contra, that Non-residents may Sue Foreign Corporations on Foreign Contracts.**— Contrary to the foregoing, there are holdings to the effect that when a corporation comes within the State for the purpose of doing business, and appoints an attorney or agent on whom process against it may be served with like effect as if it existed in the State, it may be sued by non-residents upon contracts made outside of the State, in like manner as a natural person may be sued.² This view of the law enlarges the operation of statutes under which foreign corporations subject themselves to the jurisdiction of domestic tribunals, so as to give such tribunals jurisdiction over them in respect of all actions, and for all purposes, as fully as they would have over resident persons or domestic corporations. If, therefore, as in the jurisprudence of Massachusetts, one foreigner may sue another in the domestic courts upon a simple contract made without the domestic jurisdiction, so that process can be lawfully served upon him,³ a foreign person or corporation may exercise the same right of action against another foreign corporation which has appointed an attorney within the State, and consented that process may be served upon him with like effect as though the corporation were resident within the State.⁴

¹ *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336, 339. *Contra*, *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

² *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

³ That such is the law of Massachusetts, see *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Roberts v. Knights*, 7 Allen (Mass.), 449; *Peabody v. Hamilton*, 106 Mass. 217; *Barrell v. Benjamin*, 15 Mass. 354.

⁴ *Johnston v. Trade Ins. Co.*, 132 Mass. 432. This case distinguishes *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336, cited in the preceding section, but the writer is not able to see any distinction between them, and the later seems to overrule the earlier decision. In the earlier case it was held that the court would not entertain jurisdiction of a *bill in equity* by a citizen of Alabama against a

§ 8005. **Foreign Corporations not Suable for Torts Committed in Foreign States.**— Although judicial opinion upon this question has not been uniform, yet the weight of authority, in the absence of statutes enlarging in this respect the jurisdiction of the domestic tribunals, is that a foreign corporation cannot be sued in the domestic tribunals for torts committed in a foreign State.¹ Nor does this rule appear to deny to the citizens of another State the privileges and immunities of citizens of the several States, within the meaning of the Constitution of the United States.²

§ 8006. **But Suable for Torts Committed in Domestic State.**— But it is scarcely necessary to add that a foreign corporation is suable for torts committed in the domestic State, either in the State or the Federal courts, if found within the

New York insurance company, seeking to restore to him his rights under a policy issued in New York upon his life, although the defendant was doing business in the State of Massachusetts and had complied with the provisions of its statute as to service of process against it. But in the latter case the court held that a citizen of Delaware could maintain, in a court in Massachusetts, an action against a corporation created under the laws of New Jersey, upon a policy of insurance issued in Pennsylvania upon property in Delaware, and payable to the plaintiff as mortgagee,—the New Jersey insurance company having complied with the statutes of Massachusetts entitling it to do business in that State, by appointing the Insurance Commissioner of the State its attorney, “upon whom lawful processes, in any action or proceeding against the company, may be served with like effect as if the company existed in this Commonwealth,” and being actually engaged in business within the State of Massachusetts at

the time of the commencement of the suit. *Johnston v. Trade Ins. Co.*, *supra*.

¹ *Central R. &c. Co. v. Carr*, 76 Ala. 388; s. c. 52 Am. Rep. 339; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315; s. c. 19 N. E. Rep. 625; 2 L. R. A. 636; 16 Civ. Proc. Rep. (N. Y.) 255; 5 Rail. & Corp. L. J. 172.

² *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 324, construing Const. U. S., art. 4, § 2. Thus, it is held in Alabama that a passenger injured in his person while traveling in Georgia, on a railroad incorporated only in Georgia, although extending into and doing business in Alabama, cannot maintain an action therefor in Alabama. The court proceed upon the view that such an action cannot be maintained, in the absence of a statute in Alabama giving such a right of action, and the statutes of that State are not construed as giving it. *Central R. &c. Co. v. Carr*, 76 Ala. 388; s. c. 52 Am. Rep. 339.

State in such a sense that process may lawfully be served upon it under the laws of the State.¹

§ 8007. **For What Causes Residents may Sue Foreign Corporations.**—The general rule, where not changed by statute, is believed to be that foreign corporations are suable in the domestic tribunals *only upon causes of action arising within the domestic jurisdiction*. This proposition may be enforced and illustrated by reference to a numerous class of holdings to the effect that an action cannot be brought against a foreign railroad corporation for an injury inflicted upon the plaintiff by the servants of such corporation in another State;² though judicial opinion has never been uniform on this question. But where, as in the State of New York, there is a *statute* providing that foreign corporations may be sued by residents “*for any cause of action*,” then, so far as *mere jurisdiction*,—the mere *power* to proceed to judgment,—is concerned, a foreign corporation may be sued by a resident whenever it is domiciled or found within the domestic jurisdiction in such a manner that process may be lawfully served upon it in an action *in personam*.³ Where jurisdiction *in personam* has been

¹ Gray v. Taper Sleeve Pulley Works, 16 Fed. Rep. 436; Austin v. New York &c. R. Co., 25 N. Y. L. 381.

² *Ante*, § 8005.

³ For instance, under such a statute, a suit may be brought by a resident executor upon a *policy* issued by a corporation existing in another State, upon the *life* of his testator, who died in the foreign State, where letters testamentary were issued in such State and also in the domestic State. Palmer v. Phoenix Mut. Life Ins. Co., 84 N. Y. 63. See also, as to the construction of § 1780 of the N. Y. Code of Procedure, Prouty v. Michigan Southern R. Co., 1 Hun (N. Y.), 655; Atlantic &c. Tel. Co. v. Baltimore &c. R. Co., 46 N. Y. Super. 377. By a statute of Maryland, which is a transcript of the former statute of New

York, suits against foreign corporations exercising franchises in that State may be brought in any of the courts of that State, “by a resident of this State for any cause of action; and by a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated, in this State.” Maryland Act of 1868, ch. 471, § 211. It has been decided that, to bring a case within the first clause of this statute, the liability sought to be enforced must be a *direct liability* of the corporation to the resident plaintiff, and that a resident plaintiff in an *attachment* against a non-resident debtor, cannot, under the second clause, subject the corporation to the process of *garnishment* in a Maryland court, to attach a debt due by the corporation

obtained over the foreign corporation by process duly served, the court has power, if the pleadings and evidence warrant it, to proceed against it by a decree for *specific performance*.¹

§ 8008. Foreign Corporations not Suable *ex Contractu* except upon Domestic Contracts.—The courts of some of the States restrain the right of action *in personam* by residents of the State against foreign corporations, where the cause of action arises *ex contractu*, to cases where the contract was made within the State by an agent of the corporation there doing business, — conceding at the same time that if the foreign corporation has *property* situated within the domestic jurisdiction, against which its creditor is entitled to proceed, a road will be open to him in the form of a *proceeding in rem*, as by *attachment* or *garnishment*.²

to the non-resident debtor, on a contract which is made, and the subject-matter of which is situated in another State. *Myer v. Liverpool &c. Ins. Co.*, 40 Md. 595. See also *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *s. c.* 33 Am. Rep. 258; *Brauser v. New England &c. Ins. Co.*, 21 Wis. 506.

¹ *Shafer v. O'Brien*, 31 W. Va. 601; *s. c.* 8 S. E. Rep. 298. Under a statute of Iowa which provides that "when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suit growing out of, or connected with the business of that office or agency may be brought in the county where such office or agency is located," an action cannot be prosecuted in a *Federal*, — and it seems in a *State* court, — in the State of Iowa, against a railroad company organized in another State, for a wrongful delivery of goods in another State, although the transit began in the State of Iowa. *Elgin Canning Co. v. Atchison &c. R. Co.*, 24 Fed. Rep. 866.

² *Bawknight v. Liverpool &c. Ins.*

Co., 55 Ga. 194. In the opinion of the court, delivered by Jackson, J., there is the following reasoning: "We are not aware of any case which has decided that a foreign corporation may be sued *in personam* here on a foreign judgment, or on a contract or debt of any sort with which the Georgia agency has had no connection. It would be strange if such were the law. A debt created in England by this English corporation could then be sued here; a debt made in China might be sued *in personam* here, where this corporation is allowed to live only for certain purposes, instead of being sued at home, where it lives for all purposes. There is good reason for so restricting the statute. The agent in Georgia might be able easily to defend a Georgia contract where he has made or supervised it, where all the witnesses lived, and were accessible to him; but it would be difficult for him, nay, impossible, to defend an English or a Chinese contract without great hazard and expense; and for the very reason that he could not well and readily defend such a

§ 8009. **Actions against Foreign Corporations under New York Code of Civil Procedure, Section 1780.**—The present Code of Civil Procedure of New York provides that a foreign corporation may be sued by a resident of the State or by a domestic corporation *for any cause of action*, and that it may be sued by a foreign corporation or by a non-resident,—“(1) where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof; (2) where it is brought to recover real property situated within the State, or a chattel which is replevied within the State; (3) where the cause of action arose within the State, except when the object of the action is to affect the title to real property situated without the State.”¹ The construction of this statute is that it *excludes jurisdiction* in actions by non-residents against foreign corporations which do not fall within its terms.² A *non-resident plaintiff* cannot, therefore, maintain an action in the courts of New York against a foreign corporation for a cause of action arising outside the limits of that State.³ Under the statute, the right of action depends upon *residence*, and not upon *citizenship*.⁴ But a cause of action against a foreign corporation selling agricultural implements within the domestic State upon a guaranty made by such corporation is, it seems, a cause of action arising within the State, within the meaning of the foregoing statute.⁵

contract, suit would be brought upon them here, judgment *in personam* be rendered, and then suit on that brought at the home office, and it be concluded without opportunity to defend on the merits. If it be replied that such a corporation might have assets, property in Georgia, which can be reached only in Georgia, the answer is, that a suit *in rem* will bind all that and harm nobody.” *Ibid.* 196.

¹ N. Y. Code Civ. Proc., § 1780.

² *Ervin v. Oregon Railway & Co.*, 62 How. Pr. (N. Y.) 490; *s. c.* 28 Hun (N. Y.), 269; *Galt v. Providence Savings Bank*, 18 Abb. N. Cas. (N. Y.) 431.

³ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315; *s. c.* 19 N. E.

Rep. 625; 16 Civ. Proc. Rep. 255; *Galt v. Provident Sav. Bank*, 18 Abb. N. Cas. (N. Y.) 431.

⁴ *Adams v. Penn Bank*, 35 Hun (N. Y.), 393.

⁵ *Childs v. Harris Man. Co.*, 104 N. Y. 477. According to decisions of some of the subordinate courts of New York, *actions do not lie* under this statute by non-residents against corporations,—in the following cases: To recover for the use of teams hired without the State, though they were used within the State (*Perry v. Erie Transf. Co.*, 19 N. Y. Supp. 239); upon a contract made in New Jersey to furnish a New Jersey corporation with teams and horses for trucking to be done in New York (*Perry v. Erie Transf. Co.*, 49 N. Y. St. Rep. 36; *s. c.*

§ 8010. **Actions against Foreign Corporations Which have Migrated from the Domestic State.**—Let us suppose a case where, either with or without the sanction of the laws of the domestic State, or of the State of its creation, a corporation *bodily migrates* from the State of its creation into another State, where a majority of its stockholders have always resided, where it has held all its meetings, where it keeps its books, and where, at the time of the action against it, it is doing what are called *constituent acts*¹ within the domestic State,—that is to say, a notice for a meeting of its stockholders within such State is pending,—and where it has no office or place of business anywhere in the State of its creation. In such a case it is liable to actions upon its contracts by citizens

20 N. Y. Supp. 891); for an injury by a *maritime collision* by the joint owners of a vessel, part of whom are non-residents, against a foreign corporation (*Brooks v. Mexican Construction Co.*, 49 N. Y. Super. 234; *s. c.* 50 N. Y. Super. 281); to recover damages for personal injuries received without the State (*Crowley v. Royal Exchange Shipping Co.*, 2 Civ. Proc. Rep. (N. Y.) 174). The same courts have held that *actions lie* under this statute against foreign corporations in respect of business transacted within the State: *Bradley Fertilizer Co. v. South. Pub. Co.* (N. Y. City Ct.), 21 N. Y. Supp. 472. Upon an insurance policy issued by a foreign corporation, to a resident who died within the State: *Griesa v. Massachusetts Ben. Assn.*, 15 N. Y. Supp. 71. Between two foreign corporations to recover shares of stock on the ground of the invalidity of a transfer made within the domestic State: *Toronto Trust Co. v. Chicago & C. R. Co.*, 32 Hun (N. Y.), 190. Where two foreign corporations entered into an agreement, by one clause of which, in case of differences between them, they were to appoint an arbitrator in New York, the Supreme Court of New

York had jurisdiction of an action by one of them to restrain a proceeding for arbitration thereunder: *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84 N. Y. 153; reversing *s. c.* 22 Hun (N. Y.), 568. Where some of the plaintiffs were residents, and others non-residents, it was held that the action might be dismissed as to the non-residents, and proceed as to the residents: *Ervin v. Oregon Rail. & Nav. Co.*, 28 Hun (N. Y.), 269; affirming *s. c.* 62 How. Pr. (N. Y.) 490. Where a national bank, organized in Louisiana, purchased a draft drawn on bankers in the city of New York, payable to the order of such national bank, which draft was duly presented in New York, and payment refused, and was protested for non-payment, and due notice given thereof,—it was held that the cause of action arose within the State of New York for the purpose of sustaining the jurisdiction of a court of that State, of an action by the national bank to attach the funds in New York belonging to the bank drawing the draft: *Hibernia Bank v. Lacombe*, 84 N. Y. 367; *s. c.* 38 Am. Rep. 518.

¹ *Ante*, § 694.

of the domestic State,—and it would equally seem by non-residents upon contracts made within the domestic State, although at the time of the bringing of such action it has *ceased doing business within the domestic State*. A foreign corporation cannot thus be allowed to migrate into the domestic State, do business there, incur liabilities there, and then, by the mere act of suspending its business, escape the process of the domestic courts.¹

§ 8011. Jurisdiction of Actions by Stockholders to Redress Grievances in Corporate Management.—As a general rule, actions brought by stockholders, generally in equity, to restrain or redress frauds or breaches of trust committed by the directors or officers of the corporation, or by a majority of its shareholders in the management of its business and property,² *can only be brought in the courts of the State under whose laws the corporation was created.*³ This rule rests partly on jurisdictional grounds, and partly on grounds of policy and expediency. It is indispensable, in such an action, that the corporation should be made a party in its corporate name and character.⁴ This reason alone, in many cases, drives the stockholders to the forum of the State of the corporation, because service of process cannot be had upon the corporation in other jurisdictions. It also rests upon a consideration of the inexpediency of opening the doors of the courts of the State to litigations in respect of rights depending upon transactions taking place outside the State and governed by foreign law. It rests upon the further consideration that, in many cases, by reason of the fact of the property of the corporation being situated outside the State, it will be impossible for the court

¹ *National Bank v. Southern Porcelain Man. Co.*, 55 Ga. 36. Compare *Bawknight v. Liverpool &c. Ins. Co.*, 55 Ga. 194.

² As to such actions, see *ante*, § 4479, *et seq.*

³ *Wilkins v. Thorne*, 60 Md. 253; *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 545; *s. c.* 10 S. E. Rep. 679;

New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349; *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336. Compare *Halsey v. McLean*, 12 Allen (Mass.), 438; *s. c.* 90 Am. Dec. 157.

⁴ *Ante*, § 4578; *Wilkins v. Thorne*, 60 Md. 253.

to effectuate its judgment if it should render any. But it is obvious that many cases will arise where these reasons will not be controlling. Take, for instance, such a case as that stated in a preceding section, where a manufacturing corporation migrated with its entire business, corporate books, and personnel, from the State of its creation into another State, and there did all its business and held all its corporate meetings. Clearly, the courts of the State in which it had thus, lawfully or unlawfully, acquired a *de facto* domicile, would be better able to take jurisdiction of an action by its stockholders for the redress of grievances in respect of corporate management, than would a court of the jurisdiction from which it migrated. Indeed, the courts of that State might not be able to acquire jurisdiction at all, from the mere fact of no one being left upon whom process could be served. We accordingly find judicial opinions which more or less modify the general rule of jurisdiction above stated. One of them is to the effect that, though such an action must in general be prosecuted in the State under whose laws the corporation has been created, yet injunctions and other auxiliary remedies may be had in the courts of other States.¹ Another is to the effect that where an *unlawful transfer* of the shares of stock of a foreign corporation is made within the domestic State, through an agency there maintained by the corporation for the transfer of its shares, the wrongful act is committed within the domestic State, so that it may be redressed, under a statutory provision elsewhere considered,² giving the courts of the domestic State jurisdiction of actions by non-residents against foreign corporations, where the transaction which is the subject of the action happened within the State.³ Still another, rendered by a court of subordinate jurisdiction, is to the effect that an action by a resident stockholder of a foreign corporation to obtain *specific performance* of a contract of another for-

¹ Moore v. Silver Valley Min. Co., 104 N. C. 534, 545; s. c. 10 S. E. Rep. 679.

² Toronto General Trust Co. v. Chicago &c. R. Co., 32 Hun (N. Y.), 190.

³ Ante, §§ 8002, 8009.

foreign corporation, to issue stock to the former corporation or its stockholders, pursuant to an agreement for the *consolidation* of the two corporations, is within the jurisdiction of the courts of the domestic State.¹ On the contrary, a foreign corporation cannot maintain a suit in equity in Massachusetts against a foreign railroad corporation and a citizen of that Commonwealth, to enforce *specific performance* of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the plaintiff corporation in a foreign State, and to restrain by *injunction* the citizen of Massachusetts from disposing, in that State, of shares of stock and bonds of the foreign railroad company alleged to have been delivered to him in violation of the plaintiff's rights, although the foreign railroad has an office in Massachusetts for the transfer of shares of its capital stock, and has appeared by attorney in the suit.²

§ 8012. Actions against Corporations Created by the Concurrent Legislation of Several States. — As already seen in various relations,³ corporations which have been created by the concurrent action of two or more States, are deemed to be *domestic corporations within each of the States* by whose legislation their corporate existence has been created. From this, the conclusion has been deduced that it has a residence in each of the States for the purpose of being sued, and without reference to the question of the residence of the plaintiff in the action, and seemingly without reference to the question of the place where the cause of action arose, it being a personal action. Thus, the Baltimore & Ohio Railroad Company, originally chartered in Maryland, and re-incorporated, as was held, by the Legislature of Virginia in respect of so much of its property as lay within that State, was held liable in a proceeding in *garnishment* in Virginia, on the theory of its being

¹ *Babcock v. Schuylkill &c. R. Co.*, 31 N. Y. St. Rep. 643; s. c. 9 N. Y. Supp. 845.

² *Kansas &c. Construction Co. v. Topeka &c. R. Co.*, 135 Mass. 34.

³ *Ante*, §§ 47, 319, 320, 688, 7438, 7452, 7472, 7490, 7799, 7817, 7891; *post*, §§ 8020, 8128.

a domestic corporation.¹ The same railroad had extended a branch of its line into the District of Columbia under the authority of Congress, and it was consequently held liable to an action in that District for *an injury* done to the plaintiff while traveling on its cars in the State of Virginia.²

¹ Baltimore &c. R. Co. *v.* Gallahue, (U. S.) 65. Compare Goshorn *v.* 12 Gratt. (Va.) 655; *s. c.* 65 Am. Dec. 254. Supervisors, 1 W. Va. 308; and Baltimore &c. R. Co. *v.* Supervisors, 3

² Railroad Co. *v.* Harris, 12 Wall. W. Va. 319.

CHAPTER CXCVIII.

SERVICE OF PROCESS ON FOREIGN CORPORATIONS.

SECTION

- 8019. What statutes relating to service of process include foreign corporations.
- 8020. Service upon corporations created by the concurrent action of two or more States.
- 8021. Statutory modes of acquiring jurisdiction exclusive.
- 8022. State statutes providing this mode of service applicable in the Federal courts.
- 8023. Conditions of Federal jurisdiction in actions against non-resident corporations.
- 8024. Validity of statutes providing for service of process upon any officer or agent.
- 8025. Where foreign corporation has appointed an agent to receive service under the local statute.
- 8026. Proof of appointment of such an agent.
- 8027. Where it has appointed a State officer as such agent.
- 8028. Judgments against foreign corporations founded on process served upon agents appointed under statutes to receive service of process, good everywhere.
- 8029. Service on agent with whom the contract was made.
- 8030. Service upon officer or agent casually within the State.
- 8031. Doctrine not applicable to agents appointed to do business for the corporation within the State.

SECTION

- 8032. Not necessary that agent should reside continuously within the State.
- 8033. Agent must be representing corporation as matter of fact.
- 8034. Service upon sub-corporations organized by the foreign corporation to carry on its business in the domestic State.
- 8035. Service upon a director.
- 8036. Service upon the "principal officer."
- 8037. Service upon "managing agent."
- 8038. Service upon any agent by whom the corporation does its business in the domestic State.
- 8039. Service upon any person doing business for the corporation.
- 8040. Agency expired, but business not wound up.
- 8041. Service upon stockholders.
- 8042. Alternative service.
- 8043. Service upon vice-president.
- 8044. Service upon mere clerk.
- 8045. Service upon receivers.
- 8046. Where a railroad company has leased its road to another company.
- 8047. Service upon the agent who is himself plaintiff in the action.
- 8048. Evidence of service of process.
- 8049. Construction of particular statutes relating to service of process on foreign corporations.
- 8050. Notice by publication in lieu of personal service.

§ 8019. What Statutes Relating to Service of Process Include Foreign Corporations. — Statutes providing, in the broadest terms, a mode of serving process upon any corporation, "or upon any unincorporated company," are properly construed as including foreign as well as domestic corporations.¹ On the contrary, the statute of Michigan, in force as late as 1871, providing for service of process on various named corporations through their officers, has been held to apply *only*

¹ *Société Foncière v. Milliken*, 135 U. S. 304. This was the construction of a statute of Nebraska (Neb. Civ. Code, § 912) relating to service of process on corporations generally: *Chicago &c. R. Co. v. Manning*, 23 Neb. 552; *s. c.* 35 Am. & Eng. Rail. Cas. 618; 37 N. W. Rep. 462. So, the original provisions of the code of Tennessee (Thomp. & Steg. Stat. Tenn., 1871, §§ 2831-2834), providing for service of process on corporations generally, extend to foreign as well as to domestic corporations; and the later statute of that State, entitled "An Act to Subject Foreign Corporations to Suit in this State" (Tenn. Acts 1887, p. 386), was designed merely to provide for a service upon such corporations as engaged in business in the State without having an office and a resident agent therein. *Telephone Co. v. Turner*, 88 Tenn. 265. Followed in *Kansas City &c. R. Co. v. Daugherty*, 138 U. S. 298, 304. A statute of Illinois recited: "In all cases where suit has been or may hereafter be brought against any incorporated company, process shall be served upon the president of such company, if he reside in the county in which suit is brought, and if such president be absent from the county, or does not reside in the county, then the summons shall be served by the proper officer by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of such

company found in the county, at least five days before the trial, if suit be brought before a justice of the peace, and at least ten days when suit is brought in the Circuit Court." *Scates* Ill. Stat. 243. It has been held that this statute extends to foreign corporations; so that the following return of service was good: "Executed the within writ by delivering a true copy of the same to J. R. Booth, agent, and J. W. Dexter, conductor, of said Mineral Point Railroad Company, this 2d day of February, 1857, the president of said company not residing in this State." The court said: "It is a convenient way provided to get service upon them, so as to subject their property to their contracts, and it is a proper consequence of the provisions of this act that they should be deemed found wherever one of their officers or agents, such as specified in the act, may happen to be." *Mineral Point R. Co. v. Keep*, 22 Ill. 9; *s. c.* 74 Am. Dec. 124; reaffirmed in *Hannibal &c. R. Co. v. Crane*, 102 Ill. 249, 254; *s. c.* 40 Am. Rep. 581, — where it was said that the one object of the statute was to embrace corporations having property in Illinois and their offices and places of business in other States. In *Peoria Ins. Co. v. Warner*, 28 Ill. 429, 433, it was said that the statute was *remedial* in its character, and ought to receive the most *liberal* interpretation.

to domestic corporations, for the reason that it could not be made to apply to foreign corporations without the interpolation of various clauses and qualifications;¹ and accordingly statutes having special reference to service of process on foreign corporations were subsequently enacted in that State.² These statutes failed to provide for the service of the writ of garnishment on foreign corporations, though there was such a provision³ in respect of domestic corporations; consequently a foreign corporation was not subject to garnishment in that State,⁴ until the legislature again supplied the *casus omissus*.⁵

§ 8020. Service upon Corporations Created by the Concurrent Action of Two or More States. — Where corporations are created by the concurrent action of two or more States, they are *domestic corporations within each State*, and a service of process upon such corporations, in the manner provided for service upon domestic corporations, will be good, and will give jurisdiction to proceed to judgment.⁶

¹ *People v. Judge of Wayne Circuit*, 24 Mich. 38.

² See Mich. Pub. Acts 1881, no. 256; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Lake Shore & C. R. Co. v. Hunt*, 39 Mich. 469. In the Pennsylvania Common Pleas, service of a writ of *foreign attachment* on a domestic corporation, was stricken off by the court after the appearance; because the service, though made in compliance with the statute regulating service on foreign corporations, was not made in conformity with the statute respecting corporations. *Silva v. Greenwald*, 2 Pa. County Ct. 131. That service of process upon a domestic corporation must be upon an *officer* thereof, Pa. Act April 8, 1851 (P. L. 354), authorizing service upon its *agent*, having reference only to foreign corporations, — see *Williams v. Delaware & C. R. Co.* (Pa. C. P.), 28 W. N. C. 282. As to the requisites of service of process

on foreign corporations, under Ohio Code, §§ 66-68, — see *Wheeling & C. Transp. Co. v. Baltimore & C. R. Co.*, 1 Cinc. (Ohio) 311. That the Maryland statute authorizing service of process upon any agent of a foreign corporation doing business in that State (Md. Act 1868, ch. 471, § 211), does not apply to *foreign insurance companies* licensed to do business in that State, the provisions of another statute (Md. Act 1878, ch. 106, § 30), being in this regard special and exclusive, — see *Oland v. Agricultural Ins. Co.*, 69 Md. 248; s. c. 14 Atl. Rep. 669; 12 Cent. Rep. 881.

³ How. Stat. Mich., § 886.

⁴ *Milwaukee Bridge & C. Works v. Brevoort*, 73 Mich. 155; s. c. 41 N. W. Rep. 215.

⁵ Mich. Laws 1889, no. 266.

⁶ *Re St. Paul & C. R. Co.*, 36 Minn. 85; s. c. 30 N. W. Rep. 432. See, in affirmation of this principle, *ante*,

§ 8021. **Statutory Modes of Acquiring Jurisdiction Exclusive.**—The earlier reasoning of the courts was that, as a corporation could not migrate, it could not be served with summons in an action *in personam* outside of the State of its creation, in the absence of a statute expressly authorizing this mode of service. The theory was that, at common law, an action did not lie against a foreign corporation *in personam*, founded upon notice by summons, because of its non-residence; and consequently that the only mode of service, in an action *in personam* against such a body, must be supplied by the legislature.¹ The same conclusion was also reached on the larger theory that “all exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the State, must be confined to the cases and exercised in the way precisely indicated by statute.”² When, therefore, the legislature provided a mode of acquiring jurisdiction over foreign corporations, *that mode was necessarily exclusive*.³ For example, where the legislature provided for a service of process by *publication* in such a case, that mode alone could be pursued,⁴ and a service of *summons* upon the president or managing agent of such a corporation within the State was a nullity.⁵ We have seen that the supposed principle of the common law upon which this doctrine rests is now discarded,⁶ and that, independently of statutes, the principle is now recognized

§ 8012; *Baltimore &c. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254; *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65. In Virginia, if its principal office is situated outside of the State in which the action is brought, service may be had under the statute upon the subordinate officer or agent named therein. *Baltimore &c. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655; s. c. 65 Am. Dec. 254. That an *interstate railroad company chartered by Congress*, such as the Union Pacific Railroad Company, is therefore properly deemed a *domestic corporation*, for the purposes of jurisdiction, by the courts of any

Territory within which its road lies: *Losee v. McCarty*, 5 Utah, 528; s. c. 17 Pac. Rep. 452.

¹ *Sullivan v. La Crosse &c. Co.*, 10 Minn. 386.

² *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441, 443.

³ *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 511; s. c. 22 Am. St. Rep. 433; 25 Pac. Rep. 325; 9 Rail. & Corp. L. J. 113; *ante*, § 7503.

⁴ *Broome v. Galena &c. Co.*, 9 Minn. 239.

⁵ *Sullivan v. La Crosse &c. Co.*, 10 Minn. 386.

⁶ *Ante*, § 7993, *et seq.*

that a corporation can migrate in such a sense as to acquire a residence in another State, for the purpose of *jurisdiction* as well as *taxation*.¹ But the principle remains that where there is a *statute* pointing out, in explicit terms, the mode of service of process in actions against foreign corporations, it *must be followed*, and a judgment founded upon another kind of service will be invalid. If, therefore, in pursuance of a domestic statute, a foreign corporation has *appointed*, within the county, an *attorney*, and empowered him to receive service of process in actions against it, unless process is so served, the court is without jurisdiction to proceed to judgment.² So, where there is a *special statutory provision* for the service of process on corporations relating to *actions before justices of the peace*, that statute must be followed, and not the provisions of the general statute, and unless it is followed the judgment will be invalid.³ So, also, if there is a *special statute* relating to service of process upon foreign corporations, that will control the provisions of the statutes relating to the service of process generally; and service should be had in conformity with the special statute.⁴ For the same reason, unless the statute relating to process against foreign insurance companies doing business within the State, points in clear terms to the conclusion that it was intended to be applicable to actions before *justices of the peace*, it will be construed as confined to actions in *courts of record*.⁵ Nor are the provisions of such statute extended by construction. When, therefore, the statute provided that "railway corporations, . . . the owners of cars, including . . . car companies, . . . and companies, . . . operating the same, in any county through which the . . . road passes,"⁶ may be served with process, etc.,—it was held to apply to *transportation companies only*, and not to companies exploiting a patent for an *air-brake* upon railway cars.⁷

¹ *Ante*, § 7994.

² *Thayer v. Tyler*, 10 Gray (Mass.), 164.

³ *Farmers' &c. Co. v. Warring*, 20 Wis. 290.

⁴ *Guernsey v. American Ins. Co.*, 13 Minn. 278.

⁵ *Hartford Ins. Co. v. Owen*, 30 Mich. 441.

⁶ Iowa Code, § 2582.

⁷ *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434. That the provisions of New York Laws 1846, ch. 195, § 8, that a certain for-

§ 8022. State Statutes Providing This Mode of Service Applicable in Federal Courts.—The courts of the United States are *courts of the particular States within which they sit*, within the meaning of statutes compelling foreign corporations to appoint attorneys within the domestic States to receive service of process, and prescribing the effect of such service. Thus, where a foreign insurance company was doing business in Pennsylvania under a license granted pursuant to a statute of that State, which, among other things, provided that the company should file a written stipulation agreeing that process issued in any suit brought in any court in that Commonwealth having jurisdiction of the subject-matter, and served upon the agent specified by the company to receive service of process for it, should have the same effect as if personally served upon the company within the State,—it was held that the Circuit Court of the United States, sitting within the State of Pennsylvania, was a court of the Commonwealth within the meaning of the statute, and that process in an action commenced in such court, served upon the agent of a foreign corporation in compliance with the statute, gave the court jurisdiction such as required it to proceed to hear and determine the case.¹ But

eign corporation shall be liable to be sued by summons in the same manner as corporations created by the laws of the State, do not authorize service of summons upon it as prescribed by the New York Code for domestic corporations,—see *Quade v. New York &c. R. Co.*, 39 N.Y. St. Rep. 157; *s. c.* 14 N. Y. Supp. 875. That in order to give jurisdiction of a foreign corporation by service within the State upon its secretary, under N. Y. Code Civ. Proc., § 432, it is not necessary that the corporation should have property within the State, or that the cause of action should have arisen therein,—see *Miller v. Jones*, 51 N. Y. St. Rep. 361; *s. c.* 22 N. Y. Supp. 86.

¹ *Ex parte Schollenberger*, 96 U. S.

369. This salutary decision overruled the decisions of several of the Federal Circuit Courts whose judges had declined to take jurisdiction under such circumstances. Mr. Justice Nelson had so declined in two cases: *Day v. Newark India Rubber Man. Co.*, 1 Blatchf. (U. S.) 628; *Pomeroy v. New York &c. R. Co.*, 4 Blatchf. (U. S.) 120. These decisions were rendered prior to the decision of the Supreme Court of the United States in *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65, and are regarded as being in conflict with that decision. Mr. Circuit Judge Dillon, of the Eighth Circuit, declined to take jurisdiction in such a case only because he felt his judgment foreclosed by the rulings of other Federal judges, and especially by

in respect of a service of process upon foreign corporations in the Federal courts, the statutes of the State governing the mode of service *have a partial application only*. Outside of those statutes the Federal courts must have a jurisdiction of the action founded upon diverse citizenship and "inhabitaney"; and they must have this jurisdiction under the Constitution and statutes of the United States; for it is not competent for the legislature of a State to confer it upon them. For instance, where the corporation was not "found" within the State within the meaning of the Federal statute,¹ there was no jurisdiction in the Federal court, although the process had been served in a manner which would have satisfied the State statute, as construed by the highest court of the State;² and where in such a case the action was commenced in the State court, and afterwards removed to the Federal court, it was there dismissed for want of jurisdiction.³ But where the Federal court might, under the Federal Constitution and applicatory Federal statutes, acquire a jurisdiction, then, under the Federal Process Act of 1872, assimilating the mode of serving process in the Federal courts with that obtaining in the courts of the particular State, that jurisdiction might be acquired in a given case by a service of process in the mode prescribed by the statute law of the State. Thus, where a corporation, created under the laws of another State, had appointed an agent in Louisiana, and empowered him to receive service of process in actions brought against it there, process served upon him there was good in an action at law in a court of the United States, and was equally good in a suit in admiralty.⁴ It has been pointed out that by the Federal Process Act,⁵ the

those of Mr. Justice Nelson above referred to: *Stillwell v. Empire &c. Ins. Co.*, 4 Cent. L. J. 463. But Mr. Circuit Judge Woods decided in favor of the jurisdiction in *Knott v. Southern Life Ins. Co.*, 2 Woods (U. S.), 479. See also *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93; *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17.

¹ Rev. Stat. U. S., § 739.

² *Good Hope Co. v. Railway Bark Fencing Co.*, 22 Fed. Rep. 635. See *ante*, §§ 7748, *et seq.*, 7462, *et seq.*, and 7484, *et seq.*, where this subject is considered in another relation.

³ *Bentlif v. London &c. Finance Corp.*, 44 Fed. Rep. 667.

⁴ *Re Louisville Underwriters*, 134 U. S. 488; *s. c.* 10 Sup. Ct. Rep. 587.

⁵ Rev. Stat. U. S., § 914.

State practice is not necessarily to be adopted in all cases, but only "as near as may be"; and it is said that this means so far as is compatible with the due administration of justice in the Federal tribunals. And it is added that the subordinate provisions in those statutes which would unwisely incumber the administration of law in the Federal tribunals, or tend to defeat the ends of justice therein, should be rejected.¹

§ 8023. Conditions of Federal Jurisdiction in Actions against Non-resident Corporations.—This subject was specially considered in a very important case in the Circuit Court of the United States for the Southern District of Ohio, before Jackson, Welker, and Sage, JJ.; and Mr. Circuit Judge Jackson² wrote an elaborate opinion, in which he reached this conclusion: "We think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, namely: (1) It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State."³

¹ *Hat-Sweat Man. Co. v. Davis Sewing Machine Co.*, 31 Fed. Rep. 294, 296. See, to the same general effect, *Indianapolis & C. R. Co. v. Horst*, 93 U. S. 291, 299; and *Nudd v. Burrows*, 91 U. S. 426, 441. Recognizing this principle, a Federal court in New York held that service upon a foreign corporation made upon its managing agent within the domestic State, such as would have satisfied the statute of

that State (N. Y. Code Civ. Proc., § 432), was a service upon the corporation "found within the district," within the meaning of Rev. Stat. U. S., § 732. *Hat-Sweat Man. Co. v. Davis Sewing Machine Co.*, 31 Fed. Rep. 294. See *ante*, § 7484, *et seq.*

² Since a Justice of the Supreme Court of the United States.

³ *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17, 34.

§ 8024. Validity of Statutes Providing for Service of Process upon Any Officer or Agent.—Some of the State courts uphold the validity of statutes providing for the service of process against foreign corporations upon “any officer or agent of such corporation,” found within the domestic jurisdiction,¹—the courts proceeding upon the just principle that an officer or agent of a foreign corporation who is a good enough agent to make and take contracts for it within the domestic State, is a good enough agent to impart notice to it of an action to enforce those contracts.²

§ 8025. Where Foreign Corporation has Appointed an Agent to Receive Service under the Local Statute.—Statutes relating to service of process on corporations, being in general exclusive,³ if the law of the domestic State requires the foreign corporation, as the condition of doing business in the State, to appoint an agent within the domestic State and empower him to receive service of process in actions against it, and lodge evidence of such appointment with the Secretary or other officer of the State, then, unless the statute is in its language *permissive*, so as to admit of other modes of service, service must be had upon that officer alone, or there will be

¹ *Ante*, § 7519.

² See, for example, *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660, where the court, speaking through McCay, J., said: “The only difficulty in the way is a practical one. By the common law, process against a corporation must be served upon its president or principal officer (*Angell & Ames Corp.*, § 404), and it is doubted if he can carry his functions as principal officer with him, by a mere accidental visit to another jurisdiction. If a company were to locate an office in *another State*, and its *principal officer* were to do business there, there could be no question upon his liability to be served. Nor is it any inherent, fun-

damental quality in a corporation, that process against it shall be served upon its principal officer. It is a mere matter of municipal law that the State may change at pleasure. We grant to these foreign corporations the right to do business here. We permit them to open offices here. We protect them in the property they hold here. We open our courts to them for the enforcement of the claims they have upon our citizens. Is it hard, or a violation of principle, that they should be put upon the same footing, as to actions *against* them, as our own corporations?” *Ibid.* 670.

³ *Ante*, § 7503.

no jurisdiction of an action against the corporation;¹ and service in conformity with the general statutes relating to service of process on corporations will not give jurisdiction.² So, where a foreign corporation has *appointed a State officer as its attorney* to receive service of process against it in compliance with the domestic statute, a service upon one who was its agent prior to such appointment will not support jurisdiction in the action.³ If the foreign corporation *fails to make the designation* required by the statute, but, nevertheless, by entering the State to do business there, renders itself amenable to its judicial process, then service may be obtained upon it in any mode recognized by any other statute, or by the principles of the common law.⁴ On the other hand, a service upon the agent so appointed is sufficient to sustain a *personal*

¹ *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617; *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

² *Oland v. Agricultural Ins. Co.*, 69 Md. 248; *s. c.* 12 Cent. Rep. 881; 14 Atl. Rep. 669; *Rehm v. German Ins. Sav. Inst.*, 125 Ind. 135; *s. c.* 25 N. E. Rep. 173. It follows that where a foreign insurance company has appointed such an agent, service of process upon one of its *local agents* will not be sufficient: *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617; *Gates v. Tusten*, 89 Mo. 13; *Rehm v. German Ins. Sav. Inst.*, 125 Ind. 135; *s. c.* 25 N. E. Rep. 173. So a return of service of process of garnishment "by delivering a summons of garnishment in writing to H. N. B., one of the agents of said company,"—does not show a formal service under the Missouri statute (R. S. Mo. 1879, § 6013), which requires foreign insurance companies doing business within Missouri to appoint and authorize "some person who shall be a resident of the State to acknowledge or receive service of process," etc. The reason is that the statute plainly contemplates

that but *one* agent or attorney shall be designated by the foreign insurance company. *Gates v. Tusten*, 89 Mo. 13, 19. But where the sheriff returned that he had served the summons on H. P., "State agent" of the company, it was held that the return showed a good service, since the words "State agent" sufficiently designated H. P. as the person appointed by the company to receive service of process under the above statute. *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

³ *Lafflin v. Travelers' Ins. Co.*, 121 N. Y. 713; *s. c.* 31 N. Y. St. Rep. 900; 24 N. E. Rep. 934. On the contrary, where the company made such an appointment, but the Superintendent of Insurance refused to admit it to do business in the State, after which its application was withdrawn, a service of summons on the Superintendent of Insurance was inoperative to give jurisdiction against the company. *Richardson v. Western Home Ins. Co.*, 8 N. Y. Supp. 873.

⁴ Compare *Morrison v. National Rubber Co.*, 13 Civ. Proc. Rep. (N. Y.) 233.

judgment against the corporation,¹ which will be good everywhere.²

§ 8026. **Proof of Appointment of Such an Agent.**—Where an issue is made upon the question whether the foreign corporation, against which the action is brought, has subjected itself to an action in the State, in the manner in which the action has been brought against it, by appointing an agent in pursuance of a statute, upon whom process against it may be served, a *certified copy* of the appointment, made by the *Secretary of State*, with whom the original is filed, is sufficient evidence.³

§ 8027. **Where It has Appointed a State Officer as Such Agent.**—Many of the statutes, such as have been considered in the preceding section, require the foreign corporation to designate a *particular State officer* as its agent or attorney upon whom process in actions against it may be served.⁴ A statute so designating a State officer by the name of his office applies to the officer and to his *successor in office*. Therefore, an appointment of the superintendent of the insurance department of the State, “or his successor in office,” without mentioning the individual name of the officer, is a good appointment under such a statute.⁵ Where the statute requires that a

¹ *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 149 Mass. 24; s. c. 20 N. E. Rep. 318; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; s. c. 20 Am. Rep. 513.

² *Post*, § 8028. Nor will the corporation be able to overthrow the service by producing a certificate of the Secretary of State to the effect that it had, twelve years before, filed in his office a statement under the statute, designating a different person as its agent or attorney to receive service of process, and not the person on whom the service was actually made. *Wintermute v. New Jersey Cent. R. Co.*, 5 Pa. County Ct. 648.

³ *Knapp v. Strand*, 4 Wash. 686; s. c. 30 Pac. Rep. 1063.

⁴ As, for instance, N. Y. Laws 1884, ch. 346. That service of the summons and complaint under this statute, in an action against a foreign insurance company, upon the Superintendent of Insurance at *Albany*, confers jurisdiction upon the City Court of *New York*,—see *People v. New York City Ct. Justices*, 33 N. Y. St. Rep. 147; s. c. 19 Civ. Proc. Rep. (N. Y.) 418; 25 Abb. N. Cas. (N. Y.) 403; 11 N. Y. Supp. 773.

⁵ *Lafflin v. Travelers' Ins. Co.*, 121 N. Y. 713; s. c. 31 N. Y. St. Rep. 900; 24 N. E. Rep. 934.

certificate of such appointment, "duly certified and authenticated," shall be filed in the office of the superintendent of the insurance department, but does not provide for the manner in which it shall be "certified and authenticated," it is held that a certification and authentication, such as will satisfy the superintendent of the insurance department, is sufficient.¹ Where the certificate of appointment had been accepted by and filed with the Superintendent of Insurance under the statute, which certificate purported to have been signed by the president and secretary of the company, and was sealed with the seal of the company, and bore the certificate of a notary, attested by his seal, that the instrument was acknowledged and approved by the officers signing it, and a copy of the resolution of the company's board of directors making the appointment and purporting to be certified by its secretary under the corporate seal, was annexed thereto, —it was held that the appointment was sufficiently certified and authenticated, and that a service of summons upon one who was, prior to the filing of the certificate, the agent of the company for the purpose of such service, was insufficient.² It should be added that where the statute prohibits the foreign corporation from doing business within the domestic State until it has filed with a State officer such a statutory authorization, it will be *presumed*, in conformity with the ordinary presumption of right-acting, in support of the validity of service in a particular case, that the company has complied with the law, and a default will hence be entered upon a service upon the State officer, though he may have refused to receive it.³

§ 8028. Judgments against Foreign Corporations Founded on Process Served upon Agents Appointed under Statutes to Receive Service of Process, Good Everywhere.—It is a settled principle of American jurisprudence that where a State

¹ *Lafflin v. Travelers' Ins. Co.*, 121 N. Y. 713; *s. c.* 31 N. Y. St. Rep. 900; 24 N. E. Rep. 934.

² *Ibid.*

³ *Knapp &c. Co. v. National Mut. F. Ins. Co.*, 30 Fed. Rep. 607.

imposes upon a foreign corporation, as a condition precedent to its right to do business and make and take contracts within the State, the appointment of a resident agent within the State, with power of attorney to receive service of process in actions against it, brought therein, a *judgment in personam* against the corporation, founded upon a service of process upon an agent so appointed, will be good, not only within the State in which it was rendered, but within every other State, including the State creating the corporation.¹ The reason which lies at the foundation of this principle has already been considered.² It is that a State may exclude from its limits foreign corporations altogether, and may therefore impose such conditions as it chooses, as conditions upon which they may enter and do business; and that when the State imposes the condition of the appointment of a resident agent to receive service of process against it, and the corporation accepts that condition, it is deemed to accept it with the legal consequences flowing from it.³

§ 8029. Service on Agent with Whom the Contract was Made.—Statutes exist in furtherance of the theory before advanced,⁴ that if an agent is good enough to represent a foreign corporation in the transaction of its business, he is good enough to affect it with notice, and to bind it by service of process on him in an action brought against it in relation to any matter growing out of his agency.⁵

¹ *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

² *Ante*, § 7884, *et seq.*

³ Note the clear reasoning of Mr. Justice Curtis, enforcing this conclusion, in *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 408. The nature and extent of this jurisdiction was thus more narrowly stated by Mr. Justice Wells: "If they have *property* or *rights* within the limits of another State, suits can be maintained, and judgments enforced against them, to the extent of such property and rights; but this results from the au-

thority of the State over whatever is within its limits, and not from any jurisdiction over the corporation itself. The judgment is operative only to the extent of such property and rights. As to these it is analogous in its effects to a *proceeding in rem*." *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.), 336, 339; citing *Bissell v. Briggs*, 9 Mass. 462; *Blackstone Man. Co. v. Blackstone*, 13 Gray (Mass.), 488.

⁴ *Ante*, §§ 7519, 8024.

⁵ Thus, a statute of Iowa recites: "When a corporation, company, or

§ 8030. Service upon Officer or Agent Casually within the State. — It is a principle of American law, firmly settled, and one which may be regarded as the law everywhere, except where changed by statute, that service of process upon an officer or agent of a foreign corporation, casually or temporarily found within the jurisdiction, whether upon his own business, or otherwise, will not give jurisdiction to render a judgment *in personam* against the corporation.¹ It can make no difference, in respect of the operation of this principle, whether the officer is casually or temporarily within the jurisdiction for his own private purposes, or for the purposes of the corpora-

individual, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." Code of Iowa, § 2613. Under this statute, where an agent had been appointed by a foreign corporation to sell its agricultural machinery, and the business of his agency had not been wound up, service of process upon him would support jurisdiction of an action for a breach of warranty of a machine sold to the plaintiff by the defendant through him. *Gross v. Nichols*, 72 Iowa, 239; *Brunson v. Nichols*, 72 Iowa, 763.

¹ *Ante*, § 7529; *Nash v. Rector*, 1 Miles (Pa.), 78; *Dawson v. Campbell*, 2 Miles (Pa.), 170; *Golden v. Morning News*, 42 Fed. Rep. 112; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. Rep. 433; *Bentlif v. London &c. Finance Corp.*, 44 Fed. Rep. 667; *s. c.* 9 Rail. & Corp. L. J. 235; *Phillips v. Library Co.*, 141 Pa. St. 462; *s. c.* 23 Am. St. Rep. 304; 33 Am. & Eng. Corp. Cas. 41; 28 W. N. C. 21; 21 Atl. Rep. 640; *Fitzgerald &c. Constr. Co. v. Fitzgerald*, 137 U. S. 98; *s. c.* 34 L. ed. 608; 33 Am.

& Eng. Corp. Cas. 306; 9 Rail. & Corp. L. J. 55; 11 Sup. Ct. Rep. 36; *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204; *Newell v. Great Western R. Co.*, 19 Mich. 336; *St. Clair v. Cox*, 106 U. S. 350; *M'Queen v. Middletown Man. Co.*, 16 Johns. (N. Y.) 5, *per* Spencer, J.; *Bushel v. Com. Ins. Co.*, 15 Serg. & R. (Pa.) 176 (doctrine recognized); *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15. In these and many other cases, the distinction already stated (*ante*, § 7529), is constantly pointed out between an officer or agent of a corporation coming casually into the State for the purposes of its business, and the corporation itself coming there by establishing a permanent business agency there. In a personal action brought in a court of a State against a corporation which is neither incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its *president*, temporarily within the jurisdiction, cannot be made the foundation of a judgment which will be recognized as valid in a court of the United States: *Goldey v. Morning News*, 156 U. S. 518; affirming *s. c.* 42 Fed. Rep. 112.

tion,¹—always provided that the local statute law has not changed the practice. Thus, where the *president* of a foreign corporation was within the domestic jurisdiction for the purpose of negotiating a mortgage of its property and procuring the bonds thereby secured to be listed upon the stock exchange, he did not bring the corporation with him in such a sense that jurisdiction *in personam* could be obtained over it by service of process upon him.²

¹ Thus, in a case where this principle was affirmed, the president of a New Jersey corporation was temporarily within the State of New Jersey, as Paxson, C. J., expressed it, “for either business or pleasure, it does not matter which”; and while so there, he was served with process, and it was held that there was no jurisdiction: *Phillips v. Library Co.*, 141 Pa. St. 462; *s. c.* 23 Am. St. Rep. 304.

² *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31. This rule has been changed in Michigan by a statute relating to the service of the writ of *garnishment* (*post*, § 8080), so that it is not necessary that the officer upon whom it is served should be within the State upon the business of his corporation. *Shafer Iron Co. v. Stone*, 88 Mich. 464; *s. c.* 50 N. W. Rep. 389. It had previously been changed with reference to the service of original process at law and in equity, by a statute (*How. Stat. Mich.*, § 8145), which was construed as not requiring that the officer or agent of the foreign corporation should be within the State upon official business for his corporation, or specially authorized by it to receive service of process. He was to be presumed to be such officer for the purposes of the statute, and he could not throw off his official character at will and defeat its object. *Shickle &c. Co. v. St. Louis*

Wiley Construction Co., 61 Mich. 226; *s. c.* 28 N. W. Rep. 77; 1 Am. St. Rep. 571. The statute seems to have been enacted to remedy the defects pointed out in *Newell v. Great Western R. Co.*, 19 Mich. 336. An exception to the foregoing principle also exists under the statute law of New York (*N. Y. Code Civ. Proc.*, §§ 134, 427; of the present code, § 1780; of the *Code of Civ. Proc.*, § 432), which, as construed and administered, permits service upon an officer of a foreign corporation in a case where the cause of action arose within the State of New York, although such officer is but temporarily within the State, and on his own business. *Hiller v. Burlington &c. R. Co.*, 70 N. Y. 223; *Pope v. Terre Haute Car &c. Co.*, 87 N. Y. 137; affirming *s. c.* 24 Hun (N. Y.), 238. The Federal courts sitting within that State do not admit the principle of these decisions, and a judgment *in personam* upon such a service would not be rendered by those courts, although service may have been had upon the president of a foreign corporation temporarily within the State for the purpose of settling its business. *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635. The reason is that the foreign corporation would not be “found” within the State, under such circumstances, within the meaning of section 739 of the Revised Statutes of

§ 8031. Doctrine not Applicable to Agents Appointed to do Business for the Corporation within the State.—“If,” said a very able judge, “the president of a bank of another State were to come within this State, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived this character.”¹ This language was pronounced at an early stage of the development of American jurisprudence upon the question under consideration, and it must be restrained to cases where the officer or agent of the foreign corporation is *casually* within the domestic State; for clearly it has no application to the case where the corporation enters the State by its officer or agent, and establishes a branch or agency there for the conduct of its business; and so it has been frequently held.²

the United States. *Ibid.* It may, for stronger reasons, be added that it would not be an “*inhabitant*” of the State within the same and subsequent Federal statutes using that word. *Ante*, § 7484. When, therefore, an action had been commenced in a State court of New York, founded upon a service upon a director of the corporation found within the State, but not there in any official capacity, or on the business of the corporation, and afterwards the cause was removed to a Federal court, it was dismissed by that court for want of jurisdiction. *Bentlif v. London &c. Finance Corp.*, 44 Fed. Rep. 667; *s. c.* 9 Rail. & Corp. L. J. 235.

¹ *M’Queen v. Middletown Man. Co.*, 16 Johns. (N. Y.) 5, 7, *per* Spencer, J. This was a *dictum*, but it has been cited with approval in subsequent cases:—*Bushel v. Com. Ins. Co.*, 15 Serg. & R. (Pa.) 173, 176; *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222, 223. Similar language is used in some of the cases cited, *ante*, §§ 7529, 8030.

* *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222. In a case where a railway company, created under the laws of Canada, was sued in a court in the State of Michigan, and service of process was made upon its treasurer, casually within the State and not there on the business of the corporation, and the corporation had no office or agency within the State of Michigan, it was held that the court could not proceed to judgment. In giving the opinion of the court Mr. Justice Graves said: “The corporate entity could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State, an actual present official

§ 8032. Not Necessary that Agent¹ should Reside Continuously within the State. — The general rule first stated,¹ as clearly shown by the facts of those cases, and the reasoning of the courts rendering the decisions, is for the reason that, in such a case, *there is no agency*, — the relation of principal and agent does not exist. It is not to be inferred from those decisions that it is necessary, in order to support such a juris-

or representative *status*. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, — it could not with propriety be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so *when the treasurer, the then official, the officer then in a manner impersonating the company, should be served*. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official *status* or representative character in this State." *Newell v. Great Western R. Co.*, 19 Mich. 336, 344; quoted with approval in *St. Clair v. Cox*, 106 U. S. 350, 358. To the same effect is *Moulin v. Trenton Mut. &c. Ins. Co.*, 24 N. J. L. 222. Quoting this language, it was added by the Supreme Court of the United

States, speaking through Mr. Justice Field: "According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the State. This representation implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered, in other tribunals, as possessing any probative force." *St. Clair v. Cox*, 106 U. S. 350, 358. In *Andrews v. Michigan Central R. Co.*, 99 Mass. 534, it was held that *service of process on the treasurer of the defendant, at its office in Boston, was not sufficient, and, as there was no attachment of the property, the action was dismissed*. But, qualifying this decision, it was pointed out in the opinion of the same court in a subsequent case, that "the question does not seem to have been distinctly considered in that case, whether a corporation, having a usual place of business here for the transaction of its business, may be treated as *found* here, and therefore liable to suit in our courts." *National Bank v. Huntington*, 129 Mass. 444, 446.

¹ *Ante*, §§ 7519, 8024.

diction, that the agent of the foreign corporation upon whom the process is served, should be *continuously resident* within the State asserting the jurisdiction. It is sufficient if the corporation itself has an agency in the State and does business there, and if the agent on whom the process was served was there on the business of the corporation.¹

§ 8033. **Agent must be Representing Corporation as Matter of Fact.**—Except in cases where the foreign corporation has appointed a particular agent, and empowered him to receive service of process in actions against it within the domestic State, and in cases where the statute in express terms designates the kind of agent upon whom process against a foreign corporation must be served,—then it is an obvious rule, enforced by the cases cited in the preceding section, that, in order to acquire jurisdiction over a foreign corporation by service on a *local agent*, such agent must be one actually appointed by and representing the corporation *as a matter of fact*, and not one created by construction or implication, contrary to the intention of the parties.²

§ 8034. **Service upon Sub-corporations Organized by the Foreign Corporation to Carry on its Business in the Domestic State.**—It is very clear that the relation between the *parent corporation*, so to speak, and a *sub-corporation*, organized to exploit its business in another State, *may* be that of *principal*

¹ In such a case a service was held good on the *president* of a foreign insurance company, who “from time to time, by direction and authority of said defendants, went to the State” asserting the jurisdiction. *Moulin v. Trenton Mut. &c. Ins. Co.*, 25 N. J. L. 57; with which compare the same decision on a former appeal, 24 N. J. L. 222; and compare the old case of *Nash v. Rector*, 1 Miles (Pa.), 78. That service upon a “*managing agent*,” temporarily within the State, is a good service under the

New York statute, see *Porter v. Sewall Safety Car-Heating Co.*, 7 N. Y. Supp. 166; *s. c.* 23 Abb. N. Cas. (N. Y.) 233; 17 Civ. Proc. Rep. (N. Y.) 386.

² *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17. That the question of agency for this purpose is a *question of fact*, see *Mackereth v. Glasgow &c. R. Co.*, L. R. 8 Ex. 149; *Hester v. Rasin Fertilizer Co.*, 33 S. C. 609, *mem.*; *s. c.* 33 Am. & Eng. Corp. Cas. 44; 12 S. E. Rep. 563.

and *agent*. Indeed, the subordinate corporation may be a mere *dummy*, created by the principal corporation to effect its purposes, in such a sense that the principal corporation will be liable for its *debts*, and even for its *torts*. But whether it will be so liable, or whether it will be bound by a service of process upon such subordinate corporation in an action against itself, will depend upon the actual relations which subsist between the two, and usually it will be a *question of fact*.¹ Where a suit in equity had been brought against the Bell Telephone Company, and process was served upon a subordinate company acting as its licensee in the State of Ohio, and it appeared that its relations with the dominant company existed under contracts under which the subordinate company was entitled to use the telephone instruments of the principal company, as its *licensee*, or *lessee*, — it was held that the Circuit Court of the United States, sitting in Ohio, did not obtain jurisdiction *in personam* over the Bell Telephone Company, as a corporation carrying on business in that State, by the service of process on the local corporation, as the *agent* of the foreign corporation, doing business therein. And this was so, although, under the contracts subsisting between the two corporations, the right was reserved to the foreign corporation to take possession and carry on the telephone business in Ohio, upon the failure of the local corporation to perform the terms and stipulations required, it appearing that such right had not been actually exercised, and that no relation of principal and agent existed between the two corporations in fact or in law.²

§ 8035. **Service upon a Director.** — Under a statute of New York,³ process against a foreign corporation may be *served on a director*, provided he is such in fact. Evidence showing that one on whom such process had been served had been elected a director, and that the records of the corporation so declared, was held sufficient evidence of his being a director,

¹ *Ante*, § 7505.

² *United States v. American Bell*
Teleph. Co., 29 Fed. Rep. 17.

³ N. Y. Code Civ. Proc., § 432,
subd. 3.

to support a jurisdiction founded upon such service.¹ Outside of such a statutory provision, a single director is not, on principle, an agent of the corporation upon whom service of process can properly be had.²

§ 8036. Service upon the "Principal Officer."—A *principal officer* is said to be "one whose oversight or agency extends either over the whole or some particular department of the general business of the corporation; as a president who has ordinarily a general oversight over its entire business, a secretary over its records, or a treasurer over its moneys, — or at least receiving and paying them out." Where a *foreign trust company* had taken possession of a domestic railroad under a power in a mortgage, and was operating it for the benefit of the bondholders, it was held that "the *general managing agent*" of said foreign trust company, was not a principal officer of the company, within the meaning of the statute, although the sheriff described him as such in his return.³

§ 8037. Service upon "Managing Agent."—Several of the statutes relating to service of process against foreign corporations permit such process to be served upon the "*managing agent*." The "managing agent," within the meaning of such a statute, is a person exercising the functions of an officer in the control and management of the business of the corporation, and does not include a person who merely has charge of some special work in its behalf,⁴ — such as a *baggage master* of a transportation company;⁵ or an agent employed to *make purchases* of horses and of food for the same;⁶ or an *assistant secretary*;⁷ or an agent having charge merely of the *transfer of shares* of the stock of the company, and the trans-

¹ Childs v. Harris Man. Co., 104 N. Y. 477; s. c. 10 N. E. Rep. 50.

² Ante, § 3906. Compare, ante, § 5220, et seq.

³ Farmers' Loan & Trust Co. v. Warring, 20 Wis. 290.

⁴ Hat-Sweat Man. Co. v. Davis Sewing Machine Co., 31 Fed. Rep. 294.

⁵ Flynn v. Hudson River & Co., 6 How. Pr. (N. Y.) 308.

⁶ Emerson v. Auburn R. Co., 13 Hun (N. Y.), 150.

⁷ Sterett v. Denver & Co., 17 Hun (N. Y.), 316.

mission of assessments paid by its shareholders;¹ or an agent who merely *sells railroad tickets*.² Some of the decisions have gone so far as to hold that the "managing agent," upon whom the summons may be served, must be one whose agency extends to all the transactions of the corporation; one who has, or is engaged in the management of the corporation, in contradistinction from the management of a particular branch or department of its business;³ but this distinction is broader than is usually required by later decisions.⁴ The later and better view is that an agent is to be deemed a "managing agent," within the meaning of such statutes, where he carries on within the domestic jurisdiction an *essential portion* of the business of the foreign corporation, — such, for instance, as the *superintendent of a factory* maintained by the foreign corporation within the domestic jurisdiction.⁵

§ 8038. Service upon Any Agent by Whom the Corporation does its Business in the Domestic State. — It has been frequently held that where a foreign corporation *does business within the domestic State*, the person who, as its agent, *does that business*, should be considered its "managing agent" for the purpose of serving process against it under such a statute; and more especially so where the foreign corporation has an office or place of business within the domestic State, which office is in charge of such agent, who acts for the corporation. He is there doing business for it, managing its business, and is regarded, in every sense of the word used in the statute, as its "managing agent."⁶ Such person is an "*agent*" of the

¹ Reddington v. Mariposa &c. Co., 19 Hun (N. Y.), 405.

² Doty v. Michigan Central R. Co., 8 Abb. Pr. (N. Y.) 427.

³ Brewster v. Michigan Central R. Co., 5 How. Pr. (N. Y.) 183, 186.

⁴ Hat-Sweat Man. Co. v. Davis Sewing Machine Co., 31 Fed. Rep. 294.

⁵ *Ibid.* A statute (N. Y. Code Civ. Proc., § 432), which permits service of process, in an action against a foreign

corporation, upon its "*managing agent*," "*within the State*," is satisfied by a service upon its general manager while *temporarily* within the State. Porter v. Sewall Safety Car-Heating Co., 7 N. Y. Supp. 166; *s. c.* 23 Abb. N. Cas. (N. Y.) 233; 17 Civ. Proc. Rep. (N. Y.) 386. Compare *ante*, §§ 7529, 8030.

⁶ When, therefore, a railroad company, created under the laws of Illinois, maintained in the city and State

corporation, within the meaning of a general statute permitting process against it to be served upon an officer, director, agent, clerk, or engineer of the corporation.¹ This principle is embodied in a statute of Texas, applicable alike to domestic and to foreign corporations,² under which a foreign corporation may be sued in that State if it carries on business there, by service of process on its local agent within the county where such local agent carries on its business.³

§ 8039. Service upon Any Person doing Business for the Corporation.—Some of the States have been obliged, in order to prevent *foreign insurance companies* soliciting and procuring policies from their citizens, from eluding the jurisdiction of their courts, to prescribe, in the most sweeping terms, that a

of New York a kind of agent known as a "*general passenger agent*," and designated him on its circulars and time tables as its "general agent, passenger department," etc., and over whose office were displayed signs giving the name of the railroad, with the addition of the words "freight and passenger agency," etc.,—it was held that he was a "*managing agent*," upon whom process might be served, so as to give jurisdiction of a cause of action arising in Missouri. *Tuchband v. Chicago & C. R. Co.*, 115 N. Y. 437; *s. c.* 22 N. E. Rep. 360. Compare *Maxwell v. Speed*, 60 Mich. 36, where, under a different statute, service was had upon the *passenger agent* of a foreign railway company. As to who is a "*managing agent*," within the meaning of the New York statute,—see also *Shackleton v. Wainwright Man. Co.*, 7 N. Y. St. Rep. 872; *Porter v. Sewall Safety Car-Heating Co.*, 7 N. Y. Supp. 166; *s. c.* 23 Abb. N. Cas. (N. Y.) 233; 17 Civ. Proc. Rep. (N. Y.) 386. Where a foreign corporation had a managing agent in charge of a distinct and important portion of its business within the domestic State, it was "*found*"

within that State, within the meaning of the Federal statute relating to venue, as it formerly stood. *Hat-Sweat Man. Co. v. Davis Sewing Machine Co.*, 31 Fed. Rep. 294; construing Rev. Stat. U. S., § 914, and N. Y. Code Civ. Proc., § 432. See *ante*, § 7484, *et seq.* A corporation which merely acts as the *licensee* or *lessee* of a foreign corporation in exploiting a patented invention belonging to the latter, is not its "*managing agent*," within the domestic State, under another statute, although, under the terms of the contract between the two corporations, the foreign corporation reserves the right to take possession of the business, which right it has not, however, exercised. *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17; *ante*, § 8034.

¹ *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442; *s. c.* 17 Atl. Rep. 1079; construing N. J. Rev., p. 193, § 88.

² *Société Foncière v. Milliken*, 135 U. S. 304; *s. c.* 8 Rail. & Corp. L. J. 31; 10 Sup. Ct. Rep. 823.

³ *Ibid.* And see *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305.

service of process will be good in an action upon such a company, if made upon any person doing business for it, whether he receives compensation from it or not,—proceeding upon the principle already alluded to,¹ that an agent who is good enough to solicit premiums for a foreign insurance company is good enough to receive service of process for it when it is sued upon such a contract. Thus, a statute of Wisconsin in substance declares that “whoever *solicits insurance* on behalf of any insurance corporation, or transmits an application for insurance, or receives any premium, or in any manner aids or assists in doing any business for any insurance corporation, shall be held to be an agent of such corporation to all intents and purposes.”² Another statute provides that *service of process*, in an action against a foreign insurance company, may be had upon any agent of such corporation within the State, who is within the definition of the above section.³ Under these statutes, service of process may well be had upon one who *solicits and forwards an application for insurance* in the foreign insurance company, whether he had ever been appointed its agent, and whether he had ever received any compensation, or not.⁴ For stronger reasons, such service may be had upon one who engages in the business of soliciting applications of insurance in an *unlicensed foreign insurance company*, and who advertises such business.⁵ And so it may be well served upon the *secretary* of a subordinate division of a *benevolent order*, whose duty it is to certify to the health of every applicant for insurance therein, to keep a correct list of the members of the benefit department, to place thereon the name of any member of the insurance department joining his division by transfer from any other division, and also to receive notice from members of any change of residence; since this is enough to make him an “agent” of the association within the meaning of the above statute.⁶ It should be borne

¹ *Ante*, §§ 7519, 8024.

² Rev. Stat. Wis., § 1977.

³ Rev. Stat. Wis., § 2637, subd. 9.

⁴ *State v. Northwestern &c. Asso.*,
62 Wis. 174.

⁵ *State v. United States Mut. Asso.*,
67 Wis. 624.

⁶ *Dixon v. Order of Railway Con-*
ductors, 49 Fed. Rep. 910.

in mind that in these, and other like cases, the *conclusiveness of the judgment* as an instrument of *evidence* in the courts of other jurisdictions will be a *different question*.¹

§ 8040. **Agency Expired, but Business not Wound up.**—The mere fact that the agency has expired will not render invalid the service of process upon the agent of a foreign corporation, provided the business of his agency is *not yet wound up*, but where some part of it continues in his hands; as where an agent for the sale of agricultural machinery had been appointed by a foreign corporation, and the time had expired within which, under the contract, the corporation was to furnish him machinery for the sale, but yet where he had in his hands some machinery furnished him under the contract which had not been sold, and it did not appear that he had finally settled the business of his agency with his principal, or that he had been finally discharged therefrom.²

§ 8041. **Service upon Stockholders.**—Statutes exist in some of the States authorizing the service of process in actions against foreign corporations upon any stockholder found within the jurisdiction. Thus, a statute of Colorado enacts: "If the suit be against a foreign corporation, or a non-resident joint-stock company or association doing business within this State, service shall be made by delivering a copy of the writ to an agent, cashier, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder."³ Upon the question whether one upon whom process in such an action had been served, was at the time of the service a stockholder in the foreign corporation, it was held that the fact that he had *transferred his shares* to trustees whose names he did not know, for some unknown and undefined purpose, at the same time contributing fifty dollars to cover the expense of the transfer, did not deprive him of his

¹ *Ante*, § 8028.

² *Gross v. Nichols*, 72 Iowa, 239; the Iowa statute quoted *ante*, § 8029, *Brunson v. Nichols*, 72 Iowa, 763. note. *Ibid*.

³ Colo. Code Civ. Proc., § 40.

character of stockholder so as to defeat the jurisdiction of the court. The court reasoned that, in order to establish a plea to the jurisdiction on such a ground, it was necessary to show that the stockholder had fairly, unequivocally and in good faith divested himself entirely of all ownership and interest in his shares, and severed all connection with the company; that a transfer upon the books might be no evidence of a change of ownership, because it might be collusive; and that the burden of showing that he was not a stockholder was upon the party impeaching the transaction, and that he ought to establish the change of ownership by clear and conclusive testimony.¹

§ 8042. Alternative Service. — Many of the statutes of the States provide for what may be termed alternative service: First, upon the president or other head officer of the corporation, if such officer can be found within the jurisdiction; or if not, then upon some subordinate officer, or agent, or even an employé; and in some cases, if no agent or employé can be found, provision is made for service by publication.² As already seen,³ where this mode of service is prescribed by statute, if the service is had upon any other officer than those first named, the conditions nominated in the statute upon which service may be made upon subordinate officers, agents, etc., must be disclosed by the return, or there will be no jurisdiction. There are, however, cases in seeming opposition to this sound principle. On the other hand, where the jurisdiction is challenged in any appropriate proceeding⁴ on the ground of service not being had upon the principal officer, the challenging party must bring his challenge within the terms of the statute. When, therefore, the statute recited, — “when

¹ *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 511; s. c. 22 Am. St. Rep. 433; 25 Pac. Rep. 325; 9 Rail. & Corp. L. J. 113.

² For an example of such a statute, see Civ. Code Neb., § 912; *Chicago & C. R. Co. v. Manning*, 23 Neb. 552; s. c. 37 N. W. Rep. 462.

³ *Ante*, §§ 7503, 8021.

⁴ The proceeding in the case about to be cited was an *affidavit of illegality* under the practice of Georgia, which is understood to be a mode of challenging the legality of a proceeding under execution upon a judgment.

the chief officer of any express company shall *reside* in this State," etc.,—providing for a service upon another officer in other cases, it was held that the party challenging the mode of service did not show a want of jurisdiction, by an affidavit showing that the president of the company *had his principal office* within the State.¹

§ 8043. **Service upon Vice-president.**—The office of *vice-president* of a corporation is one which has received judicial attention in a limited number of cases only.² This officer, as the name implies, discharges the duties of president in his absence or disability; and, in some cases, as is well known, there are several vice-presidents, to each of whom special departments of the executive functions are assigned. We have noticed the principle that strict, or at least substantial, compliance with statutes relating to the service of process on corporations is demanded,³ and the further principle that where a statute requires service upon a particular officer, it is not complied with by service upon an *acting officer*,—as, for instance, an *acting clerk* of a municipal corporation.⁴ It should seem, then, especially in view of the principle relating to *alternative service*,⁵ that where service is had upon the vice-president, the return ought to show *that the president is absent*, unless the statute especially names the vice-president as one of the leading officers upon whom process may be served. But, under a statute providing that service upon corporations "shall be made by delivering a copy of the summons to the president, or other head of the corporation, or to the secretary,

¹ *Southern Express Co. v. Skipper*, 85 Ga. 565; s. c. 11 S. E. Rep. 871. Under some statutes in Tennessee (2 Thomp. & Steg. Tenn. Stat. 1871, §§ 2831–2834; Mill. & Vent. Code Tenn., §§ 3536–3539), service of summons upon the subordinate officer of a foreign corporation, described in the return as "the highest officer to be found in the county," is sufficient service upon the corporation, al-

though the return of service does not show that the president or other head of the corporation was absent from the county. The presumption is that the sheriff has served the process upon the proper party. *Kansas City & C. R. Co. v. Daughtry*, 138 U. S. 298.

² *Ante*, §§ 4687–4689.

³ *Ante*, §§ 7503, 8021.

⁴ *Ante*, § 7509.

⁵ *Ante*, § 7530.

cashier, treasurer, or general agent thereof, but if no such officer of the corporation can be found in the county, service may be had on any stockholder,"—service upon the vice-president is sufficient, although the return does not show that the president could not be found in the county; because the vice-president comes within the description "or other head of the corporation"; and it would seem that service on him would be good, if the president were in the county, he being one of the heads of the corporation. "The language of this provision," said Richmond, C., "admits the service upon any of the officers enumerated therein, president or other head of the corporation, the secretary, cashier, treasurer, or general agent. Certainly the vice-president comes within the provisions of this section."¹

§ 8044. **Service upon Mere Clerk.**—The theory of the modern law, independently of statutes, is that a foreign corporation is suable only where it has established a permanent agency, or business within the domestic State, and then only by service upon the managing agent, or head officer of that agency.² It is easy to conclude in favor of the correctness of an interpretation which holds that a statute requiring writs to be served upon the clerk, etc., of a corporation, refers only to *domestic corporations*,³ unless foreign corporations are mentioned therein.

§ 8045. **Service upon Receivers.**—Since the recent act of Congress permitting actions in the State courts to be brought against receivers appointed by the Federal courts, without permission of the court appointing them, it seems that a receiver in charge of a railroad property stands in the place of the corporation, in such a sense that he may be sued by a service of process upon any agent or employé upon whom process might be served under the State statute, if the action

¹ Comet Consolidated &c. Co. v. Frost, 15 Colo. 310, 315; s. c. 25 Pac. Rep. 506.

² *Ante*, § 7995, *et seq.*

³ Hall v. Vermont &c. R. Co., 28 Vt. 401; construing Comp. Stat. Vt., p. 244, § 19. Compare *ante*, § 7524.

were brought against the corporation itself in case it were still in charge of its property.¹

§ 8046. **Where a Railroad Company has Leased its Road to Another Company**, and, in the operation of the road the lessee company has failed to discharge its duties as a *common carrier*, the party damaged thereby has a remedy by action against the lessee company for the breach of the duty which it has assumed, and it is not necessary for him to make the lessor company a party or to serve it with process.² But *if the lease has not been authorized*, then the lessor company seeking to cast off its public duties, remains liable for the torts and non-feasance of the lessee company in the discharge of its *public duties*; and hence the person having a cause of action for such an injury may, if he sees fit, bring his action against the lessor company; and it seems that he may join both the lessor and the lessee.³ If the lessee is a *foreign corporation*, then, under a statute providing that "the lessees of any railroad . . . shall be liable to suit of any kind in the same court or jurisdiction as the lessors, or owners of the railroad were before the lease,"⁴ service may be made upon it by leaving a copy at the office of the superintendent, if that is the *principal office of the lessee* as it had previously been that of the lessor, under another statute,⁵ which would have made that mode of service sufficient if the railroad had remained in the hands of the lessor.⁶

§ 8047. **Service upon the Agent Who is Himself Plaintiff in the Action.**—A statute providing for service of process upon any agent of a foreign corporation need not specially

¹ Proctor v. Missouri &c. R. Co., 42 Mo. App. 124. The fact that the sheriff understood that he was making service only on the railroad corporation, is no objection to the jurisdiction, if in fact what he did and what he stated in his return exhibited a service against the receiver. *Ibid.*

² Central R. &c. Co. v. Logan, 77 Ga. 804; s. c. 30 Am. & Eng. R. Cas. 63; 2 S. E. Rep. 465; 2 Rail. & Corp. L. J. 160; *ante*, § 5886.

³ *Ante*, §§ 5884, 5885.

⁴ Ga. Acts 1884-1885, p. 49.

⁵ Ga. Code, § 3407.

⁶ Hills v. Richmond &c. R. Co., 37 Fed. Rep. 660.

except the case where the action is brought against the corporation by the agent himself, because such an exception is engrafted upon the statute by the principles of the common law, and service upon such an agent in his own action is void.¹

§ 8048. **Evidence of Service of Process.**—The *return* of a sheriff that he had served a writ on a foreign insurance company doing business within the State, by serving it on its “*lawful attorney*,” has been held *prima facie* a good service of the writ, such as gives the court jurisdiction to render a personal judgment against the defendant. The court reasoned that the words “*lawful attorney*” in such a return should be regarded as meaning, *prima facie*, the attorney on whom the statute authorized such process to be served.² But, notwithstanding this holding, the true theory of a sheriff’s or marshal’s return is, that it should state the *facts* relating to the service of the writ, and should avoid statements of *conclusions of law*, and that where it undertakes to state conclusions of law, no *presumptions* will be indulged in its favor.³ In the

¹ *Rehm v. German Ins. & Sav. Inst.*, 125 Ind. 135; *s. c.* 25 N. E. Rep. 173; *ante*, § 7528. Compare *ante*, § 5205, *et seq.*

² *Webster Wagon Co. v. Home Ins. Co.*, 27 W. Va. 314, 321.

³ Thus, where a marshal of the United States served a subpoena in equity upon a foreign corporation, and made return that he had served the writ on the defendant, the American Bell Telephone Company (which was a corporation doing business and found within the East and West Divisions of the Southern District of the State of Ohio), by reading the same to A. D. Bullock, president of the City and Suburban Telegraph Company, and delivering him a duly attested copy thereof (the City and Suburban Telegraph Company being an agent and partner of the American Bell Telephone Company within

the said Southern District of the State of Ohio), etc.,—it was held that this failed to show affirmatively a state of facts constituting a valid service upon the American Bell Telephone Company, either under the Judiciary Acts, the rules of practice governing the Circuit Courts of the United States, or the statute of Ohio providing for service of process on a foreign corporation having a “*managing agent*” within the State. The return was irregular, in that the marshal did not confine himself to a statement of what he did in serving the process, but stated conclusions of law, and no presumptions could therefore be indulged in favor of it, so as to support the jurisdiction of the court over a non-resident corporation. *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 17.

absence of a return, where there is a *decree* reciting the facts, if the decree recites that process was "*duly served*," this, it has been said, will be taken to be true on appeal.¹

§ 8049. Construction of Particular Statutes Relating to Service of Process on Foreign Corporations.— Recollecting that the governing statute must be strictly, or at least substantially pursued, we are prepared for such holdings as that the *advertising agent of a newspaper* published by a corporation created under the laws of another State, who merely solicits and forwards advertisements, and collects bills for the same, receiving a commission therefor, is not an "agent," within the meaning of a general statute relating to the service of process on foreign corporations;² that a so-called *railway passenger agent*, whose duty it is to solicit travel for his road, is not an "agent," within the meaning of a statute relating to service of process on foreign corporations, although he may have been employed to effect a compromise of the plaintiff's claim;³ and that a statute⁴ demanding service upon the president, secretary, treasurer, or local agent, is not satisfied with a service upon the manager of a domestic corporation.⁵

§ 8050. Notice by Publication in Lieu of Personal Service.— Proceeding upon the premise of the theory of the old law, that a foreign corporation was not suable at common law, and hence could only be served with process in the manner authorized by some statute, we find that it has been held that

¹ Shafer v. O'Brien, 31 W. Va. 601, 606.

² Mulhearn v. Press Pub. Co., 53 N. J. L. 150; s. c. 20 Atl. Rep. 760.

³ Maxwell v. Atchison &c. R. Co., 34 Fed. Rep. 286.

⁴ Tex. Civ. Stat., art. 1223.

⁵ Under a statute of South Carolina, service of process upon a cause of action arising therein may be made by delivering a copy of the summons to the president or other head officer of the corporation, or any agent thereof anywhere; but unless the foreign corporation has property within the State, or the cause of

action arises therein, it can only be served by delivering, within the State, a copy of the summons to the president, or any *resident agent* thereof. Hester v. Rasin Fertilizer Co., 33 S. C. 609, *mem.*; s. c. 33 Am. & Eng. Corp. Cas. 44; 12 S. E. Rep. 563; construing 19 South Car. Stat. 835, amending § 155 of the South Car. Code. Construction of Tenn. Stat. (Mill. & V. Code Tenn., §§ 3536—3539); Cumberland Teleph. &c. Co. v. Turner, 88 Tenn. 265; s. c. 12 S. W. Rep. 544; Chicago &c. R. Co. v. Walker, 9 Lea (Tenn.), 475; Peters v. Neely, 16 Lea (Tenn.), 275.

it may be served *by publication*,¹ and in no other mode,² until the enactment of a *statute* providing for service of summons.³ This mode of service is generally authorized where the proceeding is *in rem*, and where there is *property* within the jurisdiction to be affected by the judgment, or decree. The eighth section of the Federal Judiciary Act of 1875 provides for this mode of service upon non-resident defendants, when suit is commenced "to enforce any legal or equitable *lien* upon, or *claim* to, or to remove any *incumbrance* or *lien* or *cloud* upon the *title* to real or personal property within the district." It has been held that this statute will not support jurisdiction by publication of a suit in equity against a foreign corporation to remove a *cloud* upon the *title* to *letters patent* for an invention, granted by the United States. The reasoning is that the statute refers only to proceedings against *tangible property*, and not to proceedings against property which is ideal and not actual, and which cannot be seized and sold under execution.⁴ As to the effect of jurisdiction acquired in this mode, it is not necessary to extend observations upon the principle that the courts of one State cannot extend their jurisdiction into another State, so as to reach either persons or corporations domiciled there. Upon this principle it has been held that courts of one State cannot render a valid judgment *in personam* against a foreign corporation in a case where it received no other notice than that made by *publication*, and where it does not appear to the action, but that such a judgment is a nullity.⁵

¹ Broome v. Galena &c. Co., 9 Minn. 239.

² Sullivan v. La Crosse &c. Co., 10 Minn. 386.

³ As was done the year following these decisions: Guernsey v. American Ins. Co., 13 Minn. 278.

⁴ Non-magnetic Watch Co. v. Association, 44 Fed. Rep. 6. That a

foreign corporation may be proceeded against in equity, by advertising under a statute, as in the case of any other absent defendant: Cunningham v. Pell, 5 Paige (N. Y.), 607.

⁵ Dearing v. Bank of Charleston, 5 Ga. 497; s. c. 48 Am. Dec. 300; recognized in City Fire Ins. Co. v. Carugi, 41 Ga. 660, 670.

CHAPTER CXCIX.

PROCEEDINGS AGAINST FOREIGN CORPORATIONS BY ATTACHMENT.

SECTION	SECTION
8059. Proceedings <i>in rem</i> against foreign corporations.	8062. Effect of a dissolution of corporation upon the attachment.
8060. Foreign corporations when not deemed non-residents within the meaning of attachment laws.	8063. Deposit of foreign insurance company not attachable by foreign creditor.
8061. Statutes giving such attachments may be retroactive.	8064. Attachments in courts of the United States.
	8065. Attachments by non-resident creditors.

§ 8059. Proceedings in Rem against Foreign Corporations.

It may be confidently stated that where the foreign corporation has *property* situated within the domestic jurisdiction, the road is open to proceedings *in rem* in the domestic tribunals against such property, on the part of creditors and others having claims against it, whether such persons be residents or non-residents. Where the creditors or claimants against the property are domestic citizens or *residents*, the jurisdiction is undoubted;¹ and where they are *non-residents*, the grounds of the *jurisdiction* seem to be equally clear, though there is a difference of opinion as to the propriety of exercising it.²

§ 8060. Foreign Corporations when not Deemed Non-residents within the Meaning of Attachment Laws. — We have already had occasion to note the principle that foreign corporations may become *domesticated* so as to be, for all purposes

¹ Wilson v. Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24. That foreign corporations are "*persons*" within the *attachment laws*, — see *ante*, § 7790.

² Central R. &c. Co. v. Georgia Construction &c. Co., 32 S. C. 319; *ante*, §§ 8003, 8004; *post*, §§ 8065, 8073.

of jurisdiction and procedure, domestic corporations within the State in which they acquire a qualified settlement and residence for the purposes of their business.¹ We have also had occasion to consider a class of statutes under which foreign corporations, doing business within the domestic State, become liable to *actions in personam*, in which case the judgments rendered against them have the same force and effect, in that and any other jurisdiction, as other judgments *in personam* rendered upon due notice.² It would logically seem that when a foreign corporation becomes so domiciled in the domestic State, it cannot be treated as a *non-resident* within the meaning of the attachment laws of that State.³

§ 8061. Statutes Giving Such Attachments may be Retro-active. — It is competent for the legislature of a State to pass a statute retroactive in its terms, *creating or enlarging the remedy* against foreign corporations by the writ of attachment, making it operate generally on existing as well as on subsequent causes of action; and this is no impairment of the obligation of contracts, or of vested rights, but falls within the

¹ *Ante*, § 7890, *et seq.*

² *Ante*, § 7994, *et seq.*

³ So held in *Farnsworth v. Terre Haute &c. R. Co.*, 29 Mo. 75. Where the Legislature of Kentucky conferred upon a foreign corporation all the privileges and immunities granted to it by the State creating it, it was held that, unless the effects of the corporation could be attached *in the State creating it*, for the mere failure to pay its liabilities, they could not be so attached in Kentucky, notwithstanding a general provision of the Code of Kentucky which otherwise would have sustained such an attachment. *Martin v. Mobile &c. R. Co.*, 7 Bush (Ky.), 116. Under a statute of New Jersey, exempting foreign corporations "*recognized by the laws of this State*" from attachment, it was held that, within the meaning of the law,

a foreign corporation was clearly "recognized" when, by an enabling act, it was *permitted to hold lands* within the State, for the purpose of transacting its business. *Phillipsburgh Bank v. Lackawanna R. Co.*, 27 N. J. L. 206. On the other hand, the fact that a railroad company had been allowed, by a special act of the Legislature of Georgia, to enter into a contract with a municipal corporation of that State, situated on its boundary line, and to extend its railroad into the limits of that corporation, and was by the same act made liable to suits in the courts of Georgia, — was held not to change its character as a foreign corporation so as to prevent it from being subject to foreign attachment. *South Carolina R. Co. v. People's Sav. Inst.*, 64 Ga. 18.

familiar rule of constitutional law that the legislature has the power, at its pleasure, to change the laws relating to *remedies*.¹

§ 8062. **Effect of a Dissolution of Corporation upon the Attachment.**—There is a holding to the effect that whenever a foreign attachment will lie against a corporation as defendant, the civil death of the corporation before the rendition of judgment against it, produced by a *decree of forfeiture* of its charter by a judicial tribunal of the State or country of its residence, dissolves the attachment. This decision proceeds upon the theory that the primary object of a foreign attachment is to coerce the appearance of the defendant, and that the attachment is therefore necessarily dissolved as soon as the defendant has *lost its capacity to appear*.² But it is doubtful whether this expresses the sound view. To coerce the appearance of the defendant is only *one* of the objects of a foreign attachment. The primary object is to enable the plaintiff to secure the satisfaction of his demand. Hence, if the corporation had capacity to appear at the time when the attachment was levied and the publication made, the jurisdiction of the court over the *res* attached, and it had power to proceed with the condemnation. Another court has held that, notwithstanding the foreign corporation has forfeited its franchises, has been declared insolvent, and its property placed in the hands of a receiver by an order of court obtained in the State where the corporation is domiciled,—there is nothing in the comity which exists among the States making it improper for the courts of another State to support an *attachment*

¹ Coosa River Steamboat Co. v. Barclay, 30 Ala. 120. In this case it was held that an attachment lay against a foreign corporation under the Alabama Act of 1854 on a cause of action which arose prior to the passage of the statute. So, it was held in New York that choses in action, attached in a suit at law against a foreign corporation, could not have

been sold on execution prior to the statute of 1840; but that such property, attached prior to the enactment of the statute, might, under its operation, be sold on execution subsequently issued. Crosby v. Lumbermen's Bank, 1 Clark (N. Y.), 234.

² Farmers' &c. Bank v. Little, 8 Watts & S. (Pa.) 207; s. c. 42 Am. Dec. 293.

proceeding, brought by a creditor against the property of the defunct corporation, located in the State of the forum.¹

§ 8063. **Deposit of Foreign Insurance Company not Attachable by Foreign Creditor.**—The assets of a foreign insurance company *deposited with the Treasurer of a State* in which it elects to do business, under the laws of such State, which laws provide that they shall be returned when the company shall cease to do business in the State and shall have satisfied its liabilities there,—are not subject to attachment at the suit of a *foreign creditor*, after the company has withdrawn its business from the State and settled its liabilities there. On the contrary, the company is entitled to receive back its securities, in compliance with the law of the State and its contract entered into with the State in pursuance of that law; though it is suggested that, in case the company should allow its deposit to remain there for the purpose of placing it beyond the reach of its creditors, the courts would afford a remedy to prevent and suppress such a fraud.²

§ 8064. **Attachments in Courts of the United States.**—The remedy by foreign attachment was unknown to the common law, except so far as it was recognized as subsisting by *custom* in certain localities, London and York in particular.³ But the utility of this remedy is such that it has generally found a place in the American statutory remedial systems. A conspicuous exception to this statement lay in the fact that, until the year 1872, Congress had failed to enact any law giving this remedy in the courts of the United States as a means of compelling the defendant to answer or otherwise;⁴ so that

¹ City Ins. Co. v. Commercial Bank, 68 Ill. 348.

² Rollo v. Andes Ins. Co., 23 Gratt. (Va.) 509; s. c. 14 Am. Rep. 147.

³ Brandon on Foreign Attachment, p. 1; Bond v. Ward, 7 Mass. 123; s. c. 5 Am. Dec. 28.

⁴ Toland v. Sprague, 12 Pet. (U. S.) 300; Irvine v. Lowry, 14 Pet. (U. S.) 293; Dormitzer v. Illinois &c. Bridge

Co., 6 Fed. Rep. 217; Anderson v. Shaffer, 10 Fed. Rep. 266; Chittenden & Co. v. Darden, 2 Woods (U. S.), 437; Saddler v. Hudson, 2 Curt. (U. S.) 6; Nazro v. Cragin, 3 Dill. (U. S.) 474; Levy v. Fitzpatrick, 15 Pet. (U. S.) 167, 171; Ex parte Railway Co., 103 U. S. 794. Compare North v. McDonald, 1 Biss. (U. S.) 57.

an attachment could only issue in those courts where they had jurisdiction of an action against the defendant *in personam*, and then the attachment was only an *auxiliary* writ. If, however, a foreign attachment was issued without right, by a Circuit Court of the United States, while it was the privilege of the defendant to refuse to appear, yet it was competent for him to *waive the privilege*, and he did so by appearing and pleading to the merits.¹ It is now provided by act of Congress that in common-law causes in the Circuit and District Courts of the United States, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and that such Circuit and District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held, in relation to attachments and other process; provided that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.² Under this act of Congress the Federal courts apply the State statutes relating to attachment against *non-resident corporations* doing business within the State within which the Federal court is held; so that such a corporation, having a managing agent there, may be liable in process of *garnishment* equally with a domestic corporation.³

§ 8065. **Attachments by Non-resident Creditors.**—Whether a *non-resident creditor*, individual or incorporate, will be permitted to proceed by attachment against the property of a *foreign corporation* situated within the domestic jurisdiction, depends upon the policy of that State with regard to affording remedies to foreign creditors in its courts,—in respect of which question we have discovered a marked difference of opinion among the courts.⁴ If the proceeding by attachment is re-

¹ Cases cited *supra*. See also Pol-
lard v. Dwight, 4 Cranch (U. S.), 421;
ante, § 7552, *et seq.*

² 1 Rev. Stat. U. S., § 915; Act
Cong. 1872, 17 U. S. Stat. 197.

³ Rainey v. Maas, 51 Fed. Rep. 580.

⁴ *Ante*, §§ 8003, 8004.

garded as merely *ancillary* to the principal suit, and if the *situs of the contract* which is the subject-matter of the principal suit is not in the domestic State, then the courts of that State will not feel bound to open their doors to the litigation; because, in general, the courts of a State do not sit to determine controversies between foreigners in regard to contracts which they have made abroad. If, therefore, the principal action fails for want of jurisdiction over the subject-matter, the ancillary attachment will fail with it.¹ But where the proceeding is by what is called an *original* attachment, and the object is to reach and subject assets of the foreign corporation found within the domestic State, then the domestic tribunals have, on general principles of law, jurisdiction to proceed; since the subject-matter of the action, namely, the assets to subject which the proceeding is brought, are situated within the territorial limits of their jurisdiction;² and if in such a case jurisdiction is repelled, foreign corporations may remove their property beyond the reach of their creditors, merely by depositing it within the limits of such a State. A State pursuing such a judicial policy might become the Whitefriars of bankrupt and dishonest corporations.

¹ *Central R. & Co. v. Georgia Construction & Co.*, 32 S. C. 319; *s. c.* 11 S. E. Rep. 192; 7 Rail. & Corp. L. J. 422. This case holds that, under section 423 of the Code of Procedure of South Carolina, a non-resident can sue a corporation in a court of that

State, only in cases where the cause of action arises or the subject of the action is situated in that State, and that he cannot, under any other circumstances, obtain an attachment.

² *Ante*, § 8059.

CHAPTER CC.

PROCEEDINGS AGAINST FOREIGN CORPORATIONS BY GARNISHMENT.

SECTION

- 8069. Garnishment of funds held by foreign corporations for others.
- 8070. Circumstances under which foreign corporations not subject to garnishment.
- 8071. Garnishment of the funds of foreign corporations in the hands of resident custodians.
- 8072. Attachment of a debt due from a citizen of another State to a foreign corporation of a third State.
- 8073. *Situs* of a debt due by a foreign corporation for the purpose of garnishment.
- 8074. Injunctions restraining domestic citizens from proceeding in a foreign State to subject

SECTION

- exempt wages due from foreign corporation.
- 8075. Garnishment of the wages due by foreign corporations to non-resident employes, exempt in State of residence.
- 8076. Garnishee may plead exemption of principal debtor.
- 8077. Theory that it is the duty of the garnishee to plead the exemption.
- 8078. Duty of the garnishee to notify creditor.
- 8079. Necessary that the garnishee should have notice.
- 8080. Service of the garnishment.
- 8081. Compelling disclosures by the officers of foreign corporations.

§ 8069. **Garnishment of Funds Held by Foreign Corporations for Others.** — A proceeding by garnishment is dual in its nature. In so far as it is a proceeding against the principal debtor, it is a proceeding *in rem*; because it results in attaching money or property belonging to him which is held by another for him. But in so far as it is a proceeding against the custodian of his money or property, that is to say, against the garnishee, it is a proceeding *in personam*; because, like an ordinary action commenced by summons, it proceeds upon notice, upon an answer and a hearing, and results, if successful, in a *personal* judgment against the garnishee.¹ When the

¹ That this is the proper conception of the nature of the proceeding, see *Tunstall v. Worthington*, Hempst.

(U. S.) 662; *Mahany v. Kephart &c. R. Co.*, 15 W. Va. 609, 625.

nature of the proceeding is thus understood, it would seem to follow, on principle, and as a general rule, that where a *foreign corporation is established in the domestic State* in such a manner that it is liable to be there sued in an ordinary action *in personam*, it is there liable to garnishment, provided it have in its custody money or property belonging to another, appropriate to be reached by that proceeding, under principles hereafter stated.¹ The general rule, subject to exceptions, is believed to be that a foreign corporation may be summoned and charged as *garnishee* (or, in Massachusetts and Maine, as a *trustee*) in respect of any debt owing to the principal debtor in the attachment suit, or to the judgment debtor where the plaintiff's demand has ripened into a judgment, where three circumstances concur: 1. Where the attachment or judgment debtor could *maintain an action* at law against the corporation to recover the debt which is attached in its hands. 2. Where the *situs of the debt* is in the domestic State, so that the debt is subject to condemnation there, under its laws relating to attachments and executions. 3. Where the corporation has such a residence or agency within the domestic State as renders it *amenable to the judicial process of such State*.² The fact that

¹ In conformity with this principle, it has been held that a foreign railway corporation which has accepted, in Pennsylvania, the privilege of extending its road through that State upon the condition of keeping at least one manager or officer resident therein, on whom process in actions may be served, may be made garnishee in an "attachment execution" in respect of a debt owing by it to a non-resident. *Fithian v. New York &c. R. Co.*, 31 Pa. St. 114.

² It will appear, from examination of the decisions, that in many States a foreign corporation transacting business in the domestic State may be summoned as garnishee for a debt it may owe anywhere in the State where suit for such debt could be

brought. *Selma &c. R. Co. v. Tyson*, 48 Ga. 351; *Bank of United States v. Merchants' Bank*, 1 Rob. (Va.) 573 (proceeding in equity in the nature of garnishment); *Hannibal &c. R. Co. v. Crane*, 102 Ill. 249; *s. c.* 40 Am. Rep. 581; *Rainey v. Maas*, 51 Fed. Rep. 580; *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506; *Knox v. Protection Ins. Co.*, 9 Conn. 430; *s. c.* 25 Am. Dec. 33; *Libbey v. Hodgdon*, 9 N. H. 394. It has been held in New Hampshire that foreign corporations doing business within the domestic State, under the operation of statutes which make them amenable to the jurisdiction of its courts, may be served with process of garnishment and made liable as garnishees in respect of funds or property in their custody belong-

a foreign corporation is exempt from process of garnishment under the laws of its home State will not exempt it from such process when doing business within another State, where the laws of the latter State provide for such process; since when it enters the other State to do business, it does it upon the condition of compliance with its laws.¹

§ 8070. Circumstances under Which Foreign Corporations not Subject to Garnishment.—This question is very much the same as the question under what circumstances a foreign corporation is liable to an ordinary action *in personam* in the domestic State. In so far as the proceeding by garnishment is a proceeding for the attachment of a *debt*, considered as *property*, due by the garnishee to the principal debtor, it is a proceeding *in rem*; and unless the levying officer recites in his return that he has attached the goods and chattels, rights and credits of the debtor in the hands of the garnishee, the court

ing to third persons. *Libbey v. Hodgdon*, 9 N. H. 394; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

¹ *First Nat. Bank v. Burch*, 80 Mich. 242; *s. c.* 45 N. W. Rep. 93. This case holds that under Pub. Acts Mich. 1889, No. 266, providing that any corporation, foreign or domestic, other than municipal, may be garnished, a foreign mutual benefit corporation, owing moneys on a certificate of membership issued to a resident of Michigan for the benefit of persons dependent on him for support, may be garnished in that State by a creditor of the holder of such certificate, though, by the law of the State in which the corporation is organized, such moneys are exempt. *Ibid.* That foreign corporations were not subject to trustee process (garnishment) in Massachusetts and Maine until recent statutes,—see *Danforth v. Penny*, 3 Met. (Mass.) 564; *Gold v. Housatonic R. Co.*, 1 Gray (Mass.), 424; *Larkin v. Wilson*, 106 Mass. 120; *Ting-*

ley v. Bateman, 10 Mass. 343; *Ray v. Underwood*, 3 Pick. (Mass.) 302; *Hart v. Anthony*, 15 Pick. (Mass.) 445; *Nye v. Liscombe*, 21 Pick. (Mass.) 263; *Lovejoy v. Albee*, 33 Me. 414; *s. c.* 54 Am. Dec. 630; *Columbus Insurance Co. v. Eaton*, 35 Me. 391; *Smith v. Eaton*, 36 Me. 298; *s. c.* 58 Am. Dec. 746. This rule was changed in Massachusetts, by Mass. Laws 1870, ch. 194, and in Maine by Pub. Laws Me. 1877, ch. 153 (Rev. Stat. Me. 1883, ch. 86, § 8). Under this last statute it has been held that in cases where the agent of the foreign corporation doing business within the State has property within his hands belonging to a non-resident defendant, such property may be attached, and the foreign corporation held as trustee, though the principal defendant has not been previously served with notice. *Cousens v. Lovejoy*, 81 Me. 467; *s. c.* 17 Atl. Rep. 495. See also *Gould v. Bangor & c. R. Co.*, 82 Me. 122; *s. c.* 19 Atl. Rep. 84.

acquires no jurisdiction to proceed to the condemnation of such goods and chattels, rights and credits.¹ But in so far as the proceeding involves a *summons* to the garnishee, requiring him to appear and answer, and provides for further proceedings against him upon his answer, or in default of his answer, which may result in a *judgment against him*, it is a proceeding *in personam*. Now, in so far as it is a proceeding *in personam* against the foreign corporation, no jurisdiction can be acquired unless the situation of the foreign corporation within the domestic State is such that an ordinary action *in personam* could be prosecuted against it in the domestic tribunal. It follows from these considerations that a foreign corporation which is *entirely non-resident*, is not subject to garnishment, and cannot be made so, for the States have no power to extend their judicial process into other States; but if it is resident in the domestic State in such a sense as makes it amenable to the ordinary judicial process of such State, then it is amenable to process of garnishment, unless the statute governing the question is so framed as to exclude such a conclusion.² There is certainly no principle of public policy or justice upon which an intention can be imputed to the legislature to distinguish between actions brought directly against foreign corporations for the recovery of a debt, and those in which they are indirectly brought before the court for the purpose of satisfying the demand of some third person. In both cases, it has been said, the inconvenience is the very same, and it is no more in the case of a foreign than of a domestic corporation. The conclusion is that, unless the plain language of the statute otherwise imports, foreign corporations are subject to the process of garnishment on the same condi-

¹ Keane v. Bartholow, 4 Mo. App. 507; Epstein v. Salorgne, 6 Mo. App. 352, 354; Brecht v. Corby, 7 Mo. App. 300; Norvell v. Porter, 62 Mo. 310; Connor v. Pope, 18 Mo. App. 86; Swallow v. Duncan, 18 Mo. App. 622.

² See Pennsylvania R. Co. v. Peo-

ples, 31 Ohio St. 537, and Rainey v. Maas, 51 Fed. Rep. 580, — where these ideas are brought out with sufficient clearness. And compare Squair v. Shea, 26 Ohio St. 645, where the same principle was applied in the case of the garnishment of a non-resident person.

tions as domestic corporations, or natural persons, in all cases where direct actions may be prosecuted against them to recover the debt on account of which they are garnished.¹

§ 8071. **Garnishment of the Funds of Foreign Corporations in the Hands of Resident Custodians.**—Garnishment, or “*trustee process*,” as it is called in Massachusetts, is the usual mode of levying an attachment upon property or money which is held in custody for the principal debtor by his creditor. It being established that the property of a foreign corporation, situated within the domestic jurisdiction, is subject to attachment, it follows that such an attachment may be levied by garnishment or by trustee process, directed against an inhabitant of the domestic State who owes a debt to the foreign corporation, and that a judgment against such inhabitant, in the proceeding by garnishment, will protect him against a subsequent action brought against him by the corporation to recover the debt.²

§ 8072. **Attachment of a Debt Due from a Citizen of Another State to a Foreign Corporation of a Third State.**—A citizen of Rhode Island attached in Connecticut a debt due from a citizen of Connecticut to a corporation of Pennsylvania. That corporation had become insolvent, and, under the laws of Pennsylvania, had made an assignment for the benefit of creditors, of which the Connecticut debtor had notice. It

¹ *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506, opinion by Dixon, C. J. When, therefore, a foreign corporation had extended the exercise of its prerogative franchises into the domestic State, presumably with the consent of the legislature of such State, as by assuming to operate a railroad there,—it was held that it was subject to garnishment in like manner as a domestic corporation. *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537. So, where a manufacturing company, organized under the laws of another

State, had its principal office and place of business, and place of corporate meetings, and place of deposit of its books and records, in the State of Ohio,—it was held that it was subject to garnishment in a court of the United States sitting in that State, in like manner as a domestic corporation of Ohio. *Rainey v. Maas*, 51 Fed. Rep. 580.

² *Ocean Ins. Co. v. Portsmouth &c. R. Co.*, 3 Met. (Mass.) 420; *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326.

was held that the lien of the attachment was valid against the claim of the trustee in the assignment in Pennsylvania. The court proceeded upon the view that the laws of Pennsylvania, under which the assignment was made, had no operation in Connecticut except so far as they might be allowed to operate on principles of *comity*, and that there was no rule of *comity* which required the court to give effect to them in this instance.¹

§ 8073. **Situs of a Debt Due by a Foreign Corporation for the Purpose of Garnishment.**—There is a conflict of judicial opinion upon this question,—some of the courts holding that it is the *residence of the creditor* which determines the location of the debt,² and others that it is the *residence of the debtor*.³ Still others have held that it is the *residence of the debtor, unless*, by the terms of the *contract* creating the debt, it is *payable elsewhere*, in which event the *place where it is payable* determines its *situs*.⁴ It is believed that all the foregoing decisions can be harmonized on the theory that the *situs* of a debt, for the purpose of jurisdiction to seize it by attachment or garnishment, is *the place where it is payable*. The reason is very simple. The parties have made a contract that the debt shall be *payable in a certain place*, and the law cannot make a different contract for them by compelling the payment of the debt in a different place. It is therefore said to be well settled “that a *person* domiciled in a foreign jurisdiction cannot be holden here as trustee, unless he has property of the principal defendant in his possession in this State, or owes a debt or duty to such defendant, payable here,

¹ *Paine v. Lester*, 44 Conn. 196; *s. c.* 26 Am. Rep. 442. Compare *Ful-ler v. Steiglitz*, 27 Ohio St. 355; *s. c.* 22 Am. Rep. 312.

² *Williams v. Ingersoll*, 89 N. Y. 508, 523; *Smith v. Boston &c. R. Co.*, 33 N. H. 337, 342

³ *Tingley v. Bateman*, 10 Mass. 343; *Lovejoy v. Albee*, 33 Me. 414; *s. c.* 54 Am. Dec. 630. And see *Kneeland*

Attach., § 335; *Drake Attach.*, § 474; *Freem. Ex.*, § 410; *Henderson v. Schaas*, 35 Ill. App. 155.

⁴ *Osgood v. Maguire*, 61 N. Y. 524; *Green v. Farmers' &c. Bank*, 25 Conn. 452; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Jones v. Winchester*, 6 N. H. 497; *Sawyer v. Thompson*, 24 N. H. 510.

and a foreign corporation must occupy the same position.”¹ When the nature of the proceeding by garnishment is considered,² the *crucial test* by which to determine this question must be whether the defendant in the attachment or execution could, at the time of the service of the notice of garnishment, have *maintained an action at law against the corporation* in the forum from which the garnishment issued, to recover the debt.³ Within the meaning of this principle, the *debtor* is the person owing the debt which is sought to be condemned,—that is to say *the garnishee*,—and it is with reference to *him* that it has been said: “We think the better rule, and one likely to lead to the least complications, is to hold that, in all cases where the debtor resides in this State, and the debt is not by the terms of the contract payable elsewhere, he becomes chargeable as garnishee, and the court acquires jurisdiction to condemn the debt.”⁴

¹ *Smith v. Boston &c. R. Co.*, 33 N. H. 337, 342.

² *Ante*, § 7804, *et seq.*

³ *Mahany v. Kephart*, 15 W. Va. 609, 625. On this theory it has been held in New York that an indebtedness of one foreign corporation to another foreign corporation cannot be attached, under the New York Code of Civil Procedure, §§ 641, 644, because either the *person* or the *thing* attached must be within the State. *Straus v. Chicago Glycerine Co.*, 46 Hun (N. Y.), 216; *s. c.* 11 N. Y. St. Rep. 359. But in *Illinois*, foreign insurance companies having agencies and doing business there, are liable as garnishees in respect of debts due to non-resident creditors, though by the terms of the contract the debt is payable elsewhere. *Henderson v. Schaas*, 35 Ill. App. 155. And so in *Pennsylvania*, it was held that where the New York & Erie Railroad Company, a corporation created under the laws of New York, which had secured permission from the State of Pennsyl-

vania to locate its railway line through a portion of that State, upon the condition of keeping therein a resident officer upon whom process in actions against it might be served,—it was liable to garnishment in a proceeding under an “attachment execution,” in respect of a judgment which had been recovered against it in another State by the principal debtor. *Fithian v. New York &c. R. Co.*, 31 Pa. St. 114.

⁴ *Green’s Bank v. Wickham*, 23 Mo. App. 663, 666. Where all the parties to the garnishment proceeding, the plaintiff creditor, the defendant debtor, and the corporation which had been served as garnishee, were residents of the same foreign State, it was held that the *situs* of the debt was in that State, and not in the State of Missouri, although the corporation had an office in Missouri, and under its laws was amenable to the process of its courts. *Fielder v. Jessup*, 24 Mo. App. 91. This conclusion was regarded as the more rea-

§ 8074. Injunctions Restraining Domestic Citizens from Proceeding in a Foreign State to Subject Exempt Wages Due from Foreign Corporation.—An injunction will lie to prevent a domestic creditor from going out of the State to seize,

sonable, in view of the fact that the creditor had probably resorted to the scheme of a garnishment against the corporation in another State, to avoid the effect of the statutes of the State which was the domicile of the parties, *exempting the wages* of the defendant from judicial process. *Ibid.* Opposed to this conclusion is a decision of the Supreme Court of Pennsylvania, in which, though Agnew, J., who wrote the opinion, proceeds with great confidence to reverse the decision of the court below, the conclusion of the court seems to be the plainest aberration. A citizen of Pennsylvania owed a debt to another citizen of Pennsylvania, payable in Pennsylvania. While the debtor was casually in the State of Maryland, another citizen of Pennsylvania, in a proceeding in a court of that State, attached the debt by garnishment. The garnishee gave his creditor notice of the attachment. Nevertheless the Maryland court rendered judgment against him, and he paid the same. It was held that he could not thereafter be compelled to pay it over again to his own creditor. The court proceeded upon the view that the plaintiff in the attachment suit, as a citizen of Pennsylvania, had, under the Constitution of the United States, the same right of action in the State of Maryland which he would have had if he had been a citizen of the State of Maryland. *Morgan v. Neville*, 74 Pa. St. 52. That is all very well; but he had no *greater* right of action. The court overlooked the fact that a State has no jurisdiction

over property not within its limits; that a debt is property, and that it is property only within that jurisdiction, where, by the terms of the contract creating it, it is made payable. The Maryland Code, as recited in the opinion of the court, enacts that, if neither the defendant nor the garnishee in whose hands the property or credits may be attached, shall appear at the return day of the attachment, the court may condemn the property and credits so attached, and award execution thereof. But the court does not explain where the Maryland court acquired jurisdiction to condemn *property* and *credits* which never had any *situs* in Maryland, but which had their only *situs* in Pennsylvania. This untenable decision was followed in *Bolton v. Pennsylvania Co.*, 88 Pa. St. 261, where the only defense was that the wages were due by the Pennsylvania Railroad Company to one of its employes for services upon its railroad in Pennsylvania, which, it must be assumed, were payable in Pennsylvania, and that such wages were attached by garnishment in Ohio, within which State the Pennsylvania Railroad Company was also a domestic corporation, and were condemned there in the attachment proceeding and paid there. Under a statute providing that suits against foreign corporations exercising franchises within the State may be brought "by a resident of this State for any cause of action; and by a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated

by process of garnishment, a debt due by a corporation to a domestic citizen, so as to prevent his debtor from setting up his right of exemption under the statute of the domestic State, provided the corporation is amenable to the process of the domestic State. In other words, a court will restrain by injunction a domestic citizen from resorting to such a device to defraud the family of his debtor out of the exemption allowed by the domestic statute.¹

§ 8075. Garnishment of the Wages Due by Foreign Corporations to Non-resident Employés, Exempt in State of Residence.— Nearly all the States pursue the policy of *exempting*, in their statute law, the *wages of laborers* to a certain extent, generally to the extent of the earnings for the last thirty days, from attachment or execution for their debts. It is a settled principle that statutes creating such exemptions relate to the *remedy* merely, and that the law which is applied is the law of the *forum* in which the remedy is sought, and not the law of

in this State" (Laws Md. 1868, ch. 471, § 211), a garnishment proceeding cannot be maintained by citizens of the State against a foreign insurance company doing business within the State, for a debt due to a citizen of another State. *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *s. c.* 33 Am. Rep. 258; *Myer v. Liverpool &c. Ins. Co.*, 40 Md. 595. The liability in this case is not direct, as the statute contemplates. "It is well settled," said Bartol, C. J., "that the plaintiff in attachment, as against the garnishee, is subrogated to the rights of the debtor, and can recover only by the same right and to the same extent, as the debtor might recover, if he were suing the garnishee." 40 Md. 600. See also *Brauser v. New England &c. Ins. Co.*, 21 Wis. 506. The debtor under this statute could have maintained no action against

the corporation: therefore the garnishment proceeding must fail.

¹ Thus, it has been held that, where a judgment creditor and his debtor were both residents of the State of Iowa, and the creditor sought, in the courts of another State, to subject to the payment of his judgment the exempt wages of the debtor, due him from a railroad company doing business in both States and amenable to the process of both States,—that the courts of Iowa had jurisdiction to restrain, by injunction, the creditor from so proceeding. The writ in such case was operative merely against the creditor within the jurisdiction of the court, and did not impinge upon the jurisdiction of the tribunals of the other State. *Teager v. Landsley*, 69 Iowa, 725; *Hager v. Adams*, 70 Iowa, 746.

the State or country within which the contract has been made.¹ There is also a theory that the exemption laws of a State have no extra-territorial force, and are not applied in other States, although such other States have similar exemption laws. It is on the principle that a *garnishee* is not, unless required to do so by statute, bound to plead the right of exemption of his creditor, and does not make himself liable to the creditor for failing so to plead it.² The obvious reason is that such an exemption is a *privilege* which may be *waived*,³ and that it is therefore the office of the person to whom the debt is due by the garnishee, to set up the defense that it is exempt from process if he so desires. This being so, it has been the frequent practice of the creditors of the employés of corporations to evade the exemption laws of the State of the residence of both debtor and creditor, which State is also the *situs of the contract* between them, by going into another State in which the corporation does business, and where it is amenable to judicial process, and there attaching, by garnishment against the corporation, the wages due by the corporation to the employé. As the corporation, when summoned as garnishee, is under no obligation, in the absence of statute, to set up the exemption rights of the employé, and as the setting up of those rights might not be available, in that they depend upon the laws of another State, — a judgment rendered against the garnishee will be a bar to any action against it for his wages by the employé in the State of the residence of the former.⁴ The hardships of this rule could be avoided in all cases by adopting the course taken by the Supreme Court of Illinois, which was that of holding that a statute exempting a limited

¹ Helfenstein v. Cave, 3 Iowa, 287; Newell v. Hayden, 8 Iowa, 140; Leiber v. Union Pacific R. Co., 49 Iowa, 688; Mineral Point R. Co. v. Barron, 83 Ill. 365; Morgan v. Neville, 74 Pa. St. 52; Bolton v. Pennsylvania Co., 88 Pa. St. 261.

² Jones v. Tracy, 75 Pa. St. 417; Baltimore &c. R. Co. v. May, 25 Ohio

St. 347; Moore v. Chicago &c. R. Co., 43 Iowa, 385.

³ Thomp. Homest., § 862; Blair v. Steinman, 52 Pa. St. 423; Strouse v. Becker, 44 Pa. St. 206; s. c. 38 Pa. St. 190; 80 Am. Dec. 474; Jones v. Tracy, 75 Pa. St. 417.

⁴ Moore v. Chicago &c. R. Co., 43 Iowa, 385.

amount of the wages due for labor to one who is the head of a family, is not confined to *residents* of the State, but applies equally to wages due to non-residents.¹

§ 8076. **Garnishee may Plead Exemption of Principal Debtor.** — Clearly the garnishee may defend upon any ground which goes to show that the plaintiff is not entitled to seize the money or effects of the principal debtor in his hands. He may, therefore, according to much judicial opinion, set up the fact that the money or effects in his hands belonging to the principal debtor are exempt from attachment or execution against the latter, by reason of statutes of exemption which are operative within the forum.² But other courts hold that the right to claim or select certain property as exempt from execution under a statute, is a *personal privilege* which the principal debtor may *waive*, and consequently that it cannot be set up for him by *his* debtor in a proceeding by garnishment against the latter.³ These last holdings are contrary to the policy of the statutes of exemption, and to the best legal analogies, and, as we shall hereafter see, have been productive of the greatest injustice. In so far as they impose the duty on the principal debtor to set up the privilege, they ignore the fact that in many cases he is a non-resident, and that the proceeding, in point of fact, is unknown to him until it is too late to set up the privilege. In so far as they hold that the

¹ Mineral Point R. Co. v. Barron, 83 Ill. 365.

² Staniels v. Raymond, 4 Cush. (Mass.) 314; Davenport v. Swan, 9 Humph. (Tenn.) 186; Lock v. Johnson, 36 Me. 464; Clark v. Averill, 31 Vt. 512; s. c. 76 Am. Dec. 131; Winterfield v. Milwaukee &c. R. Co., 29 Wis. 589; Brainard v. Shannon, 60 Me. 342; Chicago &c. R. Co. v. Ragland, 84 Ill. 375. Where the governing statute required the plaintiff, in his affidavit for garnishment, to allege that the property sought to be attached by garnishment was *not ex-*

empt, the conclusion was plainer; since it would be absurd to require the plaintiff to allege a fact as the foundation of his right of garnishment, without allowing the defendant to contest that fact: Winterfield v. Milwaukee &c. R. Co., 29 Wis. 589. Compare Rasmussen v. McCabe, 43 Wis. 471; s. c. on rehearing, 46 Wis. 600; Steen v. Norton, 45 Wis. 412. Case where the disclosure setting up the exemption was held insufficient: Brainard v. Shannon, 60 Me. 342.

³ State v. Barada, 57 Mo. 562; Osborne v. Schutt, 67 Mo. 712.

garnishee cannot set up the privilege because it may be waived by the principal debtor, they proceed in the face of the general rule of the law, that a party, by his mere silence, and especially where he is not personally present in court, is not deemed to waive a provision made for his benefit. The grantor in a deed poll is, for instance, presumed in law to have accepted it although he has not signed it, sealed it, or joined in its execution; and for the obvious reason that, upon experience, a party is deemed to accept anything which is beneficial to him. So, especially if we have regard to the privity which exists between debtor and creditor, and bailor and bailee, the natural and just conclusion would be that, whether the principal debtor has been served with ordinary process and is present in court or not, *his* debtor sets up the exemption which is beneficial to him, with his authorization, or at least with his consent. But where the garnishee has wrongfully paid over the money after the service of the garnishment, and is subsequently sued thereon by the attaching creditor, it is no defense for him to show that the defendant in the attachment was entitled to hold the money in his hands at the time of the service of the garnishment under the exemption laws of the State.¹ The reason is that no matter who is allowed to set up the exemption, it must be set up at the proper time, and cannot be set up after the garnishment proceedings have terminated, and by way of defense to an action for disobeying the mandate of the process of garnishment.² But on the other hand it has been held that the rule above stated does not prevent the court from allowing the principal debtor in the plaintiff's attachment suit from being made a defendant in the action by the attachment debtor to charge the garnishee with having wrong-

¹ Conley v. Chilcote, 25 Ohio St. 320.

² That an exemption is lost by a failure to assert it until after judgment in favor of the attaching creditor against the garnishee,—see Randolph v. Little, 62 Ala. 396; overruling Webb v. Edwards, 46 Ala. 17. That the delivery of the property at-

tached by the garnishee to the officer will not preclude the debtor from setting up his claim of exemption,—see Fanning v. First Nat. Bank, 76 Ill. 53. That money set apart as an exemption to a debtor cannot be attached in the hands of his attorney, see Gery v. Ehrgood, 31 Pa. St. 329; and compare Mitchell v. Milhoan, 11 Kan. 617.

fully paid over the money after receiving the notice of garnishment, and from personally setting up his right of exemption in that action.¹ But upon what principle this could be held, except upon the principle of the court discovering *some* way of escaping the consequences of its previous decision in the same case,² is not clear.

§ 8077. Theory that It is Duty of the Garnishee to Plead the Exemption.— Other courts take the view that it is the duty of the garnishee, in the case supposed in the preceding section, to plead the right of exemption of its employé, failing in which the garnishee cannot plead the judgment against him in the garnishment proceeding, against an action brought by the employé to recover such wages.³ There is great difficulty in holding the garnishee to this duty upon any tenable principle. First, he may not, in point of fact, know of the statute which creates the exemption; for although every man is, on grounds of public policy, held bound to know the law, yet it seems intolerable that he should be obliged to inform himself of the law merely to enable him to protect gratuitously the possible rights of another, that is to say, the rights which that other may or may not see fit to insist upon. And secondly, where, as in the case now supposed, the garnishee is a corporation, and hence a large employer, it is a hard rule that will require its managing officers to inform themselves of the *status* of each employé with reference to his being the head of a family, and the like. It is a sound conclusion that if the garnishee discharges this duty, and if the principal defendant is within the jurisdiction, and fails to

¹ *Chilcote v. Conley*, 36 Ohio St. 545.

² *Conley v. Chilcote*, 25 Ohio St. 320.

³ *Pierce v. Chicago & c. R. Co.*, 36 Wis. 283, 288; *s. c.* 2 Cent. L. J. 377; *Chicago & c. R. Co. v. Ragland*, 84 Ill. 375; *s. c.* 5 Cent. L. J. 169. So intimated in *Winterfield v. Milwaukee & c. R. Co.*, 29 Wis. 589. It has been

held in Maine that a trustee (garnishee) indebted to the principal defendant for his personal labor, which indebtedness is exempt from process under the statute, is bound, in his answer as garnishee, to disclose, not only the fact of the indebtedness, but also the fact that it accrued for such labor. *Lock v. Johnson*, 36 Me. 464.

set up his exemption as a defense, he cannot afterwards make the failure of the garnishee to set up the defense for him the ground of an action to recover the money from the garnishee, thereby compelling the latter to pay the debt twice, first to his creditor, and then to him.¹

§ 8078. Duty of the Garnishee to Notify Creditor.—Some of the courts have held that, under the circumstances above stated, it is the duty of the garnishee to notify the creditor of the garnishment proceedings, to the end that he may assert his right of exemption, unless he has otherwise had personal notice of them.²

§ 8079. Necessary that the Garnishee should have Notice. Where the funds or properties of a foreign corporation are attached by garnishment, or by process under whatever name called, in the hands of a *resident custodian*, whether he is called bailee or trustee, it seems to be in accordance with the fundamental principles of justice to conclude that the custodian must have *notice* of the proceeding, in order to support the *jurisdiction* of the court to make the condemnation; since, if the funds in his hands be regarded as trust property, then he is the holder of the legal title; if he is regarded as a mere bailee or custodian, then he has such an interest in the property, or such a qualified legal title and right of possession, as will support an action brought by him for the protection of it; and, by parity of reasoning, he is entitled to notice of any action, the purpose of which is to divest its possession out of him, and vest it in another. Proceeding upon the terms of a statute,³ and also reasoning upon general principles, it was held that, in case of the seizure of trust property of a foreign corporation within the State of New York, the attachment must be served upon the trustee, or else the whole proceeding would be void for want of jurisdiction.⁴

¹ *Wigwall v. Union Coal Min. Co.*, 37 Iowa, 129.

² *Pierce v. Chicago &c. R. Co.*, 36

Wis. 283; *s. c.* 2 Cent. L. J. 377; *Morgan v. Neville*, 74 Pa. St. 52.

³ N. Y. Laws 1842, p. 227.

⁴ *Wright v. Douglass*, 10 Barb. (N. Y.) 97, 109.

§ 8080. **Service of the Garnishment.**—This, like the service of other process upon foreign corporations, is generally the subject of statutory regulation. In Rhode Island, service may be had upon the *Insurance Commissioner* in case of a garnishment against an insurance company under a statute making that officer the proper person to receive service of process in suits against foreign insurance companies.¹ Under a statute of Michigan,² the garnishment may be served upon the officer of a foreign corporation when found within the State, whether on the business of the corporation or not, and his disclosure, admitting the liability of the corporation, is binding upon it.³

¹ *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297; *s. c.* 21 Atl. Rep. 538; 20 Ins. L. J. 475.

² Mich. Pub. Laws 1889, act. 266.

³ *First Nat. Bank v. Burch*, 80 Mich. 242; *s. c.* 45 N. W. Rep. 93. Compare *First Nat. Bank v. Burch*, 76 Mich. 608; *s. c.* 43 N. W. Rep. 453. This statute was evidently intended to change the rule declared in *Newell v. Great Western R. Co.*, 19 Mich. 336; *ante*, §§ 5729, 8030. It provides that a garnishment may be served on the officer of a foreign corporation found within the State, whether he is on business of the corporation or not, and that the officer shall make disclosure, which shall be considered the answer of the corporation. Prior to this statute, there was no statute in that State providing for the service of a writ of garnishment on a foreign corporation. A statutory provision as to the service of writs for the commencement of actions against foreign corporations was held not to apply; nor did a statute as to the service of a writ of garnishment against a domestic corporation. *Milwaukee Bridge &c. Works v. Brevoort*, 73 Mich. 155; *s. c.* 41 N. W. Rep. 215. The writ of garnishment and proceedings

thereon were always *ancillary*, and the service of such a writ was not the commencement of an action. *Moore v. Speed*, 55 Mich. 84; *s. c.* 20 N. W. Rep. 801; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394; *Milwaukee Bridge &c. Works v. Brevoort*, 73 Mich. 155; *s. c.* 41 N. W. Rep. 215. This statute provides that: "If a foreign corporation, the writ of garnishment may be served upon any officer or agent of the corporation, upon the conductor of any railroad train, or upon the master of any vessel belonging to and in service of the corporation, found within the State, whether said officer or agent be in this State upon the business of said corporation or not; and said officer or agent shall make disclosure, and the same shall be considered the answer of the corporation." Mich. Laws 1889, act. 266. This statute does not confine the service of process to *general* agents of the foreign corporation. When, therefore, the service was made upon the resident agent of a mining company whose duties consisted in acting as custodian of the corporate property in the county where its mining operations were carried on, and inspecting the work of its contractors in that county, it

§ 8081. Compelling Disclosures by the Officers of Foreign Corporations.—In a proceeding by garnishment against a foreign corporation, it is needless to suggest that a court cannot compel the officers of such corporation, *residing in another State*, to appear before it for the purpose of examination; because the courts of one State cannot send compulsory judicial process into another State. The remedy is to enter a *judgment by default*, not against the officers, but against the corporation, as in other cases, and to make the judgment final in the event of a failure to appear after the time prescribed by the statute.¹

was held a good service under the statute, so that his disclosures would bind the corporation. *Shafer Iron Co. v. Stone*, 88 Mich. 464. Nor will it appear that there is any hardship or oppression in this statute, when it is considered that the foreign corporation has no right to enter the domestic State to do business at all without the consent of its legislature, and that its legislature may therefore prescribe, as one of the conditions of its consent, the manner in which process of garnishment, or other process, is to be served upon its officers. The right of a foreign corporation to do business within the State of Michigan is therefore dependent upon its compliance with and submission to the above statute. *First Nat. Bank v. Burch*, 80 Mich. 242; *s. c.* 45 N. W. Rep. 93. It has been held, in *Mis-souri*, that service of garnishment in

such cases may be had on the authorized agent of the foreign corporation, he being the chief or *managing officer* thereof, within the meaning of a statute providing that "notice of garnishment shall be served on a corporation in writing, by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier, or other chief or managing officer of such corporation." *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

¹ So held under a statute in *Shafer Iron Co. v. Stone*, 88 Mich. 464; *s. c.* 50 N. W. Rep. 389. It was also held that a statutory provision (*How. Mich. Stat.*, § 8061) requiring a garnishee to appear before a circuit judge, etc., and submit to a personal examination, did not apply to the case where a foreign corporation was summoned as garnishee. *Ibid.*

CHAPTER CCI.

TAXATION OF FOREIGN CORPORATIONS.

SECTION

- 8087. General power of States to tax foreign corporations.
- 8088. Whether protected from unequal taxation by the Fourteenth Amendment.
- 8089. Further of this subject.
- 8090. Doctrine that States cannot tax foreign corporations differently from domestic corporations.
- 8091. Application of provisions in State constitutions requiring all taxation to be uniform.
- 8092. States cannot tax foreign corporations which are agencies of the United States.
- 8093. State taxation of property invested in securities of the United States.
- 8094. Taxing power over the property of foreign corporations as affected by the *situs* of their property.
- 8095. *Situs* of interstate property for the purposes of taxation.
- 8096. *Situs* of ships at sea.
- 8097. *Situs* of the rolling stock of interstate railway companies.
- 8098. Taxing the capital of foreign corporations.
- 8099. Further of this subject.
- 8100. Taxing the capital employed by foreign corporations within the State.
- 8101. Taxing foreign corporations having agencies within the State.
- 8102. Taxing foreign corporations "doing business in this State."

SECTION

- 8103. Taxing capital of foreign corporations domiciled within the State, but doing business without the State.
- 8104. Interpretation of words and phrases in statutes laying taxes upon foreign corporations.
- 8105. Taxation of foreign corporations when engaged in interstate commerce.
- 8106. Taxation of domestic corporations engaged in interstate or foreign commerce.
- 8107. State license or privilege taxes upon foreign corporations engaged in interstate commerce.
- 8108. Further of this subject.
- 8109. License taxes distinguished from licenses of occupations.
- 8110. Taxes upon the receipts of transportation companies derived from interstate commerce.
- 8111. Taxation of goods in interstate transit.
- 8112. Taxation of goods in transit through the State.
- 8113. Immaterial how the tax is laid.
- 8114. When interstate transit commences so as to exempt the property from State taxation.
- 8115. Taxing sales made within the State by non-resident corporations.
- 8116. Taxation of gross receipts.
- 8117. The question how judicially settled.
- 8118. A further explanation of these decisions.

SECTION

- 8119. The present doctrine restated.
- 8120. Validity of a tax upon the franchise of foreign corporations.
- 8121. Franchise taxes upon domestic corporations doing business wholly in foreign countries.
- 8122. Taxation of telegraph companies.
- 8123. Taxation of foreign telephone companies having domestic companies as licensees.
- 8124. Taxation of express companies.
- 8125. Taxation of sleeping-car companies.
- 8126. Taxation of ferry companies incorporated in other States.
- 8127. Taxation of foreign railroad companies operating domestic railroads under a lease.

SECTION

- 8128. Taxation of interstate bridge companies.
- 8129. Methods of assessment of interstate bridges.
- 8130. Taxation of property of railroads consolidated with foreign railroad companies.
- 8131. Exemption of foreign corporations from taxation.
- 8132. Retaliatory taxation of foreign corporations.
- 8133. Taxes or tolls for the use of improved facilities of navigation.
- 8134. Excise taxes upon foreign corporations in Massachusetts.
- 8135. Actions by foreign corporations to recover back taxes.

§ 8087. General Power of States to Tax Foreign Corporations.—With exceptions hereafter indicated, relating to cases where foreign corporations are engaged in interstate commerce, or to cases where they are agencies of the United States, and to other special cases elsewhere considered,—the Federal Constitution imposes no restraint upon the States in regard to the taxation of foreign corporations; but the rule is that, whereas the States have the power to exclude them entirely,¹ they have the power to impose upon them such burdens, as the condition of their entering, as they may see fit; and these burdens or impositions may as well take the form of taxation at a greater rate or upon a different principle from that applicable to domestic corporations, as any other. When, therefore, the foreign corporation is of such a character,—as, for instance, if it is an insurance company and consequently not engaged in interstate commerce,²—that the State has the power to exclude it altogether, it is under no Federal restraint in respect of this power of taxation over it. As a foreign corporation is not, within the domestic State, entitled to the *privileges and immunities of citizens of other States*, within the

¹ *Ante*, §§ 7876, 7884, *et seq.*

² *Ante*, § 7880.

meaning of the Federal Constitution,¹ it cannot demand, under that constitution, that it shall be taxed at the same rate and on the same principle as corporations of the domestic State.²

§ 8088. Whether Protected from Unequal Taxation by the Fourteenth Amendment.—The Fourteenth Amendment to the Constitution of the United States contains this prohibition: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."³ The extent to which, if at all, this provision protects foreign corporations from *unequal taxation* by the States, does not as yet seem to have been conclusively determined. In two celebrated decisions, rendered in the Circuit Court of the United States sitting in California, it was held that corporations were entitled to protection against unequal taxation under the operation of these provisions, and that the principle of taxation prescribed by the Constitution of California for railroad companies, operated to deny to the railroad companies challenging the validity of the tax, the equal protection of the laws of that State.⁴ These decisions were, it is understood, taken to the Supreme Court of the United States, but the writer does not understand that they ever reached a determination on their merits in that tribunal.⁵ Prior to the rendition of these decisions, the Supreme Court of the United States had held, according to a syllabus evidently drawn by the justice writing the opinion,⁶ that "while the Constitution of Illinois requires taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning

¹ *Ante*, § 7876.

² *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121; *Com. v. New York & C. R. Co.*, 129 Pa. St. 463; *s. c.* 15 Am. St. Rep. 724; 18 Atl. Rep. 412.

³ Const. U. S., amend. 14, § 1.

⁴ *Railroad Tax Cases*, 13 Fed. Rep. 722, opinions by Field and Sawyer,

JJ.; *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. Rep. 385, opinions by Field and Sawyer, JJ.

⁵ See *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121, where they are so referred to.

⁶ Mr. Justice Miller.

franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates*; and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals; nor does it violate any provision of the Constitution of the United States.”¹

§ 8089. Further of This Subject.—Later decisions of the court are to the effect that the Fourteenth Amendment “*does not prevent the classification of property for taxation*,—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate,—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit *special legislation*. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.”² It does not, for instance, prevent the State from laying a tax upon the corporate franchise or business of all corporations created under any law of the State, or of any other State or country, and doing business within the State, which tax is measured by the extent of its *dividends* for the current year.³ Nor does it prevent a State from laying a *percentage tax* upon the *gross receipts* of express companies derived

¹ State Railroad Tax Cases, 92 U. S. 575. This decision was followed, as late as the year 1887, in *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121, as involving the conclusion that a tax laid upon a particular business, whether carried on by corporations or individuals, is not prohibited by the Fourteenth Amendment, although a similar tax is not laid upon

other kinds of business; and that this amendment does not prohibit a State from imposing a tax on one class of business and not on another.

² *Home Ins. Co. v. New York*, 134 U. S. 594, 606; reaffirmed in *Pacific Ex. Co. v. Seibert*, 142 U. S. 339, 352; *s. c.* affirmed, 44 Fed. Rep. 310.

³ *Home Ins. Co. v. New York*, 134 U. S. 594.

from business done within the State.¹ It was held in a celebrated collection of cases, that a State law for the valuation of property and the assessment of taxes thereon, which provides for the *distribution of property* subject to its provisions *into different classes*; which makes for one class one set of provisions as to modes and methods for ascertaining the value, and as to right of appeal, and different provisions for another class as to those subjects; but which provides for the impartial application of the same means and methods to all constituents of each class, so as to operate equally and uniformly on all persons in similar circumstances,—denies to no person affected by it “the equal protection of the laws,” within the meaning of the Fourteenth Amendment.²

§ 8090. **Doctrine that States cannot Tax Foreign Corporations Differently from Domestic Corporations.**—It was strongly reasoned in a State court by an eminent judge, that it is not competent for a State to lay a tax upon a foreign corporation in a mode which differs in principle from that which she applies in the taxation of her own domestic corporations.³ This reasoning appears to have been the mere *dicta* of the judge who wrote the opinion. It was not directly applicable to any question before the court; because the foreign corporation which was the subject of the tax the validity of which was drawn in question, was *engaged in interstate commerce*, and hence could not be excluded from the State; nor could the State impose conditions upon its entering to do business within its limits. In cases where the corporation is engaged in interstate commerce, or is *an agency of the Federal government*, so that the State has no power under the constitution to keep it out, then it may be assumed that, in any case where the State can tax it at all, it will be obliged to apply to it, when doing business within its limits, the same

¹ Pacific Ex. Co. v. Seibert, 142 U. S. 339, 351; affirming s. c. 44 Fed. Rep. 310.

² Kentucky Railroad Tax Cases, 115 U. S. 321. See also Bell's Gap R.

Co. v. Pennsylvania, 134 U. S. 232, 237.

³ Erie Railway Co. v. State, 31 N. J. L. 531, 543; s. c. 86 Am. Dec. 226; opinion by Beasley, C. J.

principle of taxation which it applies to its own citizens and corporations; and it has been so held in several cases where the question has arisen under State constitutions.¹ For instance, it has been held, under the Constitution of Louisiana, which requires that "all property shall be taxed in proportion to its value," that a tax upon the *gross receipts* of a foreign corporation is a *property tax*, because the constitution contemplates but two kinds of taxation, property taxes and license taxes; so that the tax becomes *unconstitutional* in view of the fact that domestic persons and corporations are not so taxed.²

§ 8091. Application of Provisions in State Constitutions Requiring All Taxation to be Uniform.—It has been held that a constitutional provision that "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,"³ is not violated by a statute imposing a specific tax "upon every sewing-machine company selling or dealing in sewing machines, by itself or its agents, in this State."⁴ The governing principle is that such a constitutional provision does not prevent the imposition of a tax upon one class of business and not upon another.⁵ Upon a similar ground, it has been held that a statute which requires express companies to make returns of so much of their *gross receipts* as is derived from their business *within the State* and which lays a percentage tax upon those gross receipts, is not prohibited by a similar provision of the Constitution of Missouri

¹ *Parker v. North British &c. Ins. Co.*, 42 La. An. 428; *s. c.* 7 South. Rep. 599; *San Francisco v. Liverpool &c. Ins. Co.*, 74 Cal. 113; *s. c.* 5 Am. St. Rep. 425. See *ante*, § 7877, note, for observations on this last case.

² *Parker v. North British &c. Ins. Co.*, 42 La. An. 428; *s. c.* 7 South. Rep. 599. It has been held that a constitutional provision in this State requiring taxes to be graduated and equal and uniform as to all corpora-

tions transacting the same kind of business (Const. La., art. 217) applies exclusively to foreign corporations. *New Orleans v. Pontchartrain R. Co.*, 41 La. An. 519.

³ Const. Ga., art. 7, § 2.

⁴ *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121.

⁵ *Cutliff v. Albany*, 60 Ga. 597. See also *Davis v. Macon*, 64 Ga. 128; *s. c.* 37 Am. Rep. 60; *Athens v. Long*, 54 Ga. 330.

against unequal taxation.¹ So, it has been held that a provision of the constitution of a State,² that "taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," does not restrain the legislature, when classifying the subjects of taxation, from placing *foreign insurance* companies in a class by themselves from *domestic companies*, and taxing them *differently* from the manner in which domestic insurance companies are taxed. Therefore, a statute requiring foreign insurance companies to pay an annual tax of three per cent upon premiums received by them within the State, was held valid, although domestic insurance companies were not so taxed.³

§ 8092. States cannot Tax Foreign Corporations Which are Agencies of the United States.—The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government.⁴ They cannot, therefore, by *taxation* or otherwise, impose burdens upon foreign corporations which exist within their limits as agencies of the government of the United States, although they may, no doubt, *tax the property* of such corporations as the property of other corporations is taxed.⁵ Nor does this principle extend so far as to exempt from taxation by a State, the property of a corporation which may *in part* perform the office of an agent of the United States.⁶

¹ *Pacific Ex. Co. v. Seibert*, 142 U. S. 339; *s. c.* 44 Fed. Rep. 310.

² Const. Penn., art. 9, sec. 1.

³ *Germania Life Ins. Co. v. Com.*, 85 Pa. St. 513. See *Pacific Ex. Co. v. Seibert*, 142 U. S. 339, 355, where this case is cited with approval.

⁴ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

⁵ *McCulloch v. Maryland*, *supra*; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738; *State v. Buch-*
6448

anan, 5 Har. & J. (Md.) 317; *Bulow v. City Council*, 1 Nott & McC. (S. C.) 527.

⁶ *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. Rep. 385. Thus, the *Union Pacific Railroad Company* was incorporated under the laws of the United States. It was built in large part by the aid of the credit of the United States. In return for that aid, it is under certain special duties in regard to transporting troops, and

§ 8093. **State Taxation of Property Invested in Securities of the United States.**—The Congress of the United States, in authorizing the issue of *bonds*, to raise money to aid in the suppression of the late Rebellion, in order that the bonds might be better marketed, exempted them from taxation by State authority, whether they should be held by individuals, corporations, or associations.¹ The construction of this statute has given rise to some controversy; but, as already seen,² it has been held that it is competent for a State to tax the *franchises* of a corporation, without reference to the character of the property in which its capital stock or its deposits of money are invested.³ So, it is competent for a State to lay

performing other services for the United States; but yet its *fixed property* is taxable by a State in common with other railroad property in the State. *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5; *Thomson v. Pacific Railroad*, 9 Wall. (U. S.) 579. So, the system of *national banks* was created during the late Civil War to aid the fiscal operations of the government, and to afford a market for bonds issued by the government to raise money for the prosecution of the war, by requiring such banks to deposit such bonds as a security for their circulating notes. Notwithstanding this, the States have, as we have already seen, the power to lay a tax upon the *shares* of such banks. *National Bank v. Com.*, 9 Wall. (U. S.) 353; *ante*, § 2855, *et seq.* In this and other cases the limitation is "that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the

United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States." *National Bank v. Com.*, 9 Wall. (U. S.) 353; again quoted in *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530, 551. So, the *Western Union Telegraph Company*, having accepted certain provisions of the Revised Statutes of the United States, carries on its operations under franchises received from the United States, though incorporated under the laws of one of the States. It is obliged, in return for the franchises granted by the United States, to give precedence to the business of the United States. It is hence, in a primary sense, an agent of the United States. But nevertheless its property within a State is subject to taxation by that State, in common with the general mass of property therein. *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530.

¹ 12 U. S. Stat. at Large, 346, ch. 33, § 2.

² *Ante*, § 5556, *et seq.*

³ *Society for Savings v. Coite*, 6 Wall. (U. S.) 594; *Provident Institution v. Massachusetts*, 6 Wall. (U. S.) 611.

a tax upon the corporate *franchise* or *business*, construed to be really as a tax upon its right or privilege to do business within the State in a corporate capacity, and not technically a tax upon its franchise, although admeasured upon its *dividends* declared, and although a portion of such dividends may be derived from interest on capital invested in bonds of the United States.¹ The immunity from taxation by such an act of Congress extends to foreign, as well as to domestic corporations; and hence where a foreign insurance company had deposited with the Comptroller of the domestic State, under a domestic statute, securities to a given amount, for the protection of domestic policy-holders, as a condition precedent to its right to do business within the domestic State, it was held that such securities were liable to assessment and taxation, in like manner with other property held within the State by residents or non-residents, except as to that portion invested in stocks of the United States, which was not taxable.²

§ 8094. Taxing Power over the Property of Foreign Corporations as Affected by the Situs of their Property.—The power of taxation of a State is limited to persons, property, and business *within its jurisdiction*, and it is not competent for a State to lay a tax upon property which is situated *within another State or country*.³ Upon this subject it has been said: "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own

¹ Home Insurance Co. v. New York, 134 U. S. 594; affirming s. c. 92 N. Y. 328.

² International Life &c. Soc. v. Commissioners, 28 Barb. (N. Y.) 318. It has been held that, without the aid or the interposition of a Federal statute, *stock in the public debt of the United States*, whether owned by individuals or corporations, is taxable

under the laws of a State in common with other property. People v. Commissioners, 23 N. Y. 192. But this seems opposed to the Federal doctrine.

³ Case of State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 301; People v. Equitable Trust Co., 96 N. Y. 387, 393.

limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."¹ On the other hand, *all tangible property situated within a State*, except securities of the United States, is taxable by the State, without reference to the domicile of the owner, or to the manner in which such property is employed, *whether in interstate commerce or not*.² It is obvious at a glance that this must be the rule; since a principle which would exonerate from taxation the property of a State employed in the operations of interstate commerce, would exonerate all the railroad and telegraph property in the State, and cast the burden of taxation upon other property.³

¹ *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423, 430, opinion of the court by Mr. Justice Swayne.

² *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530; *Western Union Tel. Co. v. State*, 64 N. H. 265; *s. c.* 9 Atl. Rep. 547; *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5; *Thomson v. Pacific Railroad*, 9 Wall. (U. S.) 579; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 211; *Maye v. Baltimore & C. R. Co.*, 127 U. S. 117, 124; *Leloup v. Mobile*, 127 U. S. 640, 649; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 23; *International Life Assurance Soc. v. Commissioners*, 28 Barb. (N. Y.) 318; *Blackstone Man. Co. v. Blackstone*, 13 Gray (Mass.), 488. Thus, it has been frequently held that *vessels* engaged in foreign or interstate commerce, and duly enrolled and licensed under the acts of Congress, may be taxed by State authority as personal property; provided the tax is not a *tonnage duty*, and is levied only at the port of regis-

try, and the vessel is valued as other property in the State, without unfavorable discrimination on account of its employment. *Transportation Co. v. Wheeling*, 99 U. S. 273; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Moran v. New Orleans*, 112 U. S. 69, 74 (doctrine recognized). Such decisions as one which held that a tax laid for the purposes of revenue upon the *rolling stock* of a railroad company is tantamount to a tax upon passengers and freight, and an unconstitutional interference with *interstate commerce* (*Minot v. Philadelphia & C. R. Co.*, 2 Abb. (U. S.) 323), are necessarily *overruled* by the above decisions.

³ Thus, stock in trade or goods employed in manufacturing in Massachusetts, are not exonerated from taxation therein, although the owner resides and does business in another State, where he is liable to pay taxes on his personal property. *Leonard v. New Bedford*, 16 Gray (Mass.), 292.

§ 8095. **Situs of Interstate Property for the Purposes of Taxation.**—Such being the limit of power of taxation possessed by a State, the question of the *situs* of movable property for the purposes of taxation becomes one of the greatest importance. And here it is to be observed that the principle that the *situs* of personal property is the domicile of its owner, is not the governing principle in respect of *tangible personal property*, but that it is competent for a State to lay and enforce a tax against all tangible movable personal property situated *continuously*¹ within its boundaries, without reference to the domicile of its owner, although the same property may be taxed against the same owner in another State.² The law on this subject has been clearly expressed, with the citation of applicatory authorities in the margin, by Mr. Justice Gray, in an opinion characterized by his usual learning and research:³ “No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that, only so far as the comity of that State allows, can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner’s domicile, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule

¹ The mere fact that movable property, as, for instance, a *boat* or *vessel*, temporarily comes to a place or touches at its wharf in the operations of commerce, does not give jurisdiction to tax it at that place. *New Albany v. Meekin*, 3 Ind. 481; *s. c.* 56 Am. Dec. 522; *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423.

² *Blackstone Man. Co. v. Blackstone*, 13 Gray (Mass.), 488 (doctrine

affirmed and commented upon); *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423, 430 (doctrine recognized); *International Life Assurance Co. v. Commissioners*, 28 Barb. (N. Y.) 318; *Finley v. Philadelphia*, 32 Pa. St. 381; *People v. Commissioners*, 23 N. Y. 224, 328; *Liverpool &c. Ins. Co. v. Assessors*, 44 La. An. 760.

³ *Pullman’s Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22.

has yielded more and more to the *lex situs*, the law of the place where the property is kept and used.¹ As observed by Mr. Justice Story, in his commentaries just cited, 'although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.' For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax."²

§ 8096. *Situs of Ships at Sea.*—Ships or vessels engaged in interstate or foreign commerce upon the high seas, or upon other waters which are a common highway and having a home port at which they are registered, under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State, at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But this, it has been pointed out, is because they are not, in any proper

¹ *Green v. Van Buskirk*, 5 Wall. (U. S.) 307, and 7 Wall. (U. S.) 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; *Walworth v. Harris*, 129 U. S. 355; *Story on Conflict of Laws*, § 550; *Wharton on Conflict of Laws*, §§ 297-311.

² *Lane County v. Oregon*, 7 Wall. (U. S.) 71, 77; *Railroad Co. v. Pennsylvania*, 15 Wall. (U. S.) 300, 323, 324, 328; *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5, 29; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.)

490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517, 524; *Marye v. Baltimore & C. R. Co.*, 127 U. S. 117, 123. It has been held under a statute that where the real estate of a corporation is situate partly in one *township* and partly in another, and is occupied by the corporation, it will be subject to taxation in the township where the corporation resides. *State v. Warford*, 37 N. J. L. 397.

sense, abiding within its limits, and have no continual presence or actual *situs* within its jurisdiction, and therefore can be taxed only at their legal *situs* and their home port, and at the domicile of their owner.¹ But the question, *what is the home port* of a ship or vessel for the purposes of taxation, depends wholly upon the locality of the residence of the owner, and not upon the place of its enrollment.² When, therefore, a ferry company, chartered under the laws of Illinois, plied with its boats between East St. Louis, in Illinois, and St. Louis, in Missouri, and its boats were forbidden, by an ordinance of St. Louis, to remain at its wharves more than ten minutes at a time, but were tied up when not in use, in Illinois, and their officers and pilots lived there,—it was held that they were not within the jurisdiction of the State of Missouri for the purposes of taxation, and that a tax law taxing them as boats “*within the city*” was void; and this was so, although they were registered under the laws of the United States in St. Louis.³

§ 8097. *Situs of the Rolling Stock of Interstate Railway Companies.*—If the rule in regard to the *situs* of ships and vessels at sea for the purpose of taxation is applied to the

¹ Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 23, opinion by Mr. Justice Gray; citing Hays v. Pacific Mail Steamship Co., 17 How. (U. S.) 596; St. Louis v. Ferry Co., 11 Wall. (U. S.) 423.

² St. Louis v. Ferry Co., 11 Wall. (U. S.) 423, 431; Hill v. Golden Gate, Newb. (U. S.) 308; Jordan v. Young, 37 Me. 276. The Act of Congress of 1789, § 4 (1 U. S. Stat. at Large, 55), and that of 1792, § 3 (1 U. S. Stat. at Large, 287), declare that the home port of a vessel registered under those acts shall be *that, at or near which her owner resides*.

³ St. Louis v. Ferry Co., 11 Wall. (U. S.) 423. Compare Morgan v. Parham, 16 Wall. (U. S.) 471; Wiggins

Ferry Co. v. East St. Louis, 107 U. S. 365; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196. A tax imposed by one State on the *value* of steamboats plying between that State and another State, which boats are owned and have their home port in the State imposing the tax, is not a violation of the provision of the Federal constitution (Const. U. S., art. 1, § 10, par. 3), prohibiting the States from levying “*any duty of tonnage*”; nor is it a violation of that provision of the Federal constitution (Const. U. S., art. 1, § 8, par. 3), which confers upon Congress power to *regulate commerce among the several States*. Wheeling &c. Trans. Co. v. Wheeling, 9 W. Va. 170; s. c. 27 Am. Rep. 552.

rolling stock of railway companies, then the conclusion will be that such rolling stock is taxable only by the State of the domicile of the corporation, and that the engines and cars of a railroad company cannot be taxed by a State within which they may temporarily come for the purposes of commerce; and this for two reasons: 1. That they have no *situs* within that State, and that that State has no jurisdiction over them for the purposes of taxation; and, 2. That a tax laid upon property thus temporarily coming within the limits of a State for the purposes of *interstate commerce* would be a tax or embargo upon interstate commerce itself, and hence unconstitutional. This theory is strongly brought out in a dissenting opinion in the Supreme Court of the United States.¹ Whatever doubts may attend this question, it would seem clear that the *situs* of the rolling stock of an ordinary railway company, for the purposes of taxation, is within the State of the domicile of the company.² But whether it can have a *situs* for the purposes of taxation in another State, would seem to depend upon the *manner* in which, and *extent* to which, it is employed in such other State. If, for instance, a railroad company, created by one State, leases a connecting line from a corporation created in an adjacent State, and regularly employs its *rolling stock* upon such connecting line, then it would seem clear that, for the purposes of taxation, the rolling stock so employed acquires a *situs* in the State within which such leased line is located; though there are decisions opposed to this proposition.³ Again there is a class of rolling stock which is

¹ Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 30, dissenting opinion by Mr. Justice Bradley, with whom concurred Field and Harlan, JJ.

² This principle was, in substance, brought out in the State Railroad Tax Cases, 92 U. S. 575, 607.

³ Baltimore &c. R. Co. v. Allen, 22 Fed. Rep. 376. It has been held that the rolling stock of a railroad company created under the laws of Maryland, used upon its leased lines in

Virginia, is not taxable in Virginia, because it has no *situs* there. In its reasoning, the court compared the rolling stock of a railroad company to a ship at sea, for the purposes of taxation, which analogy, we shall see, has been discarded by the Supreme Court of the United States. Upon the question of the *situs* of rolling stock for taxation by the various counties or municipalities within a State, there is some difference of opinion. It has been held in Maryland that

owned by a corporation created under the laws of one of the States and operated upon nearly all the railroad lines in the United States and Canada, under contracts between the corporation owning it and the companies owning or leasing such lines. We allude to the *sleeping-cars* of the Pullman Palace Car Company. If it were to be held a rule of law that this property is taxable only in the State of the domicile of the corporation owning it, then it would, in a great majority of cases, be taxed in the State where it has only a fictitious *situs*, but within whose boundaries it never actually exists, and

the rolling stock of a railroad corporation is taxable *at its home office*. Appeal Tax Court *v. Northern Central R. Co.*, 50 Md. 417. So, in Missouri it has been held that rolling stock of a railroad company, which is *temporarily within a county* which is not the legal residence of the corporation is not taxable in such county, but that it is to be assessed and taxed in the county which is the legal residence of the corporation. *Pacific R. Co. v. Cass County*, 53 Mo. 18. Some earlier decisions turn upon the once disputed question whether the *rolling stock* of a railroad company is *real or personal property*. That it is personal property is now the settled doctrine. *State v. Northern Central R. Co.*, 18 Md. 193; *Randall v. Elwell*, 52 N. Y. 521; *s. c.* 11 Am. Rep. 747. Compare *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484. The Supreme Court of Iowa held in one case, which lacked the value of a precedent because the judges delivered separate and confusing opinions, that the city of Davenport had not the power to tax the rolling stock of a railroad company which kept its principal office and place of business therein, and operated a railroad running from within the limits of the city to another point in the State.

Davenport v. Mississippi &c. R. Co., 16 Iowa, 349. But this decision was *overruled* by a subsequent case, equally confusing and unsatisfactory, in which the four judges delivered separate opinions, but in which the majority of the court held that the city of Dubuque, in the State of Iowa, had the power to levy and enforce the payment of a tax upon the rolling stock of the Illinois Central Railroad Company, a corporation created under the laws of another State, but operating a railroad and using rolling stock within the corporate limits of the city of Dubuque. *Dubuque v. Illinois Central R. Co.*, 39 Iowa, 56. The statutes of some of the States in effect treat the *rolling stock* of railroad companies as *real property* and as a part of the railroad for the purposes of taxation, by apportioning the value of it, in assessing it for taxation, among the different counties and municipalities, in such proportion as the length of the main track within such taxing district bears to the whole length of the road. See *Kennedy v. St. Louis &c. R. Co.*, 62 Ill. 395. But such apportionment does not apply to a *leased* road over which the corporation occasionally sends its rolling stock. See *Cook County v. Chicago &c. R. Co.*, 35 Ill. 460.

would escape taxation within the States where it is permanently and continuously employed. A majority of the Supreme Court of the United States have held that such is not the law, and that the principle which makes a ship taxable only at its home port, does not apply to this species of traveling property.¹

§ 8098. **Taxing the Capital of Foreign Corporations.**— There is much difficulty in concluding that the legislature of a State can tax the *capital stock* of a foreign corporation, or any portion of it, though it may unquestionably tax its *tangible property* existing within the taxing State, and may impose a reasonable *license tax*, as a condition of its doing *business* within the State. According to some theory, however, a State can impose a tax upon so much or such proportion of the capital stock of a foreign corporation as is represented by its property within the State, or may impose a tax upon its capital, as a *license tax*, for its privilege of doing business within the State.² But an assessment cannot be properly laid on a portion of the capital stock of a foreign corporation, unless the legislature of the State has clearly authorized the imposition of such a tax and prescribed the mode in which it shall be assessed or apportioned.³

§ 8099. **Further of This Subject.**— On the other hand, it is competent for a State to impose upon the *movable personal property* of a foreign corporation, which is brought within the domestic territory and there *habitually* employed and used, the same rate of tax which is imposed upon similar property used in like way by its own citizens.⁴ While there is much difficulty in the case of *intangible property*, such as bonds, mortgages, and the like, in determining its *situs* for the pur-

¹ Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18.

² See the opinion of Buskirk, C. J., in Riley v. Western Union Tel. Co., 47 Ind. 511, 517.

³ See opinion of the court in Riley v. Western Union Tel. Co., 47 Ind. 511.

⁴ Marye v. Baltimore &c. R. Co., 127 U. S. 117. See also Western Union Tel. Co. v. Attorney-General, 125 U. S. 530; Liverpool &c. Insurance Co. v. Board of Assessors, 44 La. An. 760; s. c. 11 South. Rep. 91.

poses of taxation, it has been held that such *situs* is the *domicile of the owner or holder*; and hence that a State statute laying a tax of five per centum upon the interest due upon bonds of a domestic corporation, and requiring the corporation to pay the same, is invalid, in so far as it applies to bonds of such corporation held by *non-residents* of the State.¹ In assessing a tax upon the property of a foreign corporation employed within the State, the property ought to be assessed at its full and true value, and the value of any franchise granted by a local municipality ought not to be added to it in making the assessment.²

§ 8100. Taxing the Capital Employed by Foreign Corporations within the State.—The State of New York has adopted a scheme of taxation in respect of foreign corporations, which consists of laying a tax upon *that portion of their capital stock which is employed within the State*. Considerable difficulty has arisen in applying this principle of taxation. It is held that the portion of the capital stock of a corporation which is taxable under this statute is represented by the actual value of its property within the State, whether consisting of money, goods, or other tangible things; and hence that an assessment based upon the *proportion* which the *total sales* made by the corporation *within the State* has borne during the taxing year to the total sales made by it without the State, is an erroneous basis of assessment.³ As already pointed out,⁴ the *capital stock*

¹ Case of State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300.

² Thus, the property of a foreign *gas company*, engaged in selling and distributing to consumers, under authority from a village, *natural gas* furnished by another company, which property consists of *pipes* and *mains* extended under the streets, and of *tanks* built upon a lot, ought to be assessed at its full value as *real estate* under N. Y. Laws 1881, ch. 293; and in determining its value, the value of the franchise granted by the village, and of the contract with the company

furnishing the gas, ought not to be considered. *People v. Martin*, 48 Hun (N. Y.), 193. It is needless to add that, under any taxing system, the property of a foreign corporation ought not to be taxed *against the agent* or trustee of the corporation in whose custody it may be found, but that it ought to be taxed against the corporation itself. *People v. McLean*, 17 Hun (N. Y.), 204.

³ *People v. Wemple*, 133 N. Y. 323; s. c. 31 N. E. Rep. 238.

⁴ *Ante*, § 2811, p. 2006, note 3.

indicated by such a statute does not mean the *share* capital or stock, but the capital owned by the corporation, that being required to be paid in and kept intact as the basis of the business enterprise. The assessment, under such a statute, is therefore, not made upon the share stock, but always upon the *capital* and *surplus*, the same to be assessed at their actual value when that is known or can be ascertained. An assessment, under such a scheme of taxation, based upon the *market value of the shares* of the corporation, is therefore erroneous; though it has been reasoned that if the amount of capital and surplus is undisclosed and unknown, the assessors may consider the *market value* of the share stock as *evidence* of the amount of capital and surplus.¹

§ 8101. Taxing Foreign Corporations having Agencies within the State. — Under the scheme of taxation just alluded to, it is held that a foreign manufacturing corporation, which maintains an agency within the domestic State for the sale of its goods, which are *manufactured in other States*, and brought into the domestic State for sale, may be taxed by the domestic State, in the form of a tax laid upon *that portion of its capital which it employs in so transacting its business within the domestic State*, and that this is not a regulation by the State of commerce among the States, within the meaning of the commerce clause of the Federal constitution.² The theory of the decision is that where such a corporation acquires a *qualified residence* within the State, for the purpose of carrying on a portion of its business there, and keeps a bank account there, and employs a portion of its capital there, the capital so employed is justly the subject of taxation in common with the capital employed by domestic citizens and corporations; and that the payment of such a tax is merely a return which may be justly exacted by the State from the foreign corporation, for the protection accorded to its capital by the laws of the State.³

¹ *People v. Coleman*, 126 N. Y. 433.

² *People v. Wemple*, 131 N. Y. 64;
s. c. 27 Am. St. Rep. 542.

³ *Ibid.* It has been held that a foreign corporation mining silver in Utah, refining it in Chicago, and

§ 8102. Taxing Foreign Corporations "doing Business in This State."—Suppose a taxing statute lays a tax upon foreign corporations "doing business in this State," when will such a corporation be deemed to be "doing business in this State," so as to be liable to taxation, within the meaning of the statute? This question is analogous to that already considered in relation to statutes imposing conditions upon foreign corporations as precedent to their right to do business within the State.¹ Where, in the case of a foreign mining company which mined silver in the Territory of Utah, caused it to be refined at Chicago, and again assayed at the United States Assay Office in New York into standard silver bars, and its president, secretary, and treasurer had their offices in New York, and its directors held their annual meetings there, and its dividends were declared and paid there, and its silver bullion was all sent there, and sold there, and the proceeds of it were received there, some of which proceeds were deposited in banks there and some loaned there, and some used there for the purposes of the company, the balance being transferred elsewhere for its use in its business, — it was held that there was such a *substantial portion of its business* done within the State of New York as brought it within the meaning of a taxing law taxing corporations "doing business in this State." The court said: "We cannot construe the words 'doing business in this State,

procuring it to be again refined into standard silver bars in the United States Assay Office in New York, is not a manufacturing corporation carrying on a manufacture within the State of New York, within an *exemption* in a statute of that State relating to taxation. *People v. Horn Silver Min. Co.*, 105 N. Y. 76. That *gas companies* are *manufacturing companies* within this *exemption*, see *Nassau Gas Light Co. v. Brooklyn*, 89 N. Y. 409. That an *electric light company* is a *manufacturing company* within the same exemption, see *People v. Wemple*, 129 N. Y. 543. A

Federal judge has held that a statute laying a specific tax upon every *sewing-machine company* selling or dealing in sewing machines, within the State, intended to embrace all such companies, whether corporations, joint-stock companies, or partnerships, domestic or foreign, is not unconstitutional, when applied to foreign corporations engaged in the business of manufacturing and selling sewing-machines, notwithstanding the fact that no domestic companies are engaged in such business. *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121.

¹ *Ante*, § 7936, *et seq.*

to mean the whole business of the corporation within this State; and while we are not prepared to hold that an occasional business transaction, that keeping an office where the meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done, would bring a corporation within this act; yet when, as in this case, all these things are done, and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act as one 'doing business in this State.' There is no injustice in subjecting to taxation such a corporation enjoying the benefits of our great mart, the advantages of our social order, and the protection of our laws."¹ A manufacturing company, created under the laws of another State, which maintained an established *agency for the sale of its manufactured product* in the State of New York, and kept a bank account there for the convenience of its transactions, was within the provisions of statutes of New York,² subjecting foreign corporations "doing business in this State" to a tax on the amount of their capital stock employed within the State.³ A *telephone company* created in Massachusetts and having a *sub-corporation*, so to speak, in New York, which was its *licensee*, but not its agent, was not doing business in the State of New York within the meaning of this statute.⁴ It has been held that a corporation created under the laws of New Jersey, having an office in that State, and procuring therein a large part of the material used by it, but carrying on the manufacture of its special product in another State, is not transacting its business in New Jersey within the exemption clause of a statute of that State.⁵

¹ *People v. Horn Silver Min. Co.*, 105 N. Y. 76, 83; *s. c.* affirmed, 143 U. S. 305.

² *Laws N. Y.*, 1885, cc. 359, 501.

³ *Southern Cotton Oil Co. v. Wemple*, 44 Fed. Rep. 324. Compare *People v. Commissioners*, 59 N. Y. 40, 43,

where a previous statute using the expression "doing business in this State," was construed.

⁴ *People v. American Bell Teleph. Co.*, 117 N. Y. 241; *s. c.* 22 N. E. Rep. 1057; 27 N. Y. St. Rep. 459.

⁵ *New Jersey Act April 18, 1834,*

§ 8103. **Taxing Capital of Foreign Corporations Domiciled within the State, but doing Business without the State.** Under a constitutional power to "impose and levy reasonable duties and excises" upon "commodities,"¹ it has been held competent for the Legislature of Massachusetts to lay a tax, called an *excise*, upon every corporation or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of its shares," and "incorporated elsewhere," "for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other *mining*, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling, or holding mines or lands without the Commonwealth," such tax consisting of a percentage of the par value of the capital stock of such company or association. Nor is such a tax prohibited by the Constitution of the United States.²

§ 4,—imposing a *license* or *franchise tax* upon corporations, "except manufacturing companies carrying on business in the State." *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270; *s. c.* 19 Am. St. Rep. 394; 19 Atl. Rep. 733. It has been held that a manufacturing company, carrying on business in New Jersey, in order to be exempted from taxation by the Act of 1884, must *actually locate and begin work* under its charter within the State. See *Norton Naval Constr. & c. Co. v. State Board of Assessors* (N. J.), 22 Atl. Rep. 352. But the construction put upon a similar statute in New York is that a foreign manufacturing corporation, actually carrying on a portion, though small, of its manufacturing operations within the State, in the ordinary and regular course of its business and in good faith, is *exempt from taxation* under a statute exempting corporations "carrying on manufactures in

this State." *People v. Wemple*, 133 N. Y. 323; *s. c.* 31 N. E. Rep. 238; 18 N. Y. St. Rep. 504. The statute was changed in 1889 (N. Y. Laws 1889, ch. 353), so as to restrict the exemption to corporations "*wholly engaged* in carrying on manufactures within this State." An interstate railroad four hundred and fifty-five miles long, forty-two miles of which lie within a State other than that by which it was incorporated, is held to be doing business within the latter State, within the meaning of a statute taxing all railroad companies "doing business within the State," and upon whose road freight may be transported. *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; affirming *s. c.* 66 Pa. St. 84; 5 Am. Rep. 351.

¹ *Post*, § 8134.

² *Attorney-General v. Bay State Min. Co.*, 99 Mass. 148; *s. c.* 96 Am. Dec. 717.

§ 8104. **Interpretation of Words and Phrases in Statutes Laying Taxes upon Foreign Corporations.**—Foreign corporations are to be deemed “persons,” within the meaning of a statute relating to taxation, unless a different intent is indicated by the language employed.¹ A rather loose construction of a statute laying a tax upon “goods, wares, merchandise, and other stock in trade,” etc., “in cities or towns within the State other than where the owners reside,” has been held to make it include the *pledges* received by a foreign corporation which is doing business within the domestic State, as a *pawnbroker*, such pledges being “stock in trade,” and the place of business of the corporation being a “shop” within the meaning of another clause of the statute.² A corporation authorized by an “omnibus charter” to build and operate railroads, and to build and employ steamships in foreign and domestic trade, built and sold to another corporation, a short railroad, and afterwards engaged principally in operating a line of steamships. It was held that it was not a “railroad company,” within the meaning of a statute imposing a *bonus* on the stock of all companies except railroad companies.³ The case proceeds upon the view that, for the purposes of taxation, the character of a corporation which, by its charter, has various offices and distinct franchises, is to be ascertained by the character of the *principal business* in which it is engaged at the time the tax in question accrues.⁴

§ 8105. **Taxation of Foreign Corporations when Engaged in Interstate Commerce.**—What State regulations leave interstate commerce free, or hampered in a sense prohibited by a theoretical construction of the Federal Constitution already referred to, has been necessarily the subject of much casuistry, especially with reference to the *taxing power of the States*.⁵ If

¹ British Commercial Life Ins. Co. v. Commissioners, 1 Abb. App. Dec. (N. Y.) 199. To the same effect, see Boston Loan Co. v. Boston, 137 Mass. 332. Compare *ante*, §§ 11, 5689, 7366, 7790, 7804, 7882, 7900, 8059.

² Boston Loan Co. v. Boston, 137 Mass. 332.

³ International Nav. Co. v. Commonwealth, 104 Pa. St. 38.

⁴ *Ibid*.

⁵ See *ante*, § 5562.

the construction of this clause had been limited so as to restrain the States from imposing upon persons or corporations domiciled outside of the State, but trading within it, *taxes and burdens* greater than those imposed upon domestic persons or corporations doing business within the State, then the propriety of the decisions would have met with general concurrence.¹ But those decisions go further, and deny to the States altogether the power to tax the *business* of interstate commerce, or the *agencies* or *means* by which interstate commerce is transacted, irrespective of the question whether the same business, in so far as it consists of domestic commerce and the same means or agencies employed in domestic commerce, are similarly taxed. In this respect it reverses and contradicts the spirit of the previous decisions of the court with regard to the *status* of foreign corporations, and places them on a more favorable footing, in many of the States, in respect of the taxes paid for the privilege of doing business, than domestic persons and corporations enjoy. Take, for instance, the case of a *ferry company* chartered under the laws of New Jersey and having its nominal *situs* at Camden in that State, but whose entire business consisted in ferrying passengers and freight across the Delaware River to and from the city of Philadelphia. Almost the entire vitality of the corporation was manifestly drawn from the commerce of that great city; and yet a decision of the Supreme Court of the United States, reversing the Supreme Court of Pennsylvania, held that it was not competent for the State of Pennsylvania to lay the same *license tax* upon this ferry company, graduated upon its *dividends*, which it laid upon domestic corporations engaged in the same business.² In general, the doctrine of the Supreme Court of

¹ Such, for instance, was the decision in *Welton v. Missouri*, 91 U. S. 275.

² *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. The construction which the Supreme Court of the United States has given to this clause was stated by Mr. Justice Bradley in this summary language: "It is also

an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons

the United States may be said to be that a State *tax*, burden, or other imposition imposed upon the *means* or *instrumentalities* of interstate commerce, whether carried on by natural persons or by corporations, is a violation of the commerce clause of the Federal constitution, and hence void.¹

§ 8106. Taxation of Domestic Corporations Engaged in Interstate or Foreign Commerce.—In respect of the question whether a tax laid by a State upon a corporation is

and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and

• not yet become a part of the common

mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject." *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 493. In another case the court speaking through Mr. Chief Justice Fuller, reaffirmed this decision in the following language: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Lyng v. Michigan*, 135 U. S. 161, 166.

¹ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326; *McCall v. California*, 136 U. S. 104; *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114.

a burden upon interstate or foreign commerce and hence unconstitutional, no distinction exists between foreign and domestic corporations,¹ though unsuccessful and discarded attempts have been made to create such a distinction.² The constitutional provision already quoted is construed as preventing the States from *taxing the operations of interstate commerce* carried on by corporations of their own creation and having a *situs* within their own borders. Thus, a *State tax upon the gross receipts of a steamship company*, incorporated under the laws of Pennsylvania, which receipts were derived from the transportation of persons and freight by sea between different States, and to and from foreign countries, was held to be an attempt, by the State of Pennsylvania, to regulate interstate and foreign commerce, and to be in conflict with the exclusive powers conferred upon Congress by the clause of the constitution under consideration.³ In like manner, the court held that a *tax laid by the State of Pennsylvania, upon a railway corporation of its own creation, of a certain amount per ton upon all freight* carried by such corporation, was void, in so far as it applied to freight taken up within the State and carried out of it, or taken up without the State and brought within it.⁴ But in respect of the taxation of the *gross receipts of a domestic railway company* engaged in part in the operations of interstate commerce, a majority of the court came to a different conclusion, — holding that a statute of a State imposing a tax upon the gross receipts of a railroad company of its own creation, is not repugnant to this clause of the Constitution of the United States, although such gross receipts are made up in part from funds received for the transportation of mer-

¹ Philadelphia &c. R. Co. v. Pennsylvania, 122 U. S. 236, 244.

² See, for instance, State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, distinguished in Fargo v. Michigan, 121 U. S. 230, 243 (*post*, § 8117), on this ground, but overruled by Philadelphia &c. R. Co. v. Pennsylvania, 122 U. S. 326, 344. See also Com. v. Lehigh Val. R. Co. (Pa.),

17 Atl. Rep. 179; and compare Delaware &c. Canal Co. v. Com. (Pa.), 17 Atl. Rep. 175, where the corporation was created under the laws of another State.

³ Philadelphia &c. R. Co. v. Pennsylvania, 122 U. S. 326.

⁴ Case of State Freight Tax, 15 Wall. (U. S.) 232, Swayne and Davis, JJ., dissenting.

chandise from the State into another State, or into the State from another State.¹

§ 8107. **State License or Privilege Taxes upon Foreign Corporations Engaged in Interstate Commerce.**—The present construction of the interstate commerce clause of the Federal constitution is that it prohibits the States, under the guise of *license taxes*, from excluding from their jurisdiction foreign corporations engaged in interstate commerce, or from imposing any burdens upon such commerce within their limits.² For instance, it prohibits a *municipal corporation*, acting under a power derived from the Legislature of the State within which it exists, from imposing a *license tax on telegraph companies*, a portion of whose business is within the State, and a portion without the State, without any discrimination between the two kinds of business;³ though it does not inhibit a State from taxing the *property of telegraph companies* engaged in sending interstate and foreign messages, in like manner as other property within the State is taxed.⁴ So, it prohibits a State from imposing a license or privilege tax upon an *express company* which carries on the business of transporting pas-

¹ *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284. This case was "considered and questioned" in *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 342, and it seems to be overruled by the last named case, though it is to be observed that that court, while departing from its previous decisions, as other courts do, is not in the habit of stating in any case that it overrules them. A statute (Mich. Laws 1865, p. 244), imposing a specific tax upon corporations and companies engaged in mining, smelting, and refining ores in that State, which provides for the payment of a tax of one and a half cents per ton on all iron ore or mineral obtained and exported from the State before being smelted, but which exempts from taxation all that is

smelted within the State, has been held as an attempt to impose a tax upon interstate commerce, and void. *Jackson Mining Co. v. Auditor-General*, 32 Mich. 488.

² *Norfolk &c. R. Co. v. Pennsylvania*, 136 U. S. 114; *McCall v. California*, 136 U. S. 104; *Moran v. New Orleans*, 112 U. S. '69, 74; *Pickard v. Pullman's Southern Car Co.*, 117 U. S. 34, 43; *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 497; *Leloup v. Mobile*, 127 U. S. 640, 644; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25 (doctrine recognized).

³ *Leloup v. Mobile*, 127 U. S. 640; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59.

⁴ *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530.

sengers or merchandise between places in different States,¹ though such a tax is valid when applied exclusively to its business done within the State.²

§ 8108. Further of This Subject. — The power and the want of power of the States to impose *license taxes* upon foreign corporations are thrown into clear contrast by a decision of the Supreme Court of the United States, where it is held that such taxes may be imposed upon such corporations, provided they are not engaged in carrying on *foreign* or *interstate commerce*, nor *employed by the government of the United States*; and where it is added that “the only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority.”³ It is, therefore, clearly established that if the foreign corporation is not engaged in interstate commerce, or is not an agency of the United States, the State

¹ United States Express Co. v. Hemmingway, 39 Fed. Rep. 60. This conclusion is based upon the idea that the decision of the Supreme Court of the United States in *Osborne v. Mobile*, 16 Wall. (U. S.) 479, is overruled by the case of *Leloup v. Mobile*, 127 U. S. 640. The decision of the Supreme Court of Missouri in *American Union Express Co. v. St. Joseph*, 66 Mo. 675; s. c. 27 Am. Rep. 382, — is clearly *overruled* by the decisions previously cited in this section.

² United States Express Co. v. Hemmingway, 39 Fed. Rep. 60.

³ *Pembina Consolidated &c. Co. v. Pennsylvania*, 125 U. S. 181, 190. This case holds that it is competent for a State to prohibit foreign corporations,

not investing and using their capital within its limits, from having an office within the State for the use of their officers, stockholders, agents, or employes, unless they shall first obtain from the Auditor-General of the State an annual license so to do, and pay therefor into the State treasury one-fourth of a mill on each dollar of capital stock which they are authorized to have. The court could not see that this statute infringed the commerce clause of the Federal constitution, because it imposed no prohibition upon the *transportation* into Pennsylvania of the products of other States or countries, or upon their sale within that Commonwealth.

may exact of it a license tax, as the condition of its right to do business within the State, and that otherwise it cannot. Nor can the operation of this constitutional restriction be evaded by imposing a *license tax upon the agents* of the foreign corporation engaged in interstate commerce within the State; and therefore a statute of Kentucky imposing, under a penal sanction, a license tax of five dollars upon each *agent of foreign express companies* doing business within the State, was held void.¹ These decisions seem to be obviously sound; since there can be no difference, in substance, between a license tax laid upon a foreign corporation, and such a tax laid upon its agents within the State; especially in view of the fact that, by laying a small tax upon each agent, the State will succeed in collecting as much from the foreign corporation as it would by laying a large tax upon the corporation itself.²

§ 8109. License Taxes Distinguished from Licenses of Occupations.—But a *license tax* which is laid for the purposes of *revenue* is to be distinguished from a *license which is required as a qualification* to carry on a particular employment which affects the safety of the people, which license may be demanded as a reasonable *police regulation*. It was upon this ground that a State statute was upheld requiring *locomotive engineers* to be examined for *color blindness*, and to be licensed by a board appointed for that purpose before being allowed to discharge their duties within the State, although employed by *interstate railway companies*.³

¹ *Crutcher v. Kentucky*, 141 U. S. 47; reversing *Crutcher v. Com.*, 89 Ky. 6; *s. c.* 12 S. W. Rep. 141; and overruling *Woodward v. Com.* (Ky.), 7 S. W. Rep. 613; *s. c.* 9 Ky. Law Rep. 670.

² The New Jersey Tax Law of 1884, in so far as it provides that "all other corporations under the laws of this State . . . shall pay a yearly license fee or tax of one-tenth of one per cent on the amount of the capital stock . . . provided that this act shall not apply

to . . . manufacturing companies or mining companies carrying on business in this State,"—does not violate the constitutional provision requiring taxation by uniform rules, but discriminates only against corporations carrying on business outside of the State, reaching the entire class. *State v. Underground Cable Co.* (N. J.), 18 Atl. Rep. 581.

³ *Smith v. Alabama*, 124 U. S. 465; *Nashville &c. Ry. v. Alabama*, 128 U. S. 96; *ante*, § 5509. Compare *Dent*

§ 8110. **Taxes upon the Receipts of Transportation Companies Derived from Interstate Commerce.**—A statute imposing a tax upon the *receipts* of railway and other transportation companies is void under the foregoing principles, in so far as it lays the imposition upon receipts derived from commerce between points within and points without the State, and between points without and points within it.¹ And this is so although the property thus in interstate transit may be *temporarily delayed* within the limits of the State.² But a State statute imposing a tax upon the *gross receipts* of an express company derived from the carriage of goods *within the State*,—distinguishing such companies from transportation companies which own their own lines of transportation,—is not a regulation of interstate commerce, nor is it an unequal taxation within the prohibition of State constitutions, nor does it deny to the companies taxed the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution.³

§ 8111. **Taxation of Goods in Interstate Transit.**—In like manner, goods which are in interstate transit from a point within a State to a point without the State, or from a point without the State to a point within the State, cannot be taxed by a State, although such goods may be the product of the State imposing the tax.⁴

v. West Virginia, 129 U. S. 114. Under the operation of these principles, a statute, imposing a *license tax upon express companies*, has been held void: *Com. v. Smith*, 92 Ky. 38; *s. c.* 36 Am. St. Rep. 578. It has been held that where, by a general statute, a specific tax is assessed upon "every sewing-machine company, selling or dealing in sewing-machines, by itself or its agents, in this State," such an act extends to and embraces all such companies, whether corporations, joint-stock companies, or partnerships,

domestic or foreign, and does not impair the privileges and immunities of citizens of other States; and that the fact that no domestic companies are at the time engaged in such business within the State is immaterial. *Singer Man. Co. v. Wright*, 33 Fed. Rep. 121.

¹ *Delaware &c. Canal Co. v. Com.* (Pa.), 17 Atl. Rep. 175.

² *Delaware &c. Canal Co. v. Com.* (Pa.), 17 Atl. Rep. 175.

³ *Pacific Express Co. v. Seibert*, 142 U. S. 339; *s. c.* affirmed, 44 Fed. Rep. 310.

⁴ *Coe v. Errol*, 116 U. S. 517.

§ 8112. **Taxation of Goods in Transit through the State.**

In like manner, goods in transit *through* the State *from a place outside of it to another place outside of it*, are not taxable by the State, even though detained within its boundaries by low water or other temporary causes.¹ Nor are the *gross receipts* of a railway or other transportation company, derived from the transportation of goods thus detained, taxable by the State.² But where property which is merely *destined* for transportation into another State, is detained by temporary causes in the State of its production while awaiting such transportation, it remains a part of the general mass of the property of the State, which is liable to taxation in the usual way in which other such property is taxed within the State. Thus, *logs*, cut at a place in New Hampshire, and hauled to a town on the Androscoggin river in that State, to be transported from thence down the river to Lewiston, in the State of Maine, while waiting within the limits of New Hampshire for a rise of water in the river sufficient to float them, were liable to taxation in the same way as other such property within the State.³

§ 8113. **Immaterial how the Tax is Laid.** — The *transportation of property is commerce*, and a tax upon such property in its transit from State to State is a regulation of commerce between the States, within the meaning of the commerce clause of the Federal constitution,⁴ such as cannot be constitu-

¹ *Coe v. Errol*, 116 U. S. 517; *State &c. Coal Co. v. Carrigan*, 39 N. J. L. 35.

² *Delaware &c. Canal Co. v. Com.* (Pa.), 17 Atl. Rep. 175. In the application of these principles it has been held that a foreign corporation, whose business is the mining of coal in Pennsylvania, which coal is sent by railroad *across the State* of New Jersey to tide water for shipment, the office of the foreign corporation for receiving orders for coal and transacting its business being in New York City,—is not taxable in

respect of coal lying on its dock in the State of New Jersey, where it is delayed awaiting shipment to other States, nor of its coal shipped direct from its mines and delivered in the State of New Jersey, in railway cars, to local dealers on orders transmitted from its office in New York City. *State &c. Coal Co. v. Carrigan*, 39 N. J. L. 35; *State v. Engle*, 34 N. J. L. 425.

³ *Coe v. Errol*, 116 U. S. 517.

⁴ *Ante*, § 5562.

tionally imposed by State authority.¹ The mode in which the tax is imposed, whether it be directly on the property in the hands of the owner, or upon the carrier as a tax on his business, is immaterial.² If, for instance, as already seen,³ a tax directly laid upon the property in its transit across the taxing State from one State to another, is unconstitutional, then it is equally clear that a tax laid upon the carrier for transporting such property is unconstitutional, because of a substantial identity in the results.⁴ For, although such a tax is in form a tax on the business of the transportation company, it is in substance a tax on the commodities, the transportation of which constitutes the business,⁵—especially in view of the fact that the carrier must, in order to sustain his business, recoup himself to the extent of the tax by charging an increased rate for the transportation of the goods. It was upon this ground that a State law requiring an importer to take out and pay for a *license*, as a prerequisite to a right to sell imported goods, was held to be in conflict with the commerce clause of the Constitution of the United States;⁶ and that a *stamp duty upon bills of lading* for gold and silver transported to any port or place out of the State, was unconstitutional, as a tax on exports.⁷

§ 8114. When Interstate Transit Commences so as to Exempt the Property from State Taxation.—So long as the property remains *a part of the common mass of property within the State*, it is taxable by the State, wholly without reference to the question whether its owner is a resident or non-resident person or corporation. But when it is separated from that general mass and started upon its final transit out of the State,

¹ Case of State Freight Tax, 15 Wall. (U. S.) 232; Erie R. Co. v. Pennsylvania, 15 Wall. (U. S.) 282; Erie R. Co. v. State, 31 N. J. L. 531; s. c. 86 Am. Dec. 226; State &c. Coal Co. v. Carrigan, 39 N. J. L. 35, 37.

² State &c. Coal Co. v. Carrigan, 39 N. J. L. 35, 37; Erie R. Co. v. State, 31 N. J. L. 531; s. c. 86 Am. Dec. 226.

³ *Ante*, § 8112.

⁴ Erie R. Co. v. State, 31 N. J. L. 531; s. c. 86 Am. Dec. 226.

⁵ *Ibid*.

⁶ Brown v. Maryland, 12 Wheat. (U. S.) 419.

⁷ Almy v. California, 24 How. (U. S.) 169.

it ceases to be so taxable; for a tax then laid upon it would be a regulation of commerce between the States within the meaning of the commerce clause of the Federal constitution. In respect of the point of time when this transit, and with it this exemption from taxation, begins, it has been said, in relation to the products of a State intended for transportation to another State, that such goods do not cease to be a part of the general mass of property in the State, and subject to its taxation in the usual way, until they have been shipped, or entered with a common carrier for shipment, to another State, or country, or have been started upon such transportation *in a continuous route or journey*.¹ The mere fact that goods are *intended for transportation* out of the State is not sufficient; for "if such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State."² Nor does an interstate transit, and with it an exemption from taxation, commence, until the goods have entered upon their *final* journey to a place outside of the State.³ It is true that it was said in one case that "whenever a commodity has *begun to move* as an article of trade from one State to another, commerce in that commodity between the States has commenced."⁴ But in a later decision this statement was qualified by saying that "this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is not part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to

¹ *Coe v. Errol*, 116 U. S. 517, 527.

² *Ibid.*

³ *Ibid.* 528.

⁴ *The Daniel Ball*, 10 Wall. (U. S.) 557, 565.

another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.”¹

§ 8115. **Taxing Sales Made within the State by Non-resident Corporations.** — It is competent for a State to lay a uniform tax upon all *sales of goods* made within its limits, whether by its own citizens or corporations, or by persons or corporations of other States, and whether the goods sold are the products of the domestic State or of some other State; since the prohibition of the Federal constitution that “no State shall levy any imposts or duties on *imports* or exports,” does not refer to articles imported from one State into another, but only to goods imported from foreign countries into the United States.² So, it has been held that coal mined in Pennsylvania, and sent by water to New Orleans, in Louisiana, there to be sold in open market, for account of the owners in Pennsylvania, becomes, in theory of law, intermingled, on its arrival there, with the general mass of property subject to taxation in the State of Louisiana under its laws, although it may be, after its arrival, sold from the vessel in which it was transported thither, and without being landed, and for the purpose of being taken out of the country on a vessel bound for a foreign port.³ But a statute prohibiting, under a penal sanction, any person from dealing as a peddler without a license, and defining such person to be one dealing in goods or wares “*not the growth, produce, or manufacture of this State,*

¹ Coe v. Errol, 116 U. S. 517, 528.

Houston, 114 U. S. 622, where this decision is “affirmed and applied.”

² Woodruff v. Parham, 8 Wall. (U. S.) 123. Compare Brown v.

³ Brown v. Houston, 114 U. S. 622.

by going from place to place to sell the same," — intended obviously to exclude drummers and commercial travelers from other States, was held unconstitutional as an attempt to regulate interstate commerce.¹

§ 8116. **Taxation of Gross Receipts.** — A favorite mode of taxation, resorted to by State legislatures dominated by the agricultural influence, has been to lay taxes upon merchants and common carriers, in the form of requiring them to pay as taxes *a certain percentage of their gross receipts*. In some cases these taxes have been imposed in the form of *license taxes*, and the payment of such a tax for a stated period has been made a condition precedent to a renewal of the license, without which the merchant was prohibited from carrying on his business. This form of taxation is subject to the same objections, on the grounds of expediency and policy, as the taxation of incomes. The methods of collection are necessarily inquisitorial. They require the merchant to lay bare the volume and extent of his business to the inspection of his competitors and his creditors, and often in either case to his detriment. This fact, however, does not constitute a valid constitutional objection to this mode of taxation unless there is a constitutional prohibition restraining the subjects of taxation to *property*, real and personal. Such a tax is in no sense a tax upon property, but it is, in substance and effect, a tax upon the *operations of trade*, the effect of which is that whenever a merchant sells a piece of goods, he must divide the money which he receives from his customer, between himself and the State. It is therefore a tax upon the very fact of *selling*, and upon the very operation and amount of trade itself. It follows, on a principle of undeniable logic, that whenever such a tax is laid upon the *gross receipts of an interstate carrier*, it is a tax upon *interstate commerce* itself, and, as such, is unconstitutional under the interpretation of the interstate commerce clause of the Federal constitution already referred to.²

¹ *Welton v. Missouri*, 91 U. S. 275, 282; reversing *s. c.* *State v. Welton*, 55 Mo. 288.

² *Post*, § 8118.

§ 8117. **The Question how Judicially Settled.**—It is true that the contrary was held by the Supreme Court of the United States in the decision known as *State Tax on Railway Gross Receipts Case*.¹ But it was apparent to the profession, from the first, that that decision was unsound and would have to be overruled. The case was the case of a tax laid upon a domestic railroad corporation by the State of Pennsylvania, upon the basis of a percentage of its gross receipts from all sources. The tax was held to be valid for two reasons: 1. Because the receipts had passed into the general property of the company, and had thus lost their distinctive character as freight received for transportation. 2. Because the tax was held to be a tax upon the company's *franchise*, to be merely measured by the amount of its business, as shown by its gross receipts. The tax was thus upheld in respect of gross receipts derived from interstate, as well as gross receipts derived from domestic commerce.² At the same term the court decided the case known as the *Freight Tax Case*,³ in which it was held that a State tax laid upon goods carried by a transportation company from one State into another was a regulation of interstate commerce, and unconstitutional, although the transportation company was a domestic corporation. It was obvious to the profession that there could be no sound distinction between a tax laid upon a transportation company in respect of the goods which were the subject of interstate transportation, and a tax laid upon the company and admeasured upon the basis of its *gross receipts* derived from the transportation of such goods. The court was finally driven to a repudiation of this distinction, and while *distinguishing* in one case the case in which it was made,⁴ it *overruled* it in a subsequent case.⁵

§ 8118. **A Further Explanation of These Decisions.**—In the former of these cases the court held that a statute of the State of Michigan, which levied a tax upon an express company organized in the State of New York, upon its gross receipts derived from the carriage

¹ 15 Wall. (U. S.) 284.

² *Ibid.*

³ 15 Wall. (U. S.) 232.

⁴ *Fargo v. Michigan*, 121 U. S. 230.

⁵ *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326. This overruling of that decision overthrows a number of State decisions, which

upheld taxes upon gross receipts on the authority of the overruled case, — such as *Pullman's Pal. Car Co. v. Com.*, 107 Pa. St. 148; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Western Union Tel. Co. v. Com.*, 110 Pa. St. 405.

of goods into, out of, or through, the State of Michigan, was a tax upon commerce between the States, and therefore void. The court held that, while a State may tax the *money* actually within the State, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, yet a tax upon receipts derived specifically from this class of carriage is a tax upon the commerce out of which it arises, and if that be interstate commerce, the tax is void.¹ The court distinguished its former decision² on the ground that in that case the transportation company was a domestic corporation.³ In the latter case the court virtually declared that the ground of its former decision was untenable.⁴

¹ *Fargo v. Michigan*, 121 U. S. 230.

² *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 234.

³ The language of the court was as follows: "The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us, is very obvious, and is twofold: First. The corporation which was the subject of that taxation was a Pennsylvania corporation, having the *situs* of its business within the State which created it and endowed it with its franchises. Upon these franchises, thus conferred by the State, it was asserted, the State had a right to levy a tax. Second. This tax was levied upon money in the treasury of the corporation, upon property within the limits of the State, which had passed beyond the stage of compensation for freight, and had become, like any other property or money, liable to taxation by the State. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received for freight

carried within the State probably never was within the State, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the State of Michigan." *Fargo v. Michigan*, 121 U. S. 230, 243, opinion by Mr. Justice Miller.

⁴ *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326. This case was, like the *Railway Gross Receipts Case*, a case where a tax had been laid by the same State upon a domestic corporation, to be admeasured upon its gross receipts. The tax was distinctly the same as that which was held to be valid in the case of the *State Tax on Railway Gross Receipts*, but the court held it to be invalid, and in the course of its opinion the court used the following language: "The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they

§ 8119. **The Present Doctrine Restated.**—The doctrine therefore is, that the gross receipts of a railroad or other transportation company, arising from transportation between terminal points, one or both of which are without the State, by a road lying partly within and partly without the State, are not subject to taxation by the State, irrespective of the question whether the corporation is foreign or domestic.¹ But gross receipts, derived from a continuous transportation of goods between points in the same State, may be taxed in that State, though the road lies partly within another State; for where goods are taken up and set down in the same State, the transportation is not interstate commerce.² While the corpo-

are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland*, but, on the contrary, that the reasoning in that case is decidedly against it." *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 341, opinion by Mr. Jus-

tice Bradley. The court, further on, repudiating the distinction taken in the case last above cited, said: "The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations." *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 344. See *Delaware &c. Canal Co. v. Com. (Pa.)*, 17 Atl. Rep. 175, where these Federal decisions are reviewed by MacPherson, J.

¹ *Philadelphia &c. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 344; *Delaware &c. Canal Co. v. Com.*, 50 Pa. St. 399; *s. c.* 17 Atl. Rep. 175; *Com. v. Lehigh Val. R. Co.*, 129 Pa. St. 308; *s. c.* 17 Atl. Rep. 179; *s. c.* affirmed, 145 U. S. 192.

² *Com. v. Lehigh Val. R. Co.*, 129 Pa. St. 308; *s. c.* 17 Atl. Rep. 179; *s. c.* affirmed, 145 U. S. 192; distinguishing *Lord v. Steamship Co.*, 102 U. S. 541, where it was held that a ship, plying upon the high seas between two points on the coast of the same State, is subject to the regulating power of Congress in respect to the liability of her owner for loss or destruction of person or property under sections 4283

ration is engaged in *interstate commerce*, or is an *agency of the United States*, and hence has a right, under the Federal constitution, to enter the State and to transact business there, then it seems that the principle of taxation which is to be applied to it must be that which is applied to domestic corporations and persons; and it has been so held, under the constitution of Louisiana, where a tax upon gross income was levied upon foreign insurance companies under the designation of a tax upon "*capital*."¹

§ 8120. **Validity of a Tax upon the Franchise of Foreign Corporations.** — We have already seen² that the *franchises* of corporations are generally held to be appropriate subjects of taxation, and that a corporate franchise, for the purposes of taxation, is regarded as the *opportunity* which the corporation has of earning money through the exercise of the powers which have been conferred upon it by the State.³ If a State, on a principle of comity, permits a foreign corporation to exercise its franchises within its limits, no reason is perceived why it should not possess the power to lay a tax upon the exercise of those franchises, — in other words, to lay what is commonly called a "*franchise tax*," provided the basis of apportionment is fair and just. A State statute⁴ which requires every *telegraph company* owning a line of telegraph within the State to pay to the State Treasurer "a tax upon its corporate franchise, at a valuation thereof equal to the aggregate value of the shares in its capital stock," deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is in effect a tax upon the corporation on account of *property* owned and used within the State; and is constitutional and valid, although applied to a

and 4289 Rev. Stat. U. S. Compare Co., 42 La. An. 428; s. c. 7 South. State v. Philadelphia &c. R. Co., 45 Rep. 599.
Md. 361; s. c. 24 Am. Rep. 511. ² Ante, § 5556.

¹ Parker v. North British &c. Ins. ³ Ante, § 5560.

⁴ Pub. Stat. Mass., ch. 13, §§ 40, 42.

telegraph company incorporated under the laws of another State, and which has accepted the rights conferred by Congress by section 5263 of the Revised Statutes of the United States.¹ There appears to be no essential distinction between a tax upon franchises, when applied to a domestic, and to a foreign corporation. A franchise tax, when applied to a domestic corporation, is a tax upon the right of a corporation to exercise the *privilege* conferred upon it, and is *not a property tax*.² When a foreign corporation, under an indulgence of the comity of the domestic State, exercises its franchises there, a tax laid in form and in name upon its *business*, is essentially of the same nature; that is to say, it is essentially a tax upon its right to exercise, within the taxing State, the *privileges* conferred upon it by the State of its origin.³ It is meaningless casuistry to say that the franchise of a foreign corporation cannot be taxed because the franchise is not given by the domestic law, but is dependent upon the law of the State of its creation, and has no existence except as derived therefrom, upon the fantastic reasoning that a corporation really never travels, and that its franchises exist only in the place of its residence and domicile.⁴ A tax laid by a State upon the *franchise* of a corporation organized *within the State* for the purpose of carrying on the business of *transportation*, both within and without the State, has been held in no sense a tax or burden upon *interstate and foreign commerce*, but is a tax confined to *capital* employed in the domestic State by an entity existing under its laws; so that the manner in which the value of its franchise shall be assessed, and the rate of taxation applied thereto, are matters of *legislative discretion*, subject to the restrictions of the domestic constitution; and no

¹ Massachusetts v. Western Union Tel. Co., 141 U. S. 40; s. c. 11 Supp. Ct. Rep. 889; following Western Union Tel. Co. v. Attorney-General, 125 U. S. 530.

² People v. Home Ins. Co., 92 N. Y. 328; People v. Wemple, 129 N. Y. 558, 564.

³ Connecticut Mut. Life Ins. Co. v. Com., 133 Mass. 161, 163.

⁴ As was reasoned in People v. Equitable Trust Co., 96 N. Y. 387, 393; citing Plimpton v. Bigelow, 93 N. Y. 592. See also People v. Wemple, 129 N. Y. 558, 563, where the distinction criticised in the text is also made.

question in respect of such a tax arises under the Federal constitution.¹

§ 8121. **Franchise Taxes upon Domestic Corporations doing Business Wholly in Foreign Countries.** — The legislature of a State possesses also a general power of taxation over the *franchises* of corporations created by the State, in so far as they exercise their franchises and carry on their business within the State; and where the statute laid such a tax and measured it by the amount of capital stock of the corporation found to be employed within the State, the court, applying the principle of its preceding decisions,² that the determination of the Comptroller as to the assessment and taxation is not to be disturbed unless clearly shown to have been erroneous, — indulged in the presumption that *some* of the capital stock was employed within the State, although its entire business, excepting its financial business, consisted in dredging on a canal constructed in a foreign country; “for there, according to its certificate of incorporation, was its principal place of business, and from there were its operations conducted; it kept bank accounts there and paid out moneys for matters connected with, and more or less essential to, the purposes of its incorporation.”³

§ 8122. **Taxation of Telegraph Companies.** — Telegraph companies are *instruments of interstate commerce*, and consequently, under the modern doctrine, it is not competent for a State, or a municipal corporation within a State, to impose upon them a general license or privilege tax, whether on the pretense of “*regulation*” or “*taxation*.”⁴ But the *property* of

¹ *People v. Wemple*, 117 N. Y. 136; s. c. 22 N. E. Rep. 1046; 27 N. Y. St. Rep. 341; 6 L. R. A. 303; 7 Rail. & Corp. L. J. 127.

² *People v. Davenport*, 91 N. Y. 574, 581; *People v. Commissioners*, 104 N. Y. 240; *People v. Commissioners*, 99 N. Y. 154.

³ *People v. Wemple*, 129 N. Y. 558, 566.

⁴ *Leloup v. Mobile*, 127 U. S. 640; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59. This latter case also holds that a tax of \$5 per year upon every *telegraph pole* used by an interstate telegraph company within the

such a company, employed in conducting its business within the State, is taxable by the State as a part of the general mass of taxable property within the State.¹ The principle of taxation, applied both to domestic and foreign corporations, by which the property of a foreign telegraph company is taxed by comparing the length of its lines within the State with the length of its entire lines, is not open to any objection under the Constitution of the United States,² and is a "reasonable" excise tax under the Constitution of Massachusetts.³ But while a State may thus tax the property of a telegraph company, it may not lay a tax upon its *business*, in so far as it consists of transmitting *interstate messages*. It may not, for instance, lay a tax upon every message transmitted from a point within the State to a point without the State, or from a point without the State to a point within the State.⁴ Nor can it impose a *license tax* upon such a company for the *privilege* of carrying on its business within the State.⁵

§ 8123. Taxation of Foreign Telephone Companies having Domestic Companies as Licensees. — The principal corporation established to develop this great invention was organized under a special act of the Legislature of Massachusetts, "to incorporate the American Bell Telephone Company." It was held by the Supreme Court of the United States, in the Telephone Case,⁶ that the authority conferred by this special act authorized it to select its corporate name, and made the certificate provided by another statute⁷ conclusive of its corporate existence. Thus organized, this company proceeded, as many companies organized to develop patented inventions now do,

limits of a city, cannot be upheld under a charter power to *regulate* telegraph companies.

¹ Western Union Tel. Co. v. Attorney-General, 125 U. S. 530; Attorney-General v. Western Union Tel. Co., 33 Fed. Rep. 129; Western Union Tel. Co. v. State, 64 N. H. 265; *s. c.* 9 Atl. Rep. 547.

² Western Union Tel. Co. v. Attorney-General, 125 U. S. 530.

³ *Ibid.*

⁴ Telegraph Company v. Texas, 105 U. S. 460.

⁵ *Leloup v. Mobile*, 127 U. S. 640.

⁶ The Telephone Case, 126 U. S. 1; *s. c. sub nom. Dolbear v. American Bell Teleph. Co.*, 126 U. S. 147.

⁷ Mass. Stat. 1870, ch. 224, § 411.

to establish sub-corporations, so to speak, in each of the States, which were to be its licensees, for the supposed reason that such a course would obviate sundry laws unfriendly to foreign corporations. To these sub-corporations it leases its instruments and licenses their use. The entire business of furnishing telephonic facilities to the public, which, in addition to the instruments, involves the maintenance of an extensive plant, consisting of wires, poles, etc., is carried on by these local bodies, who receive the compensation paid by the public, which constitutes the entire earnings arising from the use and employment of the company's instruments in the particular territory. The Bell Company receives from the local companies, as compensation for the use of its instruments, at its office in Boston, a royalty, payable monthly, in advance, without regard to whether the instruments are used or not. It has no office or officer, unless it be those of the local companies, and has no direct business relations with the public. In a case where these facts were developed, wherein the relations between the parent corporation in Massachusetts and the sub-corporations in New York were under consideration, it was held that the local companies were its *licensees*, and not its *agents*; and that it was not "doing business" in New York, within the meaning of a statute of that State¹ taxing the gross earnings of telephone companies "doing business in this State."² It appeared that the contracts, in addition, provide for the use of private lines, and require leases for the use of telephonic instruments to the patrons of such lines to be made in the name of the Bell Company; but it was stipulated that the provision was inserted in the contracts to prevent the illegitimate use of private lines by unauthorized persons, and to guard against infringements of the company's patents. It also appeared that the management and control of the entire business was confided to the local corporations, without any material distinction between the

¹ Laws N. Y. 1881, ch. 361, § 6.

² *People v. American Bell Teleph. Co.*, 117 N. Y. 241; *s. c.* 22 N. E. Rep.

1057; 27 N. Y. St. Rep. 459; reversing *s. c.* 50 Hun (N. Y.), 114, and 3 N. Y. Supp. 733.

various classes, and that they collect the dues for the private lines, as in other cases, paying the Bell Company a royalty for the use of the instruments. In view of these facts, the court held that, even in respect of the private lines, the local corporations were not agents of the parent corporation.¹ Upon the facts above stated, the fact that the Bell Company was a stockholder in the local corporations did not render its local stock taxable in New York, under a statute of that State² taxing the capital stock of all corporations doing business in the State.³ A similar view was taken of this question in Pennsylvania, the Supreme Court of that State holding that the fact that the Bell Company had an office within the State, and made contracts with the local corporations for the introduction and use of its apparatus within the State, by which contracts it reserved to itself the right to take possession of the instruments and use them, upon certain breaches of the contract by the local companies, did not render the parent company liable to taxation upon its capital stock, under the Pennsylvania Act of June 7, 1879, unless, upon such breach of the contracts, it should come into the State and use and operate the telephones itself.⁴

§ 8124. **Taxation of Express Companies.**—The latest determination of the Supreme Court of the United States, announced in cases already considered with reference to the taxation of *telegraph companies*,⁵ is believed to exclude the power of the States from imposing *license or privilege taxes* upon *express companies*, in so far as those taxes affect *interstate or foreign commerce* carried on by such companies; and so it has been held by several courts. A decision of the Supreme Court of the United States, rendered in the year 1872, stands

¹ *People v. American Bell Teleph. Co.*, 117 N. Y. 241; s. c. 22 N. E. Rep. 1057; 27 N. Y. St. Rep. 459; reversing s. c. 50 Hun (N. Y.), 114, and 3 N. Y. Supp. 733.

² Laws N. Y. 1881, ch. 361, § 3.

³ *People v. American Bell Teleph. Co.*, 117 N. Y. 241; s. c. 22 N. E. Rep.

1057; 27 N. Y. St. Rep. 459; reversing s. c. 50 Hun (N. Y.), 114, and 3 N. Y. Supp. 733.

⁴ *Com. v. American Bell Teleph. Co.*, 129 Pa. St. 217; s. c. 46 Phila. Leg. Int. 342; 24 W. N. O. (Pa.) 187; 18 Atl. Rep. 122.

⁵ *Ante*, § 8122.

directly in the way of this conclusion;¹ and as that court is unfortunately not in the habit of saying in explicit terms that it overrules its previous decisions, the profession have to take up its conflicting decisions and do the best they can with them, and they really do not know where this question stands. It has been held by several Federal judges that a State cannot impose a license tax upon an express company engaged in domestic and interstate commerce, except in so far as the tax is confined exclusively to its domestic commerce.² They proceeded upon the ground that the case of *Osborne v. Mobile*³ had been overruled by *Leloup v. Mobile*;⁴ and certainly the two cases seem irreconcilable. Nor can the principle of these decisions be evaded by the State legislature resorting to a *verbal quibble*. Accordingly, it has been held that a statute providing that a license or privilege tax shall be paid for transporting one or more packages between points within the State, the amount of such tax being regulated by the length of the lines of the express company, is in effect a tax upon

¹ *Osborne v. Mobile*, 16 Wall. (U. S.) 479.

² *United States Ex. Co. v. Hemmingway*, 39 Fed. Rep. 60; *United States Ex. Co. v. Allen*, 39 Fed. Rep. 712.

³ 16 Wall. (U. S.) 479. In this case it appeared that the State of Georgia had chartered a company to transact a general forwarding and express business. The company had a business office at Mobile, in the State of Alabama, and so did an express business which extended within the limits of Alabama, or rather made contracts in Alabama for that species of transportation. An ordinance of the city of Mobile was then in force, requiring that all express companies or railroad companies doing business within the city and having a business extending beyond the limits of the State, should pay an annual license of \$500, which should be deemed a *first-grade* license;

that every express or railroad company doing business *within* the limits of the State should take out a license, called a *second-grade* license, and pay therefor \$100; and that every such company doing business *within the city* should take out a *third-grade* license and pay therefor \$50;—and subjecting any person or corporation violating its provisions to a fine for each day of such violation. It was held that the ordinance, in so far as it required the payment by a foreign corporation of a tax or fee for a license to transact within the domestic State its business, although extending beyond the limits of the State, was not repugnant to the provisions of the commerce clause of the Constitution of the United States. *Osborne v. Mobile*, 16 Wall. (U. S.) 479. Compare *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

⁴ 127 U. S. 640.

its interstate business, and hence unconstitutional.¹ A late authoritative judicial exposition of this question is to the effect that a statute which, after defining express companies, requires them and their agents within the State to make returns to the taxing officers of the State of the *gross receipts accruing from their business done within the State*, and laying a percentage tax upon such gross receipts, first deducting therefrom the amounts paid by such express companies to railroad and other transportation companies for their facilities of transportation,—is not in violation of the commerce clause of the Federal constitution, because it is not a tax upon *interstate*, but is strictly a tax upon *intrastate*, business.² Nor is such a tax prohibited by that clause of the *Fourteenth Amendment* to the Federal constitution, which restrains the States from denying to persons within their limits the equal protection of their laws. The reason is that it is not an unjust discrimination against express companies *to tax them as a class different from other transportation companies*; seeing that the former own little or no property, but conduct their business by hiring the facilities of other transportation companies; while the latter companies own their own facilities of transportation, which are taxed within the State in common with other property.³

§ 8125. **Taxation of Sleeping-car Companies.**— Since it is competent for a State to tax all *property*, real or personal, within its limits, although employed in the operations of *interstate commerce*,⁴ it is competent for it to lay a tax upon

¹ United States Ex. Co. v. Allen, 39 Fed. Rep. 712. The statute (Tenn. Act, April 8, 1889) provided that express companies should pay a tax, "in lieu of all other taxes except *ad valorem* tax, if the lines are less than 100 miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, \$1,000. If the lines are more than 100 miles long, for one or more packages taken up at one point in this State and

transported to another point in this State, per annum, \$3,000." It was held that this tax was unconstitutional. *Ibid.*

² Pacific Ex. Co. v. Seibert, 142 U. S. 339, where the Missouri statute which was held valid is set out: Affirming *s. c.* 44 Fed. Rep. 310.

³ Pacific Ex. Co. v. Seibert, 142 U. S. 339; affirming *s. c.* 44 Fed. Rep. 310.

⁴ *Ante*, § 8094.

sleeping-car companies created under the laws of other States, admeasured upon the whole stock of the company, in the proportion which the number of miles over which its cars are operated within the State bears to the whole number of miles over which its cars are operated,—although its cars run into, through, and out of the State.¹ But it has been held that a State has no power to lay a tax upon the *earnings* of a sleeping-car company engaged in interstate business, although the tax is admeasured upon the proportion which the distance traveled by the cars of such company through the State bears to the entire distance traversed by the cars of such company for which fares are charged.² But a statute,³ which imposes a *license* or *privilege tax* of a certain sum per annum upon every sleeping-car or coach used or run over a railroad in that State, and not owned by the railroad upon which it is run, is void in so far as it applies to the interstate transportation of passengers carried over railroads in that State, into, out of, or across that State, in sleeping-cars owned by a corporation of Kentucky and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare, and the former the compensation for the sleeping-car accommodations.⁴ The principle of the decision is that the tax in question is a license tax imposed by a State for the *privilege* of conducting the operations of interstate commerce within the State, which, as already seen, is unconstitutional.⁵

¹ Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; s. c. 11 Sup. Court Rep. 876; affirming s. c. 107 Pa. St. 156. See ante, § 8097.

² State v. Woodruff Sleeping-car Co., 114 Ind. 155; s. c. 15 N. E. Rep. 814. Query, where the tax is thus admeasured, is there any distinction between a tax upon *earnings* and a tax upon *property*? And is not the principle of this case overruled by the case previously cited? The Legislature of Arkansas has sought to avoid any Federal objection to the tax by call-

ing it a "*public highway tax*" and levying it upon railway corporations running the Pullman palace sleeping-cars, at the rate of \$3 per mile for each mile of the railroads in the State over which such cars are run. Ark. Acts 1887, No. 128, p. 225.

³ Laws Tenn. 77, ch. 16, § 6.

⁴ Pickard v. Pullman Southern Car Co., 117 U. S. 34; Tennessee v. Pullman Southern Car Co., 117 U. S. 51; overruling Pullman Southern Car Co. v. Gaines, 3 Tenn. Ch. 587.

⁵ Ante, § 8107. Some of the States,

§ 8126. Taxation of Ferry Companies Incorporated in Other States.—A company chartered in another State and operating a line of ferry boats between a point in that State and a point in the taxing State, which has all of its property in the State of its creation, and no property in the taxing State, except slips and wharves for the landing of its boats and the discharge and taking-on of its passengers and freight, and whose boats are registered at its home port within the State of its creation, — cannot be taxed in respect of its capital stock by the other State; for this is an interference with interstate commerce, such as is prohibited by the Constitution of the United States.¹ But from the principle declared by the same court in a subsequent case, it would seem clear that its wharves and other property within the taxing State, though used in the landing of its boats and in its operations of interstate commerce, are taxable as property within that State.² The ferry boats of such a corporation cannot be taxed as property “within the city,” to which the boats ply, and at whose wharves they touch for the discharge and taking-on of freight and passengers, where they are habitually laid up when not in use, and where their pilots and engineers reside, and where the real estate of the corporation owning them, including its freight warehouse, is situated on the opposite shore of the river in another State. Nor is this conclusion

in their taxing laws, pursue the policy of assessing the tax which they lay in respect of sleeping-cars, not against the company owning the cars, but against the railroad company using them under a contract arrangement with the company owning them. See, for instance, *Kennedy v. St. Louis & C. R. Co.*, 62 Ill. 395, where a tax upon Pullman palace cars was assessed against the railroad company over whose road the cars were hauled with its passenger coaches, and it was held that the assessment was valid. The court proceeded upon the view that, under the contract arrangement

between the sleeping-car company and the railroad company, the latter had such a community of interest and such a qualified property in the sleeping-cars for the time being, that, for the purposes of taxation, they must be regarded, under the statute, as belonging to the rolling stock of the railroad company, and subject to be taxed as such.

¹ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

² The case referred to is *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530, where the principle was plainly established.

altered by the fact that the boats were *enrolled*, in pursuance of the Federal navigation laws, at the city attempting to impose the tax; that the ferry company had an office there; that its president, vice-president, and other officers lived there; that the stockholders mainly resided there, and not in the opposite State; and that there the ordinary business meetings of the directors were held, and its moneys received and disbursed, and its corporate seal kept.¹

§ 8127. Taxation of Foreign Railroad Companies Operating Domestic Railroads under a Lease.—It is unnecessary to state that a railroad corporation created under the laws of a State cannot, by leasing its railroad to a foreign corporation, withdraw it from the power of taxation which the State possesses over all property within its limits; but the lessee corporation, by its act of entering the domestic State to operate the leased railroad, may subject itself to a principle of taxation different from that which may be exercised against it in the State of its own creation. It may, for instance, be compelled to pay a tax assessed upon the *franchises* and *capital stock* of the lessor corporation whose road it operates.² On the other hand, it will not be entitled to *exemptions* from taxation which were enjoyed by the lessor corporation under its charter, for exemptions from taxation are not assignable.³

§ 8128. Taxation of Interstate Bridge Companies.—We have already had occasion to notice the peculiar character ascribed by judicial construction, to corporations created by

¹ *St. Louis v. Ferry Co.*, 11 Wall. (U. S.) 423; overruling *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580. Compare *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

² *Railroad Co. v. Vance*, 96 U. S. 450.

³ *Ante*, § 5576. When, therefore, a New Jersey railroad corporation enjoyed, on payment of a certain tax on its capital stock, an exemption from any further tax, and leased its rail-

road property to a Pennsylvania corporation,—it was held that the Legislature of New Jersey might impose a tax upon the *gross earnings* of the lessee corporation acquired in operating the railroad, although the lessor corporation would have been exempt from such taxation. *State v. Delaware &c. R. Co.*, 30 N. J. L. 473. The tax itself was of such a nature as to be void under the Federal constitution. *Ante*, §§ 8118, 8119.

the concurrent legislation of two States for the purpose of operating an *interstate bridge*, or a continuous line of railway crossing the boundary line between the two States, — the conclusion being that such a corporation is a *domestic corporation within the limits of each State*. From this it logically follows that it is taxable within each State as a domestic corporation.¹ It is a conclusion equally clear that so much of its fixed property as is situated outside the limits of the taxing State is not subject to taxation by that State, because it is not competent for one State to tax property the *situs* of which is beyond its jurisdiction.² If these two principles are kept in mind, there would seem to be no difficulty in solving all the questions that may arise in respect of the power of either of the States creating such a corporation to tax it or its property. Either of the States can tax the franchise of the corporation, because each State granted the franchises; either State can tax the capital stock of the corporation, because in either State it is a domestic corporation; and either of the States, or a municipal corporation within either of them, can tax the fixed property of such an interstate corporation, even to the boundary of the State.³ Thus, in respect of an interstate bridge built by a corporation created by the concurrent legislation of two adjacent States, either State may tax it *to the center of the stream*;⁴ and so may a *municipal corporation* within either State, within whose limits the bridge has its abutments and approaches.⁵ Some difficulty arises in each State apportioning in a just manner a tax upon the *capital* and *surplus* of such an interstate corporation; but it has been held, in respect of an interstate bridge company created by the concurrent legislative action of two States, that its capital and surplus are

¹ Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615; Easton Bridge v. County, 9 Pa. St. 415; State v. Metz, 32 N. J. L. 199.

² *Ante*, § 8094.

³ Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615.

⁴ St. Louis Bridge Co. v. People, 125 Ill. 226; s. c. 17 N. E. Rep. 468;

State v. Metz, 29 N. J. L. 122; s. c. 31 N. J. L. 378.

⁵ St. Louis Bridge Co. v. East St. Louis, 121 Ill. 238; s. c. 12 N. E. Rep. 723; State v. Metz, 29 N. J. L. 122; State v. Metz, 31 N. J. L. 378; Cass County v. Chicago & C. R. Co., 25 Neb. 348.

taxable in both States, on the principle that one-half appertains to each State,—deducting, of course, such portion as may be found to have been invested in securities of the United States.¹ Upon the same principle of *equitable apportionment*, if either State were to lay a tax upon the *franchise*, each State would lay the tax upon no more than *one-half* of the estimated value of the whole franchise of the corporation; though it is to be conceded that there is no rule, beyond the *discretion* of the legislature, for the valuation of a corporate franchise for the purposes of taxation.²

§ 8129. **Methods of Assessment of Interstate Bridges.**—In regard to the *methods* of assessment and taxation, it has been held that an *interstate railroad bridge company*, owned by a domestic railroad corporation and constituting a part of its road, is taxable as a part of its road, and not as a separate structure, even though it is used in part as a toll-bridge for ordinary travel.³ And the rule is the same in Illinois, where it is held that such a bridge comes within the denomination of a “railroad track,” and is therefore to be assessed only by the State Board of Equalization.⁴

¹ *State v. Metz*, 32 N. J. L. 199.

² See *ante*, § 5561.

³ *State v. Hannibal &c. R. Co.*, 97 Mo. 348; *s. c.* 10 S. W. Rep. 436; 37 Am. & Eng. Rail. Cas. 406. That the sole object of the Illinois Act of 1873, as to the “taxation of bridges across navigable waters on the border of this State,” was to declare such structures real estate for the purposes of sale for taxes of the corporation,—see *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615.

⁴ *Anderson v. Chicago &c. R. Co.*, 117 Ill. 26; *s. c.* 7 N. E. Rep. 129. On the other hand, it has been held that a statute of Nebraska (Comp. Stats. Neb., ch. 77, § 39), requiring the officers of railroad corporations within the State to return to the auditor of public accounts, for assessment and taxa-

tion, the number of miles of railroad in each organized county, and the total number of miles in the State, “including roadbed, right of way; and superstructure thereon,” etc., does not require a return of the bridges constructed over the Missouri River; that river being a navigable stream, the right to bridge which can be obtained only by an act of Congress, and such bridge, when constructed, not being a part of the roadbed or superstructure thereon. But such bridge, not being within the definition of “roadbed, right of way, or superstructure thereon,” any part of it within the body of a county, is assessable for taxation by the local taxing officers of the county. *Cass v. Chicago &c. R. Co.*, 25 Neb. 348; *s. c.* 41 N. W. Rep. 246; *Chicago &c. R. Co. v. School District*

§ 8130. **Taxation of Property of Railroads Consolidated with Foreign Railroad Companies.**—The taxation of the property of a *consolidated railroad company* created by the concurrent action of two States, whose railway property *crosses the interstate boundary* and lies within each State, should proceed on substantially the same principles as the taxation of the property of interstate bridges, already considered.¹ Such a corporation is a domestic corporation within each State;² and, on principles of justice, its franchise is taxable in each State, because each State has granted it. Its capital is also taxable in each State, because its capital stock has been created under the authority of each State. Its property is also taxable in each State to the extent that it has a *situs* within each State.³ But in taxing its capital stock, its franchises, or its property, each State should, if it desires to do justice and avoid double taxation, apportion the tax in the proportion that the value of the property of the corporation, having its *situs* within the taxing State, bears to the value of its property having its *situs* outside the taxing State.⁴ The

No. 1, 25 Neb. 359; *s. c.* 41 N. W. Rep. 249; 2 L. R. A. 188; 5 Rail. & Corp. L. J. 304; distinguishing *Anderson v. Chicago & c. R. Co.*, 117 Ill. 26; *s. c.* 7 N. E. Rep. 129. Under a statute of Iowa relating to the taxation of railroads, bridges over the Mississippi or Missouri rivers are not taxed as portions of the railroads to which they belong, but are assessed and taxed on the same basis as the property of individuals, by the local assessors of the districts in which they are situated; nor does this violate a constitutional provision against unequal taxation. *Missouri Valley & c. R. Co. v. Harrison County*, 74 Iowa, 283; *s. c.* 37 N. W. Rep. 372.

¹ *Ante*, §§ 8128, 8129.

² *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *ante*, §§ 47, 319, 320, 688, 7438, 7452, 7472, 7490, 7799, 7817, 7891, 8012, 8020, 8128.

³ *Delaware Railroad Tax*, 18 Wall. (U. S.) 206.

⁴ This principle is clearly brought out by Judge Pearson in an opinion which was adopted by the Supreme Court of Pennsylvania in *Pittsburg & c. R. Co. v. Com.*, 66 Pa. St. 73; *s. c.* 5 Am. Rep. 344; 3 Brewst. (Pa.) 355. In *Com. v. Cleveland & c. R. Co.*, 29 Pa. St. 370, it was also said, speaking with reference to a tax laid upon the *dividends* declared by such a corporation: "So far as it has existence as a railroad company in our State, it is a company incorporated by our law, and subject to the same taxes as other like companies, and on plain principles of justice it ought to be so regarded." *Ibid.* 373. So it was held that the property of an interstate bridge company, consisting of a *fund of money* accumulated in a bank in the taxing State, for the purposes of

fact that a railroad company, created under the laws of the domestic State, becomes, by permission of the domestic State, and through the concurrent assent of another State, consolidated with a corporation created in such other State, does not change the principle of taxation which had previously been applicable to the property of the domestic railroad company situated within the State; but, in the absence of any statutory change taking place with a special reference to such a consolidation, the taxing officers should apply the same principle of taxation as heretofore.¹

§ 8131. **Exemption of Foreign Corporations from Taxation.**—On the principle that *exemptions from taxation* are to be *strictly construed*, it has been held that a statute authorizing a railroad company, created under the laws of another State, to extend its line through the domestic State, on condition of the payment of the annual sum of \$10,000, does not operate to exempt the company from a general tax imposed upon all railroads within the State.² In like manner, a statute of Delaware, under which a railroad company chartered by that State had *consolidated* with a railroad company chartered by another State, requiring the new company to pay annually into the treasury of the State a tax of one-quarter of one per cent of \$400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. The amount designated was regarded as merely a declaration of the tax which should be annually payable until a different rate should be established by the legislature.³

rebuilding and repairing the property and providing against decay, was taxable in that State,—the principle being that “this State can tax all that is within its bounds, and which receives protection from its laws, unless exempted by the Constitution of the United States, or of this State.” *Easton Bridge v. County*, 9 Pa. St. 415. See also *Com. v. Trenton Delaware Bridge Co.*, 9 Am. Law Reg. (o. s.) 298.

¹ *Chicago &c. R. Co. v. Auditor-General*, 53 Mich. 79, 92; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206.

² *Erie R. Co. v. Com.*, 66 Pa. St. 84; s. c. 5 Am. Rep. 351; affirmed, 21 Wall. (U. S.) 492.

³ *Delaware Railroad Tax*, 18 Wall. (U. S.) 206. A statute exempting from taxation foreign capital transmitted to agents within the domestic State for the purposes of investment or otherwise, operated in such a way

§ 8132. Retaliatory Taxation of Foreign Corporations. —

We have already noticed the existence of statutes in some of the States imposing, by way of *retaliation*, the same conditions upon foreign corporations entering to do business within their limits, as are imposed by the laws of the State creating the particular corporation upon similar corporations of the domestic State doing business therein.¹ We now have another and similar principle of retaliation in the statutes of some of the States relating to *taxation*. Such statutes generally prescribe a rule or basis of taxation in regard to all corporations, domestic and foreign, or in regard to all foreign corporations doing business within the State, and then, in a separate section, add, by way of qualification, the provision which is to be applied against foreign corporations in cases where a more onerous principle of taxation is applied, in the State creating such corporations, against corporations created by the domestic State and doing business in the other State.²

that a foreign banking corporation, having an agency permanently established in the city of New York, to which it transmitted its surplus funds to be employed in temporary loans, subject at all times to its control and drafts, was not liable to taxation on the funds so employed. *People v. Commissioners*, 59 N. Y. 40; reversing *s. c.* 1 Thomp. & C. (N. Y.) 630.

¹ *Ante*, §§ 7930, 7931.

² The following, from the statute books of Ohio, will suffice for an example: "When, by the laws of any other State or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities or other obligations or prohibitions, are imposed on insurance companies of this State, doing business in such State or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other

State or nation doing business within this State, and upon their agents here." Rev. Stat. Ohio, § 282. The construction put upon this statute is that it is "*protective* in its character, its purpose being to protect Ohio insurance companies from impositions which might be put upon them by other States, and not retaliatory in the sense of first imposing upon foreign companies such taxes as are imposed upon other foreign corporations under like circumstances, and then, in addition, a sum equal to what other States may impose upon our companies doing business there. And the Superintendent of Insurance performs his whole duty in the matter when he requires companies organized out of this State to pay, in addition to the amount paid as taxes in the several counties, a sum sufficient to make the total equal to the amount that would be realized were the rule of taxation of the State under whose

§ 8133. **Taxes or Tolls for the Use of Improved Facilities of Navigation.**—It is competent for a State to improve the navigation of rivers wholly within its boundaries, by removing obstructions, deepening their channels, etc., provided the free navigation of such rivers is not thereby impaired, and provided that any system for the improvement of their navigation devised by the general government is not thereby defeated.¹ To meet the cost of such improvements the States may levy a general tax, or may lay a toll upon all those who use the rivers and harbors thus improved. The improvements are in this respect like wharves and docks, constructed to facilitate commerce in loading and unloading vessels.² The tolls or charges levied upon vessels in such a case can hardly be called a tax: they are rather in the nature of *compensation* exacted by the State, of the owners of vessels, domestic or foreign, in return for the special facilities which the efforts of the State have afforded them. The regulation of such tolls or charges is mere matter of domestic administration, entirely under the control of the State.³

§ 8134. **Excise Taxes upon Foreign Corporations in Massachusetts.**—The Constitution of Massachusetts confers upon the General Court the power “to impose and levy reasonable duties and excises upon any produce, goods, wares, and merchandise, and com-

laws the foreign company is organized, applied to such company’s business transacted in this State.” *State v. Reinmund*, 45 Ohio St. 214, 217. When, therefore, a foreign insurance company has furnished to the Superintendent of Insurance a certificate of the valuation of its policies in force on the 31st day of December preceding, upon the lives of citizens of this State, made by the proper State officer of the State under whose laws such company is organized, and such valuation is according to the standard provided in section 279 of the Revised Statutes of Ohio, such superintendent is not authorized to require compen-

sation for valuation of such policies, notwithstanding such company has paid a like charge in former years, and has furnished to such superintendent, at his request, the *data* from which such valuation was made. *State v. Reinmund*, 45 Ohio St. 214; *s. c.* 2 Rail. & Corp. L. J. 422; 16 Ins. L. J. 626.

¹ *Mobile Co. v. Kimball*, 102 U. S. 691, 699; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295.

² *Huse v. Glover*, 119 U. S. 543; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295.

³ *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295.

modities whatsoever, brought into, produced, manufactured, or being within the Commonwealth.”¹ Under this provision, it has been uniformly held that the legislature has the power to impose an *excise tax* upon any *business* or *calling* exercised within the Commonwealth, and upon any *franchise* or *privilege* conferred by or exercised therein.² The power to lay an *excise tax* upon the business or franchises of a corporation, done or exercised within the State, is sustained under a forced and unnatural construction of the word “*commodities*,” used in the above clause.³ The extreme importance of this interpretation and the unjust results flowing from it, are discovered in reading the clause of the Constitution of Massachusetts immediately preceding the one above quoted, which confers upon the General Court the power “to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth.” Thus, in imposing other than excise taxes, the legislature is restrained to the duty of making them “*proportional*”; but in the imposition of excise taxes, it is under no restraint except to make them “*reasonable*.” Excise taxes laid upon corporations,

¹ Const. Mass., ch. 1, art. 4.

² *Portland Bank v. Apthorp*, 12 Mass. 252; *Com. v. People's Five Cents Savings Bank*, 5 Allen (Mass.), 428; *Connecticut Mutual Life Ins. Co. v. Com.*, 133 Mass. 161, 163.

³ “The power to determine what callings, franchises, or privileges, or, to use the language of the constitution, ‘*commodities*,’ shall be subject to an excise tax, and the amount of such excise, belongs exclusively to the legislature.” *Connecticut Mutual Life Ins. Co. v. Com.*, 133 Mass. 161, 163. “It must have been under this general term, ‘*commodity*,’ which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters,

tavern-keepers, and retailers.” *Portland Bank v. Apthorp*, 12 Mass. 252, 256; reaffirmed in *Com. v. People's Five Cents Savings Bank*, 5 Allen (Mass.), 428. It is perfectly obvious that the word “*commodities*” used in this constitutional provision was never intended by the framers of the instrument to mean what the court has thus construed it to mean. The word, in its ordinary and nearly universal acceptation, means something in the nature of *movable property*, which may be the subject of sale or commerce. When placed in juxtaposition with the words “*produce*,” “*goods*,” “*wares*,” and “*merchandise*,” the principle of interpretation *noscitur a sociis*, if the meaning of the word was doubtful, would make the conclusion overwhelming that it was intended to have this meaning, and not to refer to a business, *occupation*, or *franchise*.

under the nonsensical theory of their franchises being "commodities," are not required to be laid according to any rule of *proportion*, or with any reference to the whole amount required to be raised for public purposes, or to the actual value of the property of the corporations, or to the whole amount of property in the Commonwealth liable to be assessed for the public service.¹ Moreover, "the power to determine what callings, franchises, or privileges, or, to use the language of the Constitution, 'commodities,' shall be subjected to an excise, and the amount of such excise, belongs *exclusively to the legislature*. The provision that it must be 'reasonable' was not designed to give to the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining not only what 'commodity' shall be subjected to excise, but also the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise."² The legislature is thus not only allowed to seize the power of taxing the franchises and business operations of corporations, foreign and domestic, under the pretense of such franchises and businesses being "commodities," but it is allowed to indulge an almost unlimited fancy in regard to the manner and extent of such tax. This fanciful interpretation of the constitution allowed the legislature to lay a tax upon the stock of an incorporated *banking company*, existing in the State of Maine, though chartered in Massachusetts before the separation of the two States, and although the charter had expired prior to the passage of the taxing statute;³ and to impose an annual tax upon *savings banks*, adjusted upon the basis of their average deposits for stated periods;⁴ and a tax upon life insurance companies, domestic and foreign, to be determined "by assessment of the same upon a valuation equal to the aggregate net value of all policies in force on the thirty-first day of December then next preceding, issued or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one-half of one per centum per annum."⁵

¹ Connecticut Mutual Life Ins. Co. v. Com., 133 Mass. 161, 162; Oliver v. Washington Mills, 11 Allen (Mass.), 268; Com. v. Hamilton Man. Co., 12 Allen (Mass.), 298. Compare Attorney-General v. Bay State Min. Co., 99 Mass. 148; s. c. 96 Am. Dec. 717; Cheshire v. County Comm'rs, 118 Mass. 386.

² Connecticut Mutual Life Ins. Co. v. Com., 133 Mass. 161, 163.

³ Portland Bank v. Apthorp, 12 Mass. 252.

⁴ Com. v. People's Five Cents Savings Bank, 5 Allen (Mass.), 428.

⁵ Connecticut Mutual Life Insurance Co. v. Com., 133 Mass. 161.

§ 8135. **Actions by Foreign Corporations to Recover Back Taxes.** — An action by a foreign corporation to recover back taxes paid by compulsion, is not an action based upon any *act* or *contract* of the corporation, within the prohibition of a statute against doing business in the State or Territory, and may therefore be maintained in the courts of the State or Territory, although the foreign corporation may not have complied with the conditions of the law of the domestic State or Territory entitling it to do business therein.¹

¹ Powder River Cattle Co. v. Custer County, 9 Mont. 145; s. c. 22 Pac. Rep. 383.

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TABLE OF CASES CITED.

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Abels v. Planters & C. Ins. Co., 32 Ala. 382. §§ 2409, 2792.
Abercorn's Case, 4 De Gex, F & J. 78. § 4154.
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Aberdeen & C. R. Co. v. Blakie, 1 Macq. H. L. 461; 26 Scot. Jur. 628. §§ 4009, 4059, 4060.
Aberdeen Female Academy v. Aberdeen, 13 Smedes & M. (Miss.) 645. § 5398.
Abernethy v. Church of the Puritans, 3 Daly (N. Y.), 1. § 7729.
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Abrahams v. Swann, 18 W. Va. 274. 278. § 4969.
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Abstainers & General Ins. Co., In re (1891), 2 Ch. 124. § 2116.
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Academy of Music v. Flanders, 75 Ga. 14. § 5322.
Accidental & Ins. Corp. v. Re, L. R. 5 Ch. 428. § 1550.
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Accola v. Chicago & C. R. Co., 70 Iowa, 185. § 7672.
Achison v. Huddleson, 12 How. (U. S.) 293. § 5918.
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Adamantine Brick Co. v. Woodruff, 4 McArthur (D. C.), 318. §§ 768, 802, 805.
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Adden v. White Mountains Railroad, 55 N. H. 413. § 5626.
Adderly v. Storm, 6 Hill (N. Y.), 624. §§ 3173, 3192, 3213, 3283, 4205, 7282.
Addington v. Allen, 11 Wend. 374. § 1462.
Addison v. Lewis, 75 Va. 701. §§ 4068, 7114.
Addison v. Saulnier, 19 Cal. 82. § 1028.
Addlestone Linoleum Co., Re, 37 Ch. Div. 191. §§ 2048, 3786.
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Admiral, The, 18 Law Rep. 51. § 5234.
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Adsit v. Brady, 4 Hill (N. Y.), 630; 40 Am. Dec. 305. § 6363.
Ætna Bank v. Charter Oak Life Ins. Co., 50 Conn. 167. § 4638.
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- Aggs v. Nicholson, 1 Hurlst. & N. 165. §§ 5034, 5058, 5126, 5147, 5153, 5735.
- Agnew v. Bank of Gettysburg, 2 Har. & G. (Md.) 478. §§ 7665, 7691, 7712.
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- Aiken v. Quartz Rock & Co., 6 Cal. 186. § 7503.
- Aikin v. Matterson, 17 Ill. 167. §§ 762, 766.
- Aikin v. Wasson, 24 N. Y. 482. § 3152.
- Aikman v. School District, 27 Kan. 129. § 3905.
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- Alexander v. Cauldwell, 83 N. Y. 480. §§ 4887, 4900, 5974.
- Alexander v. Denaveaux, 53 Cal. 663; 59 Cal. 476. § 4943.
- Alexander v. Gibson, 2 Camp. 555. §§ 4783, 4929.
- Alexander v. Horner, 1 McCrary (U. S.), 634. 641. §§ 1659, 1660, 5748.
- Alexander v. Jones, 9 Mo. App. 589, 591. § 1109.
- Alexander v. Merry, 9 Mo. 510. § 5032.
- Alexander v. Presbyterian Church, 30 Pa. St. 154. § 113.
- Alexander v. Relfe, 74 Mo. 495; 9 Mo. App. 133. §§ 333, 3562, 5992, 6275, 6279, 6945, 6950, 6953, 6979.
- Alexander v. Rollins, 14 Mo. App. 109; 84 Mo. 657. §§ 3276, 5752, 5754, 6953.
- Alexander v. Searcy, 81 Ga. 536. §§ 2070, 4495, 4500, 4508, 4510, 4569.
- Alexander v. Simpson, 43 Ch. Div. 139. § 717.
- Alexander v. Sizer, L. R. 4 Ex. 102. §§ 5126, 5133, 5146, 5147, 5148, 5156.
- Alexander v. Tolleston Club, 110 Ill. 65. §§ 5795, 5799, 7918.
- Alexander v. Walter, 8 Gill (Md.), 239. § 6246.
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- Allard v. Bourne, 15 C. B. (N. s.) 468. § 4883.
- Allegheny City v. McClurkin, 14 Pa. St. 81. §§ 1116, 4883.
- Allegheny County v. Cleveland & C. R. Co., 51 Pa. St. 228, 231. § 48.
- Allegheny County v. McKeesport Diamond Market, 123 Pa. St. 164. § 24.
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- Allen v. Fairbank, 40 Fed. Rep. 188. § 3026.
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- Allen v. Knight, 5 Hare, 272. § 6214.
- Allen v. Leonard, 16 Gray (Mass.), 202. § 1048.
- Allen v. Martin, 10 Wend. (N. Y.), 300. § 3363.
- Allen v. Maury, 66 Ala. 10. § 2386.
- Allen v. McKean, 1 Sumn. (U. S.) 276. §§ 26, 5384, 5386, 5418.
- Allen v. Montgomery R. Co., 11 Ala. 437. §§ 1063, 1550, 1559, 1573, 1793, 1794, 1800, 1966, 2951, 2952, 2958, 2959, 3221, 3222, 3231, 3413, 3436, 3454, 3527, 6134, 6136, 6137, 6747.
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- Allen v. Patterson, 2 Seld. (N. Y.) 478. § 7616.
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 Allen v. Sea Fire & Life Ins. Co., 9 O. B. 574. §§ 5058, 5126, 5147.
 Allen v. Sewall, 2 Wend. (N. Y.) 327; 6 Wend. (N. Y.) 335. §§ 3074, 3358, 3469, 3476, 3502, 3531.
 Allen v. Silvers, 22 Ind. 491. § 659.
 Allen v. South Boston & C. Co., 150 Mass. 200. §§ 2046, 2577, 2593, 2596, 2599, 2606, 2608, 2782.
 Allen v. Stevens, 29 N. J. L. 509. § 5596.
 Allen v. Sullivan & Co., 32 N. H. 446. § 5070.
 Allen v. Walsh, 25 Minn. 543. §§ 3004, 3020, 3467.
 Allen v. Willard, 57 Pa. St. 377. § 6348.
 Allen v. Wilson, 28 Fed. Rep. 674. §§ 4500, 5270.
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 Allibone v. Hagar, 46 Pa. St. 48. §§ 1403, 1573, 2003, 2008, 2114, 3701.
 Allin's Case, L. R. 16 Eq. 449. § 3258.
 Ailing v. Ward, 24 N. E. Rep. 551. § 1535.
 Ailing v. Wenzell, 133 Ill. 264. §§ 1535, 1532.
 Ailing v. Wenzell, 27 Ill. App. 511. §§ 1616, 3135, 3623.
 Allis v. Jones, 45 Fed. Rep. 148. §§ 5016, 5052, 5705, 6194.
 Allison v. Coal Co., 87 Tenn. 60. § 4264.
 Allison v. Hubbard, 17 Ind. 559. §§ 4621, 4659, 4661, 4748, 4795.
 Allman v. Havana & C. R. Co., 98 Ill. 521. §§ 1235, 3993.
 Allnutt v. Inglis, 12 East, 527. § 5534, 5535.
 All Saints Church v. Lovett, 1 Hall (N. Y.), 191. §§ 499, 508, 518. 529, 531, 1973, 3893, 5023, 5268, 6598, 6555, 7696.
 Almada and Tiritto Co., Re, 38 Ch. Div. 415; 57 L. J. Ch. 703; 59 L. T. (N. S.) 159. § 2048.
 Almy v. California, 24 How. (U. S.) 169. § 8113.
 Almy v. Harris, 5 Johns. (N. Y.) 175. § 3054.
 Alpena v. Kelley, 37 Mich. 550. § 7768.
 Alpena Nat. Bank v. Greenbaum, 80 Mich. 1. §§ 4613, 4615, 4931.
 Alsbury, Re, 45 Ch. Div. 237. § 2199.
 Alsop, Ex parte, 1 De Gex, F. & J. 289. § 6955.
 Alsop v. Mather, 5 Conn. 584. § 3330.
 Alspaugh v. Winstead, 79 N. C. 526. § 7632.
 Alston v. Clark, 1 Hayw. (N. C.) 171. § 6931.
 Alston v. Heartman, 2 Ala. 699. §§ 4963, 7592, 7595, 7598.
 Alston v. Munford, 1 Brook. (U. S.) 268. § 7045.
 Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629. § 6183.
 Alvanley v. Kinnaird, 2 Mac. & G. 7; 29 Beav. 490. § 1568.
 Alven v. Bond, 3 Ir. Eq. 365. § 7014.
 Alvord v. Miller, 32 Conn. 543. § 2055.
 Alward v. Holmes, 10 Abb. N. Cas. (N. Y.) 96. §§ 5975, 5977, 7384.
 Amador & C. M. Co. v. Dewitt, 73 Cal. 482. § 5955.
 Ambrose v. Duinow Union, 9 Beav. 503. § 5297.
 Ambrose v. McDonald, 53 Cal. 28. § 4943.
 Amba v. Caspari, 13 Mo. App. 587. § 2023.
 American & C. Ins. Co. v. Owen, 15 Gray (Mass.), 491. § 7922.
 American & C. R. Co. v. Miles, 52 Ill. 174. § 4330.
 American Asylum & C. v. Phoenix Bank, 4 Conn. 172. § 2445.
 American Bank v. Baker, 4 Metc. (Mass.) 164. §§ 715, 3748, 4087.
 American Bank v. Cooper, 54 Me. 438. § 6698.
 American Bank v. Doolittle, 14 Pick. (Mass.) 123. § 3796.
 American Bank v. Jenness, 2 Met. (Mass.) 238. § 5752.
 American Bank v. Mumford, 4 R. I. 478. §§ 2813, 2814.
 American Bank v. Wall, 56 Me. 167. §§ 6965, 6967, 6968, 7302.
 American Bank v. Wheelock, 45 N. Y. Super. Ct. 205. § 4140.
 American Baptist Home Mission Soc. v. Foote, 52 Hun (N. Y.), 307; 5 N. Y. Supp. 236. § 7661.
 American Bible Soc. v. Marshall, 15 Ohio St. 537. §§ 5784, 5786, 7919.
 American Biscuit & C. Co. v. Klotz, 44 Fed. Rep. 721. § 6847.
 American Bridge Co. v. Heidelberg, 94 U. S. 798. §§ 6926, 6932.
 American Button Hole & C. Co. v. Moore, 2 Dak. 280. §§ 7979, 7980, 7984.
 American Casualty Ins. Co. v. Fyler, 60 Conn. 448. § 7829.
 American Coal Co. v. County Commr., 59 Md. 185. §§ 2837, 2849.
 American Const. Co. v. Jacksonville & C. R. Co., 52 Fed. Rep. 937. §§ 6886, 6970.
 American Express Co. v. Conant, 45 Mich. 642. § 7503.
 American Express Co. v. Haggard, 37 Ill. 465. § 7677.
 American Express Co. v. Johnson, 17 Ohio St. 641. § 7512.
 American Express Co. v. Patterson, 73 Ind. 430. § 6312.
 American File Co. v. Garrett, 110 U. S. 288, 295. § 3206, 3723.
 American Fur Co. v. United States, 2 Pet. (U. S.) 358. § 4785.
 American Insulator Co. v. Bankers' and Merchants Telegraph Co., 13 Daly (N. Y.), 200. § 7632.
 American Ins. Co. v. Butler, 70 Ind. 1. §§ 7938, 7957.
 American Ins. Co. v. Cutler, 35 Mich. 261. § 7965.
 American Ins. Co. v. Fisk, 1 Paige (N. Y.), 90. § 1506.
 American Ins. Co. v. Oakley, 9 Paige (N. Y.), 259. § 7162.
 American Ins. Co. v. Oakley, 9 Paige (N. Y.), 496. §§ 4621, 4622, 4865, 4388, 5047.
 American Ins. Co. v. Smith, 73 Mo. 368. § 7965.
 American Legion of Honor v. Perry, 140 Mass. 580. § 1011.
 American Loan and Trust Co. v. East & West R. Co., 37 Fed. Rep. 242. §§ 7938, 7957.
 American Loan & C. Co. v. Toledo & C. R. Co., 29 Fed. Rep. 416. § 6827.
 American Mortgage Co. v. Tennesse, 87 Ga. 23. §§ 7795, 7913, 7918.
 American Nat. Bank v. Harrison Wire Co., 11 Mo. App. 446. § 2656.
 American Nat. Bank v. Oriental Mills, 17 R. I. 551. §§ 2367, 2374, 2388, 2755, 6747.
 American Pastoral Co. Re, W. N. (1890), 62. § 2117.
 American Preservers' Co. v. Norris, 43 Fed. Rep. 711, 714. § 7770.
 American Preservers' Trust v. Taylor Man. Co., 46 Fed. Rep. 152. §§ 3906, 6407.
 American Print Works v. Lawrence, 23 N. J. L. 9. § 5621.
 American Railway-Frog Co. v. Haven, 101 Mass. 398. §§ 700, 734, 762, 2062.
 American Refrigerating & C. Co. v. Linn, 93 Ala. 610. §§ 4523, 4602.
 American Salt Co. v. Heidenheimer, 80 Tex. 344. §§ 2991, 2992.
 American Tube Works v. Boston Machine Co., 139 Mass. 5. §§ 2042, 2043, 2253, 2258.
 American Union Express Co. v. St. Joseph, 66 Mo. 675. § 8107.
 American Union Tel. Co. v. Union Pacific R. Co., 1 McCrary (U. S.), 188. §§ 5355, 5359, 6003.
 American Union Tel. Co. v. Western Union Tel. Co., 67 Ala. 26. § 7935.
 American Water Works v. Venner, 18 N. Y. Supp. 379. § 7784.
 American Wire-Nail Co. v. Bayless, 91 Ky. 94. §§ 1496, 1500.
 Ameriscoogin Bridge v. Bragg, 11 N. H. 102. § 60.
 Amerman v. Wiles, 24 N. J. Rq. 13. §§ 3115, 5271.
 Ames v. Dyer, 41 Me. 397. § 3145.
 Ames v. Kansas, 111 U. S. 449. §§ 676, 7477.
 Ames v. Lake Superior & C. R. Co., 21 Minn. 241, 259. § 5342.
 Ames v. New Orleans & C. R. Co., 2 Woods (U. S.), 206. § 6230.
 Ames v. Port Huron & C. Co., 6 Mich. 266. § 659.
 Ames v. Trustees, 20 Beav. 332. § 6329.
 Ames Packing & C. Co. v. Tucker, 8 Mo. App. 95. § 3205.
 Amelbury v. Bowditch & C. Ins. Co., 6 Gray (Mass.), 596. §§ 1034, 1045.
 Amey v. Allegheny County, 24 How. (U. S.) 365. § 1118.
 Amherst Academy v. Cowls, 6 Pick. (Mass.), 427. §§ 1205, 6772.
 Amherst & C. R. Co. v. Watson, 4 Gray (Mass.), 61. § 1823.
 Amherst Bank v. Root, 2 Met. (Mass.) 522. §§ 5176, 7733.
 Amhurst v. Dawling, 2 Vern. 401. § 735.

Amison—Application TABLE OF CASES CITED.

- Amison v. Ewing, 2 Coldw. (Tenn.) 366. §§ 5126, 5156.
- Ammant v. New Alexandria & Co. Co., 13 Serg. & Co. R. (Pa.) 210. §§ 5355, 5837, 7843, 7849, 7853, 7854.
- Amory v. Amory, 95 U. S. 186. § 6985.
- Amory v. Fairbanks, 3 Mass. 582. § 1787.
- Amory v. Francis, 16 Mass. 308. § 7045.
- Amory v. Hamilton, 17 Mass. 103. § 5298.
- Amory v. Lawrence, 3 Cliff. (U. S.) 523. §§ 3205, 3722.
- Amphlett v. Parke, 2 Russ. & M. 221. § 5790.
- Amsden v. Norwich Union Fire Ins. Soc., 44 Fed. Rep. 515. § 7463.
- Amy v. Dubuque, 98 U. S. 470. § 6111.
- Amy v. Watertown, 130 U. S. 301, 318. §§ 7502, 7503, 7509.
- Anacosta Tribe v. Murbach, 13 Md. 91. §§ 939, 1034.
- Ancher v. Bank of England, Doug. 637. § 5136.
- Anchor Milling Co. v. Walsh, 37 Mo. App. 567. § 1924.
- Ancient City Sportman's Club v. Miller, 7 Lans. (N. Y.) 412. § 201.
- Anderson's Case, 17 Ch. Div. 373. § 1529.
- Anderson's Case, L. R. 3 Eq. 337. § 3799.
- Anderson v. Anderson, 9 Ir. Eq. 23. § 7014.
- Anderson v. Blatta, 43 Mo. 42. §§ 4277, 4325, 4462.
- Anderson v. Chicago etc. R. Co., 117 Ill. 26. § 8129.
- Anderson v. Cincinnati etc. R. Co., 86 Ky. 44. § 5355.
- Anderson v. Com., 18 Gratt (Va.) 295. § 5411.
- Anderson v. Kanawha Coal Co., 12 Va. 526. § 7696.
- Anderson v. Kerns Draining Co., 14 Ind. 199. §§ 5611, 7691.
- Anderson v. Kissam, 35 Fed. Rep. 693. § 4799.
- Anderson v. Line, 14 Fed. Rep. 405. § 3103.
- Anderson v. Longden, 1 Wheat. (U. S.) 85, 91. § 4905.
- Anderson v. McPike, 41 Mo. App. 323. § 3531.
- Anderson v. Newcastle & Co. R. Co., 12 Ind. 376. §§ 3697, 5275.
- Anderson v. Nicholas, 28 N. Y. 600. §§ 2450, 2455, 2592, 2605.
- Anderson v. Philadelphia Warehouse Co., 111 U. S. 479. §§ 3216, 3265.
- Anderson v. Rome etc. R. Co., 54 N. Y. 334. § 4785.
- Anderson v. Santa Anna, 116 U. S. 356, 364. § 590.
- Anderson v. Schaffer, 10 Fed. Rep. 266. § 8064.
- Anderson v. Speers, 8 Abb. N. Cas. (N. Y.) 382. § 4338.
- Anderson v. Speers, 58 How. Pr. (N. Y.) 68. §§ 4249, 4338.
- Anderson v. Speers, 21 Hun (N. Y.), 568; 59 How. Pr. (N. Y.) 421. §§ 4264, 4265.
- Anderson v. Tompkins, 1 Brock. (U. S.) 462. § 5295.
- Anderson v. Trenton, 42 N. J. L. 486. § 595.
- Anderson v. Turbeville, 6 Coldw. (Tenn.) 150. §§ 5589, 5592, 5595.
- Anderson Co. v. Paola & Co. R. Co., 20 Kan. 534. § 3905.
- Anderson County Court v. Stone, 18 B. Mon. (Ky.) 848. § 7829.
- Anderton v. Wolf, 41 Hun (N. Y.), 571; 4 N. Y. St. Rep. 101. § 4504.
- Andover's Case, 2 Salk. 433; Holt, 441. § 830.
- Andover v. Grafton, 7 N. H. 298, 301. §§ 4959, 6191.
- Andover & Co. Turnp. Co. v. Gould, 6 Mass. 40. §§ 1039, 1187, 1550, 1788, 1794, 7381.
- Andover & Co. Turnp. Corp. v. Hay, 7 Mass. 102. § 5045.
- Andres's Case, 8 Ch. Div. 126. § 3712.
- Andrew, Appeal of, 1 Pa. Supm. Ct. Cas. 126. § 3136.
- Andrew's Case, L. R. 4 Eq. 458; L. R. 3 Ch. 161. § 1550.
- Andrews v. Bacon, 38 Fed. Rep. 777. §§ 1988, 1999, 3421, 3569.
- Andrews v. Boise, 2 Brown P. C. 504. § 6878.
- Andrews v. Branch Bank, 10 Ala. 375. § 7760.
- Andrews v. Callender, 13 Pick. (Mass.) 484. §§ 3020, 3081, 3319, 3794, 3818, 3825, 3827, 4345, 4377.
- Andrews v. Essex & Co. Ins. Co., 3 Mason (U. S.), 6. § 5024.
- Andrews v. Estes, 11 Me. 267. §§ 20, 5126, 5146.
- Andrews v. Franklin, 1 Strange, 24. § 1829.
- Andrews v. Hart, 17 Wis. 297. §§ 1378, 1654, 5781.
- Andrews v. Michigan Central R. Co., 99 Mass. 534. §§ 7989, 8031.
- Andrews v. Murray, 33 Barb. (N. Y.) 354. §§ 3052, 3450, 4176, 4208, 4376.
- Andrews v. Ohio & Co. R. Co., 14 Ind. 169. §§ 1369, 1394, 1395, 1746, 1786, 7901.
- Andrews v. Page, 3 Heisk. (Tenn.) 653. § 590.
- Andrews v. Paschen, 67 Wis. 413. § 6971.
- Andrews v. People, 83 Ill. 529. § 29.
- Andrews v. People, 84 Ill. 28. § 29.
- Andrews v. Portland, 79 Me. 434. § 4708.
- Andrews v. Pratt, 44 Cal. 309. § 4060.
- Andrews v. Suffolk Bank, 12 Gray (Mass.), 461. §§ 4824, 4827.
- Andrews v. Union & Co. Ins. Co., 37 Me. 256. §§ 1011, 1012, 5860, 5973.
- Andrews v. Vanderbilt, 37 Hun (N. Y.), 468. §§ 3351, 3355.
- Andrew's Bay Land Co. v. Mitchell, 4 Fla. 192. § 5081.
- Androscoogin & Co. R. Co. v. Androscoogin R. Co., 52 Me. 417. § 5872.
- Androscoogin & Co. R. Co. v. Stevens, 28 Me. 434. § 7423.
- Androscoogin Water-Power Co. v. Bethel Steam Mill Co., 64 Me. 441. § 6285.
- Anfenger v. Anzeiger Pub. Co., 9 Colo. 377. § 4336.
- Angas's Case, 1 De Gex & S. 560. § 3275.
- Angel v. Smith, 9 Ves. 335. §§ 6927, 7128.
- Angell v. Davis, 4 Mylne & C. 360. § 7037.
- Angerhoefer v. Bradstreet Co., 22 Fed. Rep. 305. §§ 7997, 8038.
- Angier v. Ash, 26 N. H. 99. § 3363.
- Anglo-Austrian & Assn. Co. v. British Provident & Co. Soc., 3 Giff 521; 4 De Gex. F. & G. 341. § 3969.
- Anglo-California Bank v. Grangers' Bank, 63 Cal. 359. §§ 1032, 2594.
- Anglo-Californian Bank v. Mahoney Mining Co., 5 Sawy (U. S.) 255. §§ 4946, 5287.
- Anglo-Greek Steam Nav. Co., Re, 35 Beav. 399. § 4009.
- Anglo-Greek Steam Co., Re, L. R. 2 Eq. 1. § 4482.
- Anglo-Italian Bank v. Davies, 9 Ch. Div. 275, 293. §§ 6919, 6932.
- Anketel v. Converse, 17 Ohio St. 11. § 5190.
- Annan, Re, 2 N. Y. Supp. 275. § 5530.
- Annelly v. De Saussure, 12 S. C. 489. § 4943.
- Annett v. Terry, 35 N. Y. 256. § 4015.
- Anon., 1 Barnard, 402. § 511.
- Anon., 1 Camp. 492. § 2356.
- Anon., Comb. 41. § 782.
- Anon., Comb. 105. §§ 763, 5616.
- Anon., Comb. 133. § 762.
- Anon., Lofft, 372. § 3363.
- Anon., Godb. 42. 1 Nels. Ab. 33. § 7432.
- Anon., 6 Mod. 183. § 6302.
- Anon., 1 Mod. 215. § 7299.
- Anon., 12 Mod. 559. §§ 6302, 6418.
- Anon., 1 Salk. 191. § 284.
- Anon., 2 Salk. 428; 1 Ld. Raym. 125. § 833.
- Anon., 1 Vern. 117. § 7409.
- Anon., 6 Ves. 287. § 6977.
- Anthony v. Bartholow, 69 Mo. 186. § 7507.
- Anthony v. Household Sewing Mach. Co., 16 R. I. 571. §§ 2255, 2256, 5984.
- Anthony v. International Bank, 93 Ill. 225. § 288.
- Antipoda Baptist Church v. Mulford, 8 N. J. L. 182, 191. §§ 5044, 5045, 5046, 5181, 7392, 7611.
- Antonio v. Jones, 28 Tex. 59. § 6602.
- Anvil Min. Co. v. Sherman, 74 Wis. 226. §§ 1724, 1725, 1743, 1827.
- Appeal Tax Court v. Northern Central R. Co., 50 Md. 417. § 8097.
- Apperly v. Page, 1 Phil. Eq. 779. § 4566.
- Apperson v. Exchange Bank (Ky.), 10 Ky. L. Rep. 943. §§ 4654, 5814.
- Apperson v. Mutual Benefit Life Ins. Co., 38 N. J. L. 272. §§ 7412, 7533.
- Appley v. Joe, Cro. Jac. 645. § 6754.
- Appley v. New York, 15 How. Pr. (N. Y.) 428. § 4874.
- Appleford's Case, 1 Mod. 82. §§ 763, 829.
- Applegarth v. McQuiddy, 77 Cal. 408. §§ 4595, 4599.
- Appleton v. Binks, 5 East, 148. §§ 5074, 5076.
- Appleton v. Kennon, 19 Mo. 637. §§ 1220, 1657.
- Appleton v. Turnbull, 84 Me. 72. § 3812.
- Appleton v. Water Commrs., 2 Hill (N. Y.), 432. § 21.
- Appleton Ins. Co. v. Jessor, 5 Allen (Mass.), 446. §§ 220, 519, 1852, 1857.
- Appley v. Montauk, 33 Barb. (N. Y.) 275. § 5794.
- Application for Charter, Re (Pa. Exco. Dep.), 27 W. N. C. 399. § 1096.
- Application of Attorney-General, Re, 3 N. Y. St. Rep. 464; 50 Hun (N. Y.), 511. § 6784.
- Application of Department of Public Parks, Re, 86 N. Y. 439. § 611.

- Apps, *Ex parte*, 18 L. J. (Ch.) 409. § 428.
 Athorp v. North, 14 Mass. 167. §§ 5175, 5176.
 Arapahoe Cattle & Co. v. Stevens, 13 Colo. 531. §§ 941, 1605, 1644, 4003, 4970.
 Arapahoe County v. Kansas Pac. R. Co., 4 Dill. (U. S.) 1277. § 6215.
 Arasmit v. Temple, 11 Ill. App. 39. §§ 6275, 6298.
 Arbitration between Eldon and Ferguson Townships, Re, 6 Upper Can. L. J. 270. § 7754.
 Archer v. American Water Works, 50 N. J. Eq. 33. §§ 2426, 4402.
 Archer v. Rose, 3 Brewst. (Pa.) 264. §§ 3112, 3561, 4182.
 Archer v. Terre Haute & C. R. Co., 102 Ill. 495. § 5358.
 Archer v. Williams, 2 Carr. & Kir. 27. § 2430.
 Archibald v. Argall, 53 Ill. 307. § 2656.
 Arden, Re, 4 N. Y. Supp. 177. §§ 6598, 6599.
 Ardesco Oil Co. v. Gilson, 63 Pa. St. 146. §§ 4883, 6348, 6350.
 Ardesco Oil Co. v. North American Min. Co., 66 Pa. St. 375. § 6473.
 Arents v. Com., 18 Gratt. (Va.) 750, 773. §§ 6064, 6107.
 Aranz v. Weir, 89 Ill. 25. §§ 3021, 3160, 3686.
 Argenti v. San Francisco, 16 Cal. 255, 265. §§ 5303, 5021, 6025.
 Argus Printing Co., Re, 1 N. Dak. 434. §§ 2303, 2624, 3860, 3864, 3867, 3868.
 Arkansas River Land T. & C. Co. v. Farmers Loan & Trust Co., 13 Colo. 587. §§ 1187, 1491, 1691, 4476, 4497, 7374, 7380.
 Arkansas Valley Agri. Soc. v. Eicholtz, 45 Kan. 164. § 1696, 6503.
 Arkenburgh v. Wood, 23 Barb. (N. Y.) 360, 370. § 4472.
 Arkwright v. Newbold, 17 Ch. Div. 301. § 467.
 Arlington v. Hinds, 1 D. Chip. (Vt.) 431. §§ 7590, 7593.
 Arlington v. Merrick, 2 Saund. 411. § 4904.
 Arlington v. Peirce, 122 Mass. 270. § 5308.
 Arment v. New Orleans & C. R. Co., 41 La. An. 1020. §§ 2138, 2222.
 Armington v. Earnet, 15 Vt. 745. §§ 5615, 5618.
 Armington v. State, 95 Ind. 421. § 771.
 Armour v. Michigan Cent. R. Co., 65 N. Y. 111. § 6331.
 Arms v. Conant, 38 Vt. 750. §§ 55, 694, 3933, 3968, 7897.
 Armstrong, Re, 41 Fed. Rep. 381. § 7273.
 Armstrong v. Abbott, 11 Colo. 220. §§ 5197, 5198.
 Armstrong v. American Exch. Nat. Bank, 133 U. S. 433. § 4812.
 Armstrong v. Chemical Nat. Bank, 41 Fed. Rep. 234. § 7272.
 Armstrong v. Cowles, 44 Conn. 44. §§ 4189, 4332.
 Armstrong v. Ebener, 46 N. J. Eq. 457. § 4388.
 Armstrong v. Ettlesohn, 36 Fed. Rep. 209. § 7270.
 Armstrong v. Hayward, 6 Cal. 183. § 3796.
 Armstrong v. Herancourt Brew. Co. (Ohio C. P.), 26 Ohio L. J. 39, 93. §§ 2387, 4498.
 Armstrong v. Karsner, 47 Ohio St. 276. §§ 1287, 1291, 1335, 1342, 1394, 1975.
 Armstrong v. Scott, 36 Fed. Rep. 63. § 7300.
 Armstrong v. Trautman, 36 Fed. Rep. 275. § 7270.
 Armstrong v. Warner, 21 Week. Law Bull. (Ohio) 136; 27 Weekly Law Bull. (Ohio) 100. § 7299.
 Arnis v. Smith, 41 Ch. Div. 348. § 4144.
 Arnkens v. Rouse (Ohio C. P.), 26 Ohio L. J. 221. § 4616.
 Arno v. Wayne Circuit Judge, 42 Mich. 362. § 3161.
 Arnold v. Brown, 24 Pick. (Mass.) 89. § 7607.
 Arnold v. Clifford, 2 Sumner (U. S.), 238. § 4582.
 Arnold v. Covington & Bridge Co., 1 Duv. (Ky.) 372. § 5595.
 Arnold v. Delano, 4 Cush. (Mass.) 33. § 1220.
 Arnold v. Nichols, 64 N. Y. 119. § 381.
 Arnold v. Poole, 4 Man. & G. 860. §§ 5058, 5059, 5297.
 Arnold v. Ruggles, 1 R. I. 165. §§ 1066, 1070, 2767, 3231, 3317.
 Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 1424. §§ 2320, 3247, 4458, 1126.
 Arnot v. Alexander, 44 Mo. 25, 27. § 7754.
 Arnot v. Railroad Co., 5 Hun (N. Y.), 608. § 5724.
 Arnot v. Sage, 5 N. Y. Supp. 477. § 3367.
 Arrott v. Walker, 118 Pa. St. 249. § 4981.
 Arthur v. Clarke, 46 Minn. 491. § 3676.
 Arthur v. Commercial & Bank, 9 Smed. & M. (Miss.) 394. §§ 1987, 5353, 5356, 5364, 6140, 6537, 7348, 7853.
 Arthur v. Griswold, 55 N. Y. 400. §§ 1462, 1469, 1476, 4094.
 Arthur v. Oakes, 63 Fed. Rep. 310. § 7782.
 Arthur v. Willis, 44 Minn. 409. §§ 3004, 3009, 3431, 3518, 3528, 3531, 3644.
 Arundel v. Phipps, 10 Ves. Jr. 139, 145. § 2617.
 Ash v. People, 11 Mich. 347. § 1028.
 Ash v. Savage, 5 N. H. 545. § 2619.
 Ashbury v. Watson, 30 Ch. Div. 376. §§ 2244, 2291.
 Ashby v. Blackwell, 2 Eden, 299; Ambli. 503. §§ 2587, 4201.
 Ashe v. Johnson, 2 Jones Eq. (N. C.) 140. § 2728.
 Asher v. Louisville & C. R. Co., 87 Ky. 391. § 5626.
 Asher v. Sutton, 31 Kan. 286. §§ 4622, 4632, 4634.
 Asher v. Texas, 128 U. S. 129. § 5463.
 Asheville v. Johnston, 71 N. C. 398. § 5626.
 Asheville Division v. Aston, 92 N. C. 578. § 531.
 Ashley's Case, L. R. 9 Eq. 283, 268. §§ 1440, 1443.
 Ashley v. Godwin, 19 N. Y. Supp. 658. § 4209.
 Ashley v. Kinsan, 18 N. Y. St. Rep. 791; 2 N. Y. Supp. 574. § 4381.
 Ashley v. White, 2 Ld. Raym. 938. § 926.
 Ashmead v. Colby, 26 Conn. 287. §§ 1424, 1428, 1453, 1484.
 Ashpitel v. Sercombe, 5 Exch. 147. §§ 440, 441, 418.
 Ashtabula & C. R. Co. v. Smith, 15 Ohio, St. 328. §§ 227, 1152, 1224, 1317, 1332, 1335, 1345, 1739.
 Ashton v. Atlantic Bank, 3 Allen (Mass.), 217. §§ 377, 3121, 4930.
 Ashton v. Burbank, 2 Dill. (U. S.) 435. §§ 72, 74, 1281, 1550, 1658, 1794.
 Ashton v. Dashaway Asso., 84 Cal. 61. §§ 4332, 4383, 4504, 4509.
 Ashton Hand. Man. Co., Re, 5 Pa. Co. Ct. 400, 450. § 6700.
 Ashuelot Boot & C. Co. v. Hoit, 56 N. H. 548. §§ 1170, 1211.
 Ashuelot Man. Co. v. Marsh, 1 Cush. (Mass.) 507. §§ 4622, 4629.
 Ashuelot R. Co. v. Elliot, 57 N. H. 397. §§ 704, 6111.
 Ashullot Savings Bank v. Albee, 63 N. H. 152. § 4148.
 Ashurst's Appeal, 60 Pa. St. 290. §§ 3983, 3987, 4047, 4070, 4534, 5317.
 Ashurst v. Field, 26 N. J. Eq. 1. § 2199.
 Ashurst v. Mason, L. R. 20 Eq. 225. §§ 4095, 4377.
 Ashworth v. Bristol & C. R. Co., 15 L. T. (N. S.) 561. §§ 1597, 3214.
 Askew's Case, L. R. 9 Ch. 664. §§ 1424, 1484, 6335.
 Askew v. Hooper, 28 Ala. 634. § 6548.
 Askew v. Reynolds, 1 Dev. & Bat. (N. C.) 367. § 2617.
 Askno's Case, L. R. 9 Ch. 664. § 1446.
 Aspen v. Rucker, 10 Colo. 184. § 7783.
 Aspinwall v. Butler, 133 U. S. 595. §§ 1737, 1939, 2103, 2111, 3694, 4466.
 Aspinwall v. Commissioners, 22 How. (U. S.) 361. §§ 1123, 1124.
 Aspinwall v. Delano, 118 U. S. 649. § 2111.
 Aspinwall v. Meyer, 2 Sandf. (N. Y.) 180, 188. § 4760.
 Aspinwall v. Sacchi, 57 N. Y. 331. §§ 2253, 7661.
 Aspinwall v. Torrance, 1 Lans. (N. Y.) 381. §§ 2057, 3816, 4377.
 Associates of the Jersey Co. v. Jersey City, 8 N. J. Eq. 715. § 5690.
 Association v. Sendmeyer, 50 Pa. St. 67. § 2390.
 Association v. Wiltz, 10 Fed. Rep. 330. § 2615.
 Astley v. Reynolds, 2 Stra. 915. § 2103.
 Astor v. Arcade R. Co., 113 N. Y. 93, 114. §§ 585, 591, 609, 610, 624, 650.
 Astor v. New York Arcade R. Co., 48 Hun (N. Y.), 562. §§ 60, 618, 650.
 Astor v. Westchester Gaslight Co., 33 Hun (N. Y.), 333. § 6163.
 Astoria & C. R. Co. v. Hull, 20 Or. 177. §§ 1724, 3388.
 Astoria v. New Orleans, 105 U. S. 362. § 5570.
 Atchafalaya Bank v. Dawson, 13 La. 497. §§ 6586, 6598, 6602, 6681.
 Atcherson v. Troy & C. R. Co., 6 Abb. Pr. (N. S.) (N. Y.) 329; 1 Abb. App. Dec. 13. § 3396.
 Atchison v. Bartholow, 4 Kan. 124. §§ 475, 582.
 Atchison v. Butcher, 3 Kan. 104. § 590.
 Atchison v. Morris, 11 Biss. (U. S.) 191. § 7556.
 Atchison & C. R. Co. v. Cochran, 43 Kan. 225. §§ 1078, 1109.
 Atchison & C. R. Co. v. Davis, 31 Kan. 645. § 7773.
 Atchison & C. R. Co. v. Davis, 34 Kan. 203. § 1109.
 Atchison & C. R. Co. v. Denver & C. R. Co., 110 U. S. 667. § 7828.

Atchison—Att'y-Gen'l TABLE OF CASES CITED.

- Atchison & Co. v. Fletcher, 35 Kan. 236. § 1109.
 Atchison & Co. v. Maquillon, 12 Kan. 301
 § 590.
 Atchison & Co. v. Phillips County, 25 Kan. 261.
 §§ 365, 366.
 Atchison R. Co. v. Nave, 38 Kan. 744. §§ 6586,
 6587, 6590.
 Atchison, Topeka etc. R. Co. v. People, 5 Colo. 60.
 § 6791.
 Athenæum Life Ins. Co., Re. 4 Kay & J. 549. § 3734.
 Athenæum Life Ins. Co. v. Pooley, 1 Gift. 102; af-
 firmed 5 Jur. (N. S.) 129. § 3734.
 Athenæum & Soc. v. Pooley, 81 L. T. 70. § 3115.
 Athens v. Long, 54 Ga. 330. § 8091.
 Atherton v. Sugar Creek etc. Turnp. Co., 67 Ind.
 334. § 5942.
 Athol & Co. R. Co. v. Prescott, 110 Mass. 213. § 3711.
 Athol Music Hall Co. v. Carey, 116 Mass. 471. §§ 1158,
 1173, 1817.
 Atkins v. Albree, 12 Allen (Mass.), 359. § 2094, 2210.
 Atkins v. Brown, 59 Me. 90. § 5176.
 Atkins v. Gamble, 42 Cal. 86. §§ 2348, 2455, 2643,
 2645.
 Atkins v. Petersburg etc. R. Co., 3 Hughes (U. S.),
 307. §§ 7114, 7116.
 Atkins v. Randolph, 31 Vt. 226. § 1129.
 Atkinson v. Atkinson, 8 Allen (Mass.), 15. §§ 2370,
 2468, 2486, 2529, 2533, 2544.
 Atkinson v. Bemis, 11 N. H. 44. §§ 39, 5075.
 Atkinson v. Elliott, 7 T. R. 378. § 6967.
 Atkinson v. Foster, 134 Ill. 473. §§ 2615, 2633.
 Atkinson v. Goodrich Transportation Co., 60 Wis.
 141. §§ 1021, 1024.
 Atkinson v. Manks, 1 Cow. (N. Y.) 691, 703. § 7413.
 Atkinson v. Marietta & Co. R. Co., 15 Ohio St. 21, 35.
 §§ 511, 574, 581, 5342, 5354.
 Atkinson v. Newcastle & Co. Water Works Co., 2 Ex.
 Div. 441; L. R. 6 Ex. 404. § 6358.
 Atkinson v. Pocock, 1 Exch. 798. § 447.
 Atkinson v. Rochester Printing Co., 114 N. Y. 168;
 43 Hun (N. Y.), 167. § 6519.
 Atkinson v. St. Croix Man. Co., 24 Me. 171. §§ 4721,
 45, 0, 5746.
 Atkyns v. Sawyer, 1 Pick. (Mass.) 351. § 3248.
 Atlanta v. Central R. & Co. Co., 53 Ga. 120. § 5626.
 Atlanta v. Gate City Gas-Light Co., 71 Ga. 106. §§
 60, 247, 531, 6598, 6601.
 Atlanta v. Grant, 57 Ga. 340. § 7856.
 Atlanta & Co. R. Co. v. Harrison, 6 Ga. 757. § 7517.
 Atlanta v. R. Co., 80 Ga. 276. § 611.
 Atlanta Nat. Bank v. Burke, 81 Ga. 597. § 7098.
 Atlanta Real Estate Co. v. Atlanta Bank & Co., 75
 Ga. 40. §§ 4479, 4566.
 Atlantic & Co. Ins. Co. v. Fitzpatrick, 2 Gray (Mass.),
 279. § 789.
 Atlantic & Co. Ins. Co. v. Sanders, 36 N. H. 252. §§
 707, 710, 3528.
 Atlantic & Co. Ins. Co. v. Young, 38 N. H. 451. §
 4933.
 Atlantic & Co. R. Co. v. Allen, 15 Fla. 637. §§ 262, 368,
 5574.
 Atlantic & Co. R. Co. v. Cowles, 69 N. C. 59. § 6972.
 Atlantic & Co. R. Co. v. Dunn, 19 Ohio, St. 162, §§
 6276, 6305, 6383, 6388, 6390.
 Atlantic & Co. R. Co. v. Johnston, 70 N. C. 348.
 §§ 496, 1850, 3897.
 Atlantic & Co. R. Co. v. Reisner, 18 Kan. 458, 460.
 §§ 4849, 4984.
 Atlantic & Co. R. Co. v. State, 55 Ga. 312. § 5569.
 Atlantic & Co. R. Co. v. St. Louis, 66 Mo. 228. §§ 337,
 512, 513, 5105, 6035, 6742.
 Atlantic & Co. R. Co. v. Sullivant, 5 Ohio St. 276.
 §§ 327, 511.
 Atlantic & Co. Tel. Co. v. Baltimore & Co. R. Co., 46
 N. Y. Super. 377. § 8007.
 Atlantic & Co. Tel. Co. v. Commonwealth, 66 Pa. St.
 57. §§ 2891, 2903.
 Atlantic & Co. Tel. Co. v. Commonwealth, 3 Brews.
 (Pa.) 366. § 2148.
 Atlantic & Co. Tel. Co. v. Union Pac. R. Co., 1 Fed.
 Rep. 745; 1 McCrary (U. S.), 541. §§ 5357, 5883.
 Atlantic Bank v. Merchant's Bank, 10 Gray (Mass.),
 532. §§ 4816, 4819, 4929, 5227, 5228.
 Atlantic City Water Works Co. v. Atlantic City, 39
 N. J. Eq. 367. § 598.
 Atlantic City Water Works Co. v. Consumers
 Water Co., 44 N. J. Eq. 427. §§ 593, 594, 595,
 598, 600.
 Atlantic Cotton Mills v. Indian Orchard Mills, 147
 Mass. 268; 9 Am. St. Rep. 698. § 4728.
 Atlantic Delaine Co. v. Mason, 5 R. I. 463. §§ 717,
 1707, 1914.
 Atlantic Delaine Co. v. Tredick, 5 R. I. 171. § 5752.
 Atlantic & Co. Life Ins. Co., Re. 9 Ben. (U. S.) 270.
 § 6704.
 Atlantic Nat. Bank v. Harris, 118 Mass. 147. § 5209.
 Atlantic State Bank v. Savery, 18 Hun (N. Y.), 37.
 § 5208.
 Atlantic Trust Co. v. Consolidated Electric Storage
 Co., 49 N. J. Eq. 402, 405. §§ 4543, 6570.
 Atlas Bank v. Gardner Co., 8 Biss. (U. S.) 537. § 3887.
 Atlas Bank v. Nahant Bank, 3 Met. (Mass.) 581.
 § 2954.
 Atlas Bank v. Savery, 127 Mass. 75, 77; 34 Am. Rep.
 345. §§ 5950, 6036.
 Atlee v. Fink, 75 Mo. 100; 42 Am. Rep. 385. § 4022.
 Attaway v. Third Nat. Bank, 93 Mo. 485, 482; 15 Mo.
 App. 578. §§ 4011, 4016, 4017, 4022.
 Atterberry v. Knox, 4 B. Mon. (Ky.) 90. § 7895.
 Attorney-General v. Abbott, 154 Mass. 323. § 3911.
 Attorney-General v. Amos, 60 Mich. 372. § 3879.
 Attorney-General v. Aspinall, 2 Mylne & C. 613, 625.
 §§ 2959, 4150, 7774, 7775.
 Attorney-General v. Atlantic Mut. Life Ins. Co., 77
 N. Y. 336. §§ 6993, 7193.
 Attorney-General v. Bank of Charlotte, 4 Jones Eq.
 (N. C.) 387. § 5361.
 Attorney-General v. Bank of Chenango, 1 Hopk.
 Ch. (N. Y.) 596. §§ 4482, 4538.
 Attorney-General v. Bank of Columbia, 1 Paige
 (N. Y.), 511, 517; 3 Wend. (N. Y.) 538. §§ 6863,
 6885.
 Attorney-General v. Bank of Newbern, 1 Dev. & B.
 Eq. (N. C.) 216. § 5384.
 Attorney-General v. Bank of Niagara, 1 Hopk. Ch.
 (N. Y.) 354. §§ 4482, 4538, 6654.
 Attorney-General v. Bay State Min. Co., 99 Mass.
 148. §§ 5556, 5557, 5560, 7835, 7887, 7998, 8102,
 8134.
 Attorney-General v. Boston & Co. R. Co., 109 Mass.
 99. § 320.
 Attorney-General v. Boston Wharf Co., 12 Gray
 (Mass.) 553. § 7774.
 Attorney-General v. Bowyer, 3 Ves. 714. § 5786.
 Attorney-General v. Brown, 1 Swanst. 265. §§ 7774,
 7775.
 Attorney-General v. Cambridge, 16 Gray (Mass.),
 247. § 7774.
 Attorney-General v. Cape Fear Nav. Co., 2 Ired.
 Eq. (N. C.) 444. § 1133.
 Attorney-General v. Chicago & Co. R. Co., 112 Ill.
 520, 535. § 6787.
 Attorney-General v. Chicago & Co. R. Co., 35 Wis.
 425, 532, 533. § 7774.
 Attorney-General v. Clarendon, 17 Ves. 491. §§ 3877,
 4482, 4554.
 Attorney-General v. Clements, 1 Turn. & R. 58.
 § 7754.
 Attorney-General v. Clergy Society, 10 Rich. Eq.
 (S. C.) 604. § 95.
 Attorney-General v. Commissioners, L. R. 10 Eq.
 152. § 7774.
 Attorney-General v. Compton, 1 Young & Coll. 417.
 § 7775.
 Attorney-General v. Continental Life Ins. Co., 94
 N. Y. 199. § 7012.
 Attorney-General v. Continental Life Ins. Co., 28
 Hun (N. Y.), 360. § 7059.
 Attorney-General v. Corporation of Leicester, 9
 Beav. 546. § 289.
 Attorney-General v. Corporation of Poole, 8 Beav.
 75. § 817.
 Attorney-General v. Coventry, 1 P. Wms. 306.
 § 6999.
 Attorney-General v. Coventry, 8 Swanst. 312, note.
 § 7026.
 Attorney-General v. Cullum, 1 Young & Coll. 411.
 § 7775.
 Attorney-General v. Davy, 2 Atk. 212. §§ 3914, 5045.
 Attorney-General v. Day, 2 Mad. 246. § 6831.
 Attorney-General v. Delaware & Co. R. Co., 38 N. J. L.
 282. §§ 6783, 6788, 6789.
 Attorney-General v. Dixie, 13 Ves. 519. § 3877.
 Attorney-General v. Dublin, 1 Bligh, (N. R.) 312.
 § 7774.
 Attorney-General v. Eau Claire, 37 Wis. 400. § 6797.
 Attorney-General v. Earl of Clarendon, 17 Ves. 491.
 498. §§ 3877, 4482, 4554.
 Attorney-General v. Eastern R. Co., 137 Mass. 45.
 § 5501.

- Attorney-General v. Erie & C. R. Co.**, 55 Mich. 15. §§ 6625, 6781.
- Attorney-General v. Forbes**, 2 Mylne & Cr. 123, 133. § 7774.
- Attorney-General v. Garrison**, 101 Mass. 223. § 7774.
- Attorney-General v. Gower**, 9 Mod. 224. §§ 6718, 6745.
- Attorney-General v. Great Northern R. Co.**, 4 De Gex & Sm. 75. § 7774.
- Attorney-General v. Great Northern R. Co.**, 1 Drew. & Sm. 154, 161. § 7774.
- Attorney-General v. Guardian Mut. Life Ins. Co.**, 77 N. Y. 272. §§ 6897, 6920, 6927, 6950.
- Attorney-General v. Guardian Mut. Life Ins. Co.**, 5 N. Y. Supp. 81. § 7073.
- Attorney-General v. Hanchett**, 42 Mich. 436. §§ 226, 227.
- Attorney-General v. Higgins**, 2 Hurl. & N. 339. § 1084.
- Attorney-General v. Joy**, 55 Mich. 91. §§ 256, 618.
- Attorney-General v. Kell**, 2 Beav. 575. § 2859.
- Attorney-General v. Kerr**, 2 Beav. 420, 429. § 289.
- Attorney-General v. Leicester**, 7 Beav. 176. § 2959.
- Attorney-General v. Life & Acc. Ins. Co.**, 4 Paige (N. Y.), 224. § 7225, 7229.
- Attorney-General v. Life & Fire Ins. Co.**, 9 Paige (N. Y.), 470, 477. §§ 5045, 5730, 5736, 5745.
- Attorney-General v. Litchfield**, 13 Sim. 547. § 7774.
- Attorney-General v. Liverpool**, 1 Mylne & Cr. 171, 210. § 7774.
- Attorney-General v. Lock**, 3 Atk. 161. § 816.
- Attorney-General v. London**, 3 Brown (Ch.), 171. § 693.
- Attorney-General v. Lorman**, 59 Mich. 157. §§ 207, 231, 232, 236, 5951.
- Attorney-General v. McArthur**, 38 Mich. 204. § 596.
- Attorney-General v. Michigan State Bank**, 2 Dougl. (Mich.) 359. § 6800.
- Attorney-General v. Mid-Kent & C. R. Co.**, L. R. 3 Ch. 100, 103. § 7774.
- Attorney-General v. North American Life Ins. Co.**, 80 N. Y. 152; 18 Hun (N. Y.), 470; 58 How. Pr. (N. Y.) 197. §§ 6959, 6960.
- Attorney-General v. North American Life Ins. Co.**, 82 N. Y. 172. §§ 6946, 7022, 7219.
- Attorney-General v. North American Life Ins. Co.**, 89 N. Y. 94; 26 Hun (N. Y.), 294. §§ 6960, 7006, 7198, 7223.
- Attorney-General v. North American Life Ins. Co.**, 6 Abb. N. Cas. (N. Y.) 293. §§ 6874, 6910, 7130.
- Attorney-General v. Norwich**, 16 Sim. 225. § 4527.
- Attorney-General v. Norwich**, 2 Mylne & Cr. 406. § 7774.
- Attorney-General v. Oakland County Bank**, 1 Walker Ch. (Mich.) 90, 97. § 690, 5638.
- Attorney-General v. Pearson**, 2 Coll. 581. § 7775.
- Attorney-General v. Perkins**, 73 Mich. 303. §§ 256, 559.
- Attorney-General v. Petersburg & C. R. Co.**, 6 Ired. L. (N. C.) 456. §§ 5938, 6511, 6793, 6901.
- Attorney-General v. Poole**, 4 Mylne & Cr. 17. §§ 7774, 7775.
- Attorney-General v. Railroad Co.**, 35 Wis. 425. §§ 594, 5537, 5543, 7768.
- Attorney-General v. Reformed Protestant Dutch Church**, 33 Barb. (N. Y.) 313. § 5783.
- Attorney-General v. Rice**, 64 Mich. 335. § 633.
- Attorney-General v. Rye**, 7 Taunt. 546. § 7609.
- Attorney-General v. State Bank**, 1 Dev. & B. Eq. (N. C.) 545. §§ 1693, 2128, 2168.
- Attorney-General v. Stevens**, 1 N. J. Eq. 369. §§ 5339, 5642, 5643, 5663.
- Attorney-General v. Telephone Co.**, 6 Q. B. Div. 244. § 5695.
- Attorney-General v. Tudor Ice Co.**, 104 Mass. 239. § 7774.
- Attorney-General v. Utica Ins. Co.**, 2 Johns. Ch. (N. Y.) 371, 385. §§ 4009, 4043, 4118, 4120, 4482, 4519, 4538.
- Attorney-General v. West Wisconsin R. Co.**, 36 Wis. 466, 496. §§ 6690, 7406.
- Attorney-General v. Western Union Tel. Co.**, 33 Fed. Rep. 129. § 8122.
- Attorney-General v. Whitwood**, 40 L. J. (Ch. Div.) 592. § 4426.
- Attorney-General v. Wilson**, 1 Craig & Ph. 1; 10 L. J. (N. S.) 53; 4 Jur. 1174. §§ 4016, 4093, 4119, 4120, 4582.
- Attorney-General v. Wilson**, 9 Sim. 30, 48. § 289.
- Atrill v. Huntington**, 70 Md. 191; 146 U. S. 657. §§ 3052, 4166, 4167, 4241, 4242.
- Atwater v. Woodbridge**, 6 Conn. 223. § 2925.
- Atwood v. Dumas**, 149 Mass. 16. § 7820.
- Atwood v. Rhode Island Agricultural Bank**, 7 R. I. 376. §§ 3015, 3097, 3098, 3100, 3429, 3431, 3437, 3558.
- Atwood v. Shenandoah Valley R. Co.**, 85 Va. 966. §§ 6257, 6265.
- Atwood v. Small**, 6 Cl. & Fin. 232, 395. § 1372.
- Atwood v. Wright**, 29 Ala. 346. §§ 1462, 6323.
- Atwood v. Merryweather**, 37 L. J. Ch. 35. § 474.
- Atwood v. Merryweather**, L. R. 5 Eq. 464, note. §§ 457, 459, 4481, 4519, 4566.
- Auburn Academy v. Strong**, Hopk. (N. Y.) 278. §§ 802, 804, 3951.
- Auburn & C. Plank-road Co. v. Douglass**, 9 N. Y. 444; 12 Barb. 553. §§ 5404, 5662.
- Auckland v. Westminster Local Board**, L. R. 7 Ch. 597. § 7774.
- Audenried v. Betteley**, 5 Allen (Mass.), 382. § 6917.
- Auditor v. Ballard**, 9 Bush (Ky.), 572. § 5999.
- Auditors v. Benoit**, 20 Mich. 176. § 4706.
- Audley's Case**, Latch. 123. § 763, 833.
- Auerbach v. Le Sueur Mill Co.**, 28 Minn. 292. §§ 5730, 5734, 5737, 5738.
- Augusta v. Marks**, 50 Ga. 612. § 5626.
- Augusta & C. R. Co. v. Kittel**, 52 Fed. Rep. 63. §§ 5072, 5298, 5299.
- Augusta & C. R. Co. v. Randall**, 79 Ga. 301. § 599.
- Augusta Bank v. Augusta**, 36 Me. 255. § 2917.
- Augusta Bank v. Augusta**, 49 Me. 507. § 1118.
- Augusta Bank v. Hamblet**, 35 Me. 491. §§ 3985, 4632, 4655.
- Augusta Ice Man. Co. v. Gray**, 60 Ga. 344. §§ 6823, 6379, 6882, 6887.
- Aull Sav. Bank v. Lexington**, 74 Mo. 104. §§ 5948, 7632.
- Aultman's Appeal**, 98 Pa. St. 505. §§ 3018, 3040, 3050, 3255, 3439, 3485, 3745.
- Aultman v. Waddle**, 40 Kan. 195. §§ 3000, 3005.
- Aurora v. West**, 9 Ind. 74, 85. §§ 475, 1118, 5639.
- Aurora v. West**, 22 Ind. 83. § 1118.
- Aurora v. West**, 7 Wall. (U. S.) 82. §§ 6064, 6107, 6111, 6113.
- Aurora Agric. Soc. v. Paddock**, 80 Ill. 263. §§ 6131, 6132, 6133, 6159, 6184.
- Aurora & C. R. Co. v. Lawrenceburg**, 56 Ind. 80. § 501.
- Aurora & C. R. Co. v. Miller**, 56 Ind. 83. § 501.
- Austin's Case**, L. R. 2 Eq. 435. §§ 1260, 3885, 4154.
- Austin v. Berlin**, 13 Col. 138. §§ 4207, 4208.
- Austin v. Bethnal Green**, L. R. 9 C. P. 91. § 5058.
- Austin v. Boston**, 14 Allen (Mass.), 359; Aff'd, 7 Wall. (U. S.) 694. § 2850.
- Austin v. Daniels**, 4 Denio (N. Y.), 239. §§ 4479, 4622, 4660, 4762, 4992.
- Austin v. Goodrich**, 49 N. Y. 266. § 7622.
- Austin v. Gulf & C. R. Co.**, 45 Tex. 234, 267. § 610.
- Austin v. Murray**, 16 Pick. (Mass.) 121. § 1017.
- Austin v. New York & C. R. Co.**, 25 N. J. L. 381; §§ 7886, 8006.
- Austin v. Rawdon**, 42 N. Y. 155. § 6989.
- Austin v. Searing**, 16 N. Y. 112. §§ 914, 924, 7602.
- Austin v. Shaw**, 10 Allen (Mass.), 255. § 5113.
- Austin v. Underwood**, 37 Ill. 438, 441. § 3187.
- Austin v. Wilson**, 4 Cush. (Mass.) 273. §§ 6377, 6379.
- Australian Royal Mail Nav. Co. v. Marzett**, 41 Ex. 223. § 5058.
- Australian Steam Co. v. Mounsey**, 4 Kay & J. 733. §§ 2079, 5106, 5700, 5701, 6132.
- Automatic Phonograph Exhibition Co. v. North American Phonograph Co.**, 45 Fed. Rep. 1. § 7647.
- Avenue v. Citizens' Bank**, 40 La. An. 799. § 2103.
- Aveline v. Whisson**, 4 Man. & G. 801. § 5089.
- Aver v. Seymour**, 5 N. Y. Supp. 650. § 4480.
- Averall v. Wade**, Lloyd & G. 255, 268. § 7045.
- Averell v. Washington City Second Nat. Bank**, 19 Wash. L. Rep. 86. §§ 4770, 4836, 5328.
- Averill v. Barber**, 25 N. Y. St. Rep. 194; 6 N. Y. Supp. 255. §§ 4072, 4073, 4504.
- Avil v. Alexander Water Co.**, 1 Hughes (U. S.), 408. § 2508.
- A. Wright Co. v. Steinkemeyer**, 6 Mo. App. 575. §§ 1579, 1583, 2397.
- Aycock v. Martin**, 37 Ga. 124. § 5437.
- Aycock v. Raleigh & C. R. Co.**, 89 N. O. 321. § 6293.
- Aycock v. W. & W. R. Co.**, 6 Jones L. (N. C.) 231. §§ 4248, 7601.
- Ayer v. Hutchins**, 4 Mass. 370. § 5752.
- Ayer v. Seymour**, 5 N. Y. Supp. 650. § 4546.
- Ayers, In Re**, 123 U. S. 443. § 7780.
- Ayers v. Trego**, 37 Kan. 240. § 636.

Ayray's Case, 11 Co. 18, 19. §§ 286, 7609.
Ayre's Case, 25 Beav. 513. §§ 1362, 1367, 462, 1500, 6321.
Ayres v. French, 41 Conn. 142. §§ 2450, 2451, 2459, 2687, 2688.
Ayres v. Methodist Church, 3 Sandf. (N. Y.) 351, § 5395.
Ayres v. Siebel, 82 Iowa, 347. § 7344.
Ayres v. Turnpike Co., 9 N. J. L. 33. §§ 5911, 5930 5931.
Ayres v. Weed, 16 Conn. 291. § 295.
Babbage v. Second Baptist Church, 54 Iowa, 172. § 7631.
Babcock v. Beman, 11 N. Y. 200. §§ 4802, 5126, 5133, 5135, 5137.
Babcock v. Bryant, 12 Pick. (Mass.) 133, 135. § 3333.
Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296. § 5671.
Babcock v. Schuykill & Co. R. Co., 31 N. Y. St. Rep. 643, 9 N. Y. Supp. 845. §§ 7572, 8011.
Babcock v. Story, (Cal.), 30 Pac. Rep. 777. § 3455.
Bach v. Pacific Mail Steamship Co., 12 Abb. Pr. (N. S.) (N. Y.) 373. § 4533.
Bacheller v. Pinkham, 68 Me. 253. §§ 4096, 4097.
Bachman, Re, 12 Nat. Bank. Reg. 223. §§ 3255, 3970.
Backus v. Lebanon, 11 N. H. 19. §§ 5381, 5588, 5665, 5616, 5617.
Bacon v. Arthur, 4 Watts (Pa.), 437. § 5666.
Bacon v. Cohea, 12 Smedes & M. (Miss.) 516. §§ 8749, 8750.
Bacon v. Horne, 123 Pa. St. 452. § 7346.
Bacon v. Irvine, 70 Cal. 221. §§ 4485, 4500, 4503.
Bacon v. Mississippi Ins. Co., 31 Miss. 116. §§ 4617, 4619, 4655, 5734, 5742.
Bacon v. Morris, 10 Phila. (Pa.) 93. § 4348.
Bacon v. Northwestern Stove Co., 5 Ohio C. C. 289. § 7792.
Bacon v. Pomeroy, 104 Mass. 577. § 3319.
Bacon v. Robertson, 18 How. (U. S.) 480. §§ 375, 3341, 4453, 4481, 5555, 5566, 6730, 7038.
Badger v. Bank of Cumberland, 26 Me. 428. §§ 4825, 4881, 5046, 5176.
Badger v. Badger, 2 Wall. (U. S.) 87. §§ 5300, 6226.
Badger v. Batavia Paper Man. Co., 70 Ill. 302. §§ 6131, 6133.
Badger v. United States, 93 U. S. 599, 604. § 7509.
Badlam v. Tucker, 1 Pick. (Mass.) 389. §§ 2617, 2721.
Bagaley v. Pittsburgh Iron Co., 146 Pa. St. 478. §§ 4623, 4658, 4683, 4705.
Bagby v. Atlantic & C. R. Co., 86 Pa. St. 291. §§ 7337, 7339, 7346.
Bagge, Ex parte, 13 Beav. 162. § 1515.
Baggs' Case, Rolle Rep. 224. §§ 52, 802, 5416.
Baggs' Case, 11 Co. Rep. 93. §§ 799, 800, 802, 807, 803, 810, 820, 838, 846, 847, 854, 855, 859, 831, 904, 905, 906.
Baglan Stall Colliery Co., Re L. R. 5 Ch. 346. §§ 1578, 1605, 1618.
Bagley v. Tyler, 43 Mo. App. 195. §§ 3018, 3050, 3185, 3357, 3463, 3468.
Bagnell v. Carlton, 6 Ch. Div. 371. §§ 457, 462, 464, 465.
Bagshaw v. Eastern Counties R. Co., 7 Hare, 114; 2 Mac. & G. 389. §§ 105, 1205, 4049, 4462, 4518, 4519, 4566, 4578.
Bagshaw v. Seymour, 18 C. B. 903; 29 L. J. (Exch.) 62, note. §§ 1460, 1471.
Bahia & Co. v. Re L. R. 3 Q. B. 584. §§ 2501, 2556, 2572, 2574, 2581, 2595.
Baile v. Calvert & Co. Education Soc., 47 Md. 117. §§ 1311, 1513, 1958.
Baile v. Equitable Fire Ins. Co., 68 Mo. 617. §§ 7993, 8025.
Baile v. St. Joseph etc. Insurance Co., 73 Mo. 371. §§ 1628, 5645.
Bailey, Ex parte, 15 Jur. 29. § 1792.
Bailey v. Bancker, 3 Hill (N. Y.), 188. §§ 3405, 3446, 3448.
Bailey v. Birkenhead & Co. R. Co., 12 Beav. 443. § 1710, 6694.
Bailey v. Briggs, 56 N. Y. 407. § 7589.
Bailey v. Champlain & C. R. Co., 77 Wis. 453. §§ 1424, 2083, 2084.
Bailey v. Citizens' Gas Light Co., 27 N. J. Eq. 196. § 332.
Bailey v. Dubuque & C. R. Co., 13 Iowa, 97. § 3597.

Bailey v. Glover, 21 Wall. (U. S.) 342, 348. § 2021.
Bailey v. Hannibal & C. R. Co., 1 Dill. (U. S.) 174. §§ 2271, 2282.
Bailey v. Haynes, 15 Ad. & El. (N. S.) 533, 539. §§ 433, 3026, 3320, 3321, 3322.
Bailey v. Lincoln Academy, 12 Mo. 174. § 7690.
Bailey v. Macaulay, 13 Q. B. 814. §§ 421, 423, 430, 434.
Bailey v. Macaulay, 19 L. J. (Q. B.) 73. § 1908.
Bailey v. Magwire, 22 Wall. (U. S.) 215. §§ 5571, 5572, 5575.
Bailey v. Manchester & C. R. Co., L. R. 7 C. P. 415; 3 Moake, 303. § 6307.
Bailey v. New York, 3 Hill (N. Y.), 531; 2 Denio (N. Y.), 433. § 28.
Bailey v. New York, 1 N. Y. Supp. 304. § 650.
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Bain v. Brown, 56 N. Y. 285, 288. §§ 4022, 7512.
Bain v. Whitehaven & C. R. Co., 3 H. L. Cas. 22. § 7734.
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- Bank v. Planters' Bank**, 3 Wheat. (U. S.) 904. §§ 7437, 7455.
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- Bank v. Weed**, 19 Johns. (N. Y.) 300. § 7665.
- Bank v. Wheeler**, 21 Ind. 90. § 4745.
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- Bank v. Wister**, 2 Pet. (U. S.) 318. § 5046.
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- Bank v. Wrenn**, 3 Smedes & M. (Miss.) 791. § 7720.
- Bank & Co. v. Gibbs**, 3 McCord (S. C.), 377. § 24.
- Bank & Co. v. Rome**, 18 N. Y. 38. § 643.
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- Bank of Alexandria v. Patton**, 1 Rob. (Va.) 499. §§ 6722, 6749, 6751, 7370.
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- Bank of British North America v. Hooper**, 5 Gray (Mass.), 567. §§ 5126, 5137, 5149.
- Bank of Cape Fear v. Steinmetz**, 1 Hill (S. O.), 44. § 7977.
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- Bank of Chillicothe v. Swayne**, 8 Ohio, 257. § 5969.
- Bank of Chillicothe v. Yoe**, 4 Ohio, 125. § 7388.
- Bank of Circleville v. Renick**, 15 Ohio, 322. §§ 521, 531, 5275, 6598, 6600.
- Bank of Columbia v. Attorney-General**, 3 Wend. (N. Y.) 588; 1 Paige (N. Y.), 510. § 6882.
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- Bank of Commerce v. Bogy**, 9 Mo. App. 334. § 1200.
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- Bank of Commerce v. Rutland & Co.**, 10 How. Pr. (N. Y.) 1. § 7512.
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- Bank of Danville**, Matter of, 6 Hill. (N. Y.) 370. §§ 7747, 4755, 4760, 6703.
- Bank of Edwardville v. Simpson**, 1 Mo. 184. § 7979.
- Bank of England v. Anderson**, 3 Bing. N. C. 589. § 5745.
- Bank of England v. Booth**, 2 Keen, 466. § 5745.
- Bank of England v. Davis**, 5 Barn. & Cres. 185. § 2559.
- Bank of England v. Lunn**, 15 Ves. Jr. 569. § 2531.
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- Bank of Fort Madison v. Alden**, 129 U. S. 372. §§ 2932, 3449, 3450.
- Bank of Gallipolis v. Trimble**, 6 B. Mon. (Ky.) 599. §§ 518, 530, 531, 5275, 6598, 6600, 6754.
- Bank of Genesee v. Patchin Bank**, 19 N. Y. 312; 13 N. Y. 319. §§ 4789, 4800, 4802, 4887, 4961, 5133, 5158, 5737, 5739, 5740, 5754, 5949, 7592, 7665, 7667.
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- Bank of Hamilton v. Dudley**, 2 Pet. (U. S.) 528. § 658.
- Bank of Healdsburg v. Bailhache**, 65 Cal. 327. § 3906.
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- Bank of Hindustan & Co., Re**, L. R. 5 Ch. 400. § 3537.
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- Bank of Ireland v. Archer**, 11 Mees. & W. 383, 385. § 5154.
- Bank of Ireland v. Evans' Charities**, 5 H. L. Cas. 389. §§ 2558, 2562, 2563.
- Bank of Kentucky v. Clark**, 4 Mo. 59. § 5761.
- Bank of Kentucky v. Schuykill Bank**, 1 Park. Sel. Cas. (N. Y.) 180, 216-217. §§ 1506, 2695, 3208, 3978, 3979, 4740, 4828, 5060, 5176, 5181, 5222, 7882, 7905, 7920.
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- Bank of London v. Tyrrell**, 5 Jur. (n. s.) 924. § 457.
- Bank of Louisiana v. Wilson**, 19 La. An. 1. §§ 6718, 6720.
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- Bank of Louisville v. Young**, 37 Mo. 398, 405. §§ 5952, 7942.
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- Bank of Manchester v. Slason**, 13 Vt. 334. §§ 7590, 7592.
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- Bank of Michigan v. Williams, 5 Wend. (N. Y.) 478, 482; 7 Wend. 539. §§ 7653, 7665, 7712, 7977.
- Bank of Middlebury v. Edgerton, 30 Vt. 182. § 5356.
- Bank of Middlebury v. Rutland & C. R. Co., 30 Vt. 159. §§ 3938, 5070, 5646, 5894.
- Bank of Mississippi v. Wrenn, 3 Smedes & M. (Miss.) 791. §§ 6718, 6722.
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- Bank of Missouri v. Price, 1 Mo. 54. § 5748.
- Bank of Missouri v. Snelling, 35 Mo. 130. § 6598.
- Bank of Monroe v. Field, 2 Hill (N. Y.) 445. §§ 4656, 4779.
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- Bank of Montreal v. Potts Salt & Co., 93 Mich. 342. § 6495.
- Bank of Montreal v. Thayer, 7 Fed. Rep. 622. §§ 6944, 7156, 7186.
- Bank of Mt. Pleasant Re, 5 Ohio, 249. §§ 6779, 6784, 6785.
- Bank of Muskingum v. Carpenter, 7 Ohio, 21, part 1. § 3835.
- Bank of Mutual Redemption v. Hill, 56 Me. 385. §§ 4206, 4302.
- Bank of Newbern v. Taylor, 2 Murph. (N. C.) 266. § 7384.
- Bank of New York v. Muskingum Branch Bank, 29 N. Y. 619. §§ 4789, 4802, 4807, 4816, 4933, 5135, 5158, 7592.
- Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645. §§ 4323, 6577, 6681, 6947, 6967.
- Bank of North America, 2 Pa. County Court, 97. § 287.
- Bank of North America v. Chicago & C. R. Co., 82 Ill. 493. §§ 689, 692.
- Bank of North America v. Fletcher, 15 Mo. App. 272, 11 Mo. App. 595. §§ 3615, 3616.
- Bank of North America v. Rindge, 154 Mass. 203, 205. §§ 3055, 3058.
- Bank of Northern Liberties v. Cresson, 12 Serg. & R. (Pa.) 306. §§ 5019, 5674.
- Bank of Northern Liberties v. Davies, 6 Watts & S. (Pa.) 285, 290. § 4785.
- Bank of Oldtown v. Houlton, 21 Me. 501, 507. § 4919.
- Bank of Omaha v. Douglass County, 3 Dill. (U. S.) 298. § 7437.
- Bank of Pennsylvania v. Com., 19 Pa. St. 144. §§ 5559, 5583.
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- Bank of Pennsylvania v. Reed, 1 Watts & S. (Pa.) 101. §§ 4752, 4756.
- Bank of Pittsburgh v. Neal, 22 How. (U. S.) 96. § 6081.
- Bank of Pittsburgh v. Whitehead, 10 Watts (Pa.), 397; 36 Am. Dec. 186. §§ 5212, 5221, 5228, 5234, 5239.
- Bank of Poughkeepsie v. Ibbotson, 5 Hill (N. Y.), 461. § 1539.
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- Bank of Republic v. Hamilton, 21 Ill. 53. § 632.
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- Bank of Rome v. Rome, 18 N. Y. 38. §§ 1118, 1120.
- Bank of Rome v. Rome, 19 N. Y. 20. § 6064.
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- Bank of South Australia v. Abrahams, L. R., 6 P. C. 562. § 6150.
- Bank of South Carolina v. Humphreys, 1 McCord (S. C.), 388. § 5239.
- Bank of State v. Bank of Cape Fear, 13 Ired. L. (N. C.) 75. § 5381.
- Bank of State v. Farmers' Branch, 36 Barb. (N. Y.) 332. §§ 4789, 4807, 4933.
- Bank of State v. Wheeler, 21 Ind. 90. §§ 4789, 4794.
- Bank of St. Mary's v. Calder, 3 Strobl. L. (S. C.) 403. § 4815.
- Bank of St. Mary's v. Mumford, 6 Ga. 44. § 5229.
- Bank of St. Marys v. Powers, 25 Ala. 555, 612. §§ 1569, 1570, 1576, 2057, 2951, 2957, 2959, 2962, 2963, 3046, 3488, 4014, 4100, 4152, 4153, 4288, 4313, 4479, 4480, 5268, 5561.
- Bank of Tennessee v. Burke, 1 Coldw. (Tenn.) 623. §§ 5030, 5037.
- Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.), 379. § 1133.
- Bank of Toledo v. International Bank, 21 N. Y. 542. §§ 220, 518, 7670, 7689.
- Bank of Toledo v. Toledo, 1 Ohio St. 622. § 5381.
- Bank of United States v. Bank of Georgia, 10 Wheat. (U. S.) 333. §§ 4763, 4777.
- Bank of United States v. Dallam, 4 Dana (Ky.) 574. §§ 3357, 3416, 3431, 3436, 3437.
- Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64. 81. §§ 508, 3652, 3967, 4624, 5044, 5045, 6047, 5061, 5105, 5175, 5176, 5181, 5266, 5308, 5674, 5802.
- Bank of United States v. Daniel, 12 Pet. (U. S.) 32. §§ 1393, 1563.
- Bank of United States v. Davis, 2 Hill (N. Y.), 451, 461. §§ 5199, 5203, 5209, 5220, 5221, 5225.
- Bank of United States v. Davis, 4 Cranch C. C. (U. S.) 533. §§ 2502, 4789.
- Bank of United States v. Deveau, 5 Cranch (U. S.), 61, 87. §§ 7421, 7476, 7977.
- Bank of United States v. Dunn, 6 Pet. (U. S.) 51. §§ 3998, 4614, 4622, 4637, 4751, 4782, 5760.
- Bank of United States v. Haskins, 1 Johns. Cas. (N. Y.) 132. §§ 7658, 7661.
- Bank of United States v. Lyman, 20 Vt. 666, 669. §§ 7890, 7893.
- Bank of United States v. Leathers, 8 B. Mon. (Ky.) 126. § 7720.
- Bank of United States v. Martin, 5 Pet. (U. S.) 479. § 7476.
- Bank of United States v. McLaughlin, 2 Cranch. C. C. (U. S.) 20. §§ 530, 7370, 7720.
- Bank of United States v. Merchants' Bank, 1 Rob. (Va.) 573. § 8069.
- Bank of United States v. Northumberland & C. Bank, 4 Conn. 333. § 7899.
- Bank of United States v. Northumberland Bank, 4 Wash. (U. S.) 168. § 7476.
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- Bank of United States v. Roberts, 4 Conn. 323. § 7899.
- Bank of United States v. Stearns, 15 Wend. (N. Y.) 314. § 1846.
- Bank of United States v. Waggener, 9 Pet. (U. S.) 378. § 5969.
- Bank of Utica v. Magher, 18 Johns. (N. Y.) 341. §§ 2802, 5128.
- Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770, 780. §§ 2180, 2389, 2391, 2593, 3246, 3283, 7613, 7658, 7661, 7665.
- Bank of Vergennes v. Warren, 7 Hill (N. Y.), 91. §§ 4760, 4815, 5106.
- Bank of Vincennes v. State, 1 Blackf. (Ind.) 267. §§ 681, 6615, 6629, 6632, 6633, 6634, 6635, 6636, 6637, 6643, 6806.
- Bank of Virginia v. Craig, 6 Leigh (Va.), 399, 433. §§ 5228, 7439.
- Bank of Virginia v. Robinson, 5 Gratt. (Va.) 174. § 784.
- Bank of Washington v. Barrington, 2 Penr. & W. (Pa.) 27. § 4740.
- Bank of Washtenaw v. Montgomery, 3 Ill. 422. § 7977.
- Bank of Watertown v. Watertown, 25 Wend. 636. § 532.
- Bank of Wooster v. Stevens, 1 Ohio St. 233. § 5969.
- Bank of Yolo v. Weaver (Cal.), 31 Pac. Rep. 160. § 5016.
- Bankers' & C. Tel. Co. v. Bankers' & C. Tel. Co., 27 Fed. Rep. 536. § 7758.

Bankhead—Barstow TABLE OF CASES CITED.

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 Banks v. Darden, 18 Ga. 318. §§ 4165, 4168, 4177, 4266, 4362.
 Banks v. Mayor, 7 Wall. (U. S.) 16. § 2855.
 Banks v. Mitchell, 48 Yerg. (Tenn.) 111. § 3446.
 Banks v. Poitiaux, 3 Rand. (Va.) 136; 15 Am. Dec. 706. §§ 5045, 5046, 5049, 5062, 5770, 5773, 5795, 5799, 5814, 5975, 5998, 7722.
 Banks v. Judah, 8 Conn. 145. §§ 86, 92, 270.
 Bannan v. State, 48 Ark. 167. § 599.
 Banty v. Buckles, 68 Ind. 49. § 3650.
 Baptist Church v. Witherell, 3 Paige (N. Y.), 301. §§ 652, 911, 927.
 Baptist Meeting House v. Webb, 66 Me. 398. § 6659.
 Barbaro v. Occidental Grove, 4 Mo. App. 429. §§ 524, 7941.
 Barbee v. Plank Road Co., 6 Fla. 262. § 1784.
 Barber's Case, 5 Ch. Div. 963. §§ 1260, 4154.
 Barber in re, L. R. 9 Eq. 725. § 5058.
 Barber v. Andover, 3 N. H. 398. § 5615.
 Barber v. Boulton, 1 Strange, 314. § 748.
 Barber v. Hubbard, 3 Code Rep. (N. Y.) 171. § 7552.
 Barber v. Standard Sewer Pipe Co., 5 Pa. County Ct. 293. § 4272.
 Barbier v. Connolly, 113 U. S. 27. § 5454.
 Barbor v. Boehm, 21 Neb. 450. §§ 7920, 7953.
 Barbours v. National Exch. Bank, 45 Ohio St. 133. § 6841.
 Barclay v. Globe Mutual Ins. Co., 26 Mo. 490. § 1952.
 Barclay v. Quicksilver Min. Co., 6 Lans. (N. Y.) 25. § 7339.
 Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123. §§ 531, 8003.
 Barclay v. Wainright, 14 Ves. 66. § 2212.
 Barcus v. Hannibal & C. Plank Road Co., 26 Mo. 102. §§ 3906, 3932, 4887, 5181, 5328.
 Bard v. Banigan, 39 Fed. Rep. 13. §§ 1890, 2253, 4704, 4707.
 Bard v. Poole, 12 N. Y. 495. §§ 7882, 7913, 7915.
 Barden v. St. Louis & C. Life Ins. Co., 3 Mo. App. 248. § 5856.
 Bardtown & C. R. Co. v. Metcalfe, 4 Met. (Ky.) 199; 81 Am. Dec. 541. §§ 5353, 5362, 5642, 5643, 6131, 6140.
 Bardtown & C. Turnp. Co. v. Rodman (Ky.), 12 Ky. L. Rep. 151; 13 S. W. Rep. 917. § 4485.
 Barelli v. Brown, 1 McCord (S. C.), 449. § 1220.
 Bargate v. Shortridge, 5 H. L. Cas. 297. §§ 1800, 1869, 3999, 4100, 4109, 5020.
 Barickman v. Kuykendall, 6 Blackf. (Ind.) 21, 22. § 5182.
 Baring v. Dicks, 1 Cox Ch. 213. § 4547.
 Barker, Ex parte, 6 Wend. (N. Y.) 509. §§ 734, 743, 2624.
 Barker v. Allan, 5 H. & N. 61. § 1515.
 Barker v. Haskell, 9 Cush. (Mass.) 218. § 3741.
 Barker v. Mechanics Fire Ins. Co., 3 Wend. (N. Y.) 94. §§ 5048, 5126, 5132, 5152, 5154, 5730, 5734, 5849.
 Barker v. Stead, 3 O. B. 946. § 1908.
 Barksdale v. Finney, 14 Gratt. (Va.) 338. §§ 365, 375, 376.
 Barling v. Bank of British North America, 50 Fed. Rep. 260. §§ 7466, 7467, 7478.
 Barling v. West, 29 Wis. 307. § 1024.
 Barlow v. Congregational Society, 8 Allen (Mass.), 460. §§ 5126, 5132, 5137, 7592.
 Barnard v. Eaton, 2 Cush. (Mass.) 294. § 6141.
 Barnard v. Stevens, 2 Aik. (Vt.) 429. §§ 6305, 7507.
 Barnard v. Vermont & C. R. Co., 7 Allen (Mass.), 512. § 2284.
 Barnes's Banking Co., Re, L. R. 3 Ch. 105. § 5104.
 Barnes v. Brown, 80 N. Y. 527, 11 Hun, 315. §§ 4024, 4059.
 Barnes v. Chicago, & C. R. Co., 122 U. S. 1. § 6208.
 Barnes v. Chicago & C. R. Co., 8 Biss. (U. S.) 514. § 6249.
 Barnes v. Jones, 91 Ind. 161. § 6887.
 Barnes v. Morris, 4 Ired. Eq. (N. C.) 22. § 6841.
 Barnes v. Ontario Bank, 19 N. Y. 152. §§ 4747, 4748, 4812, 4815, 5045, 5060, 5706.
 Barnes v. Perine, 12 N. Y. 18. § 1206.
 Barnes v. Perine, 9 Barb. (N. Y.) 202, 207. § 7591.
 Barnes v. Suddard, 117 Ill. 237. §§ 7913, 7914, 7916, 7918, 7964.
 Barnes v. Swift (Super. Ct. Cin.), 26 Ohio L. J. 110. § 2624.
 Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33. §§ 4657, 5206.
 Barnett v. National Bank, 98 U. S. 555. § 7301.
 Barnett v. Smith, 30 N. H. 256. § 4814.
 Barnett's Case, L. R. 19 Eq. 449. § 3786.
 Barnett v. Atlantic & C. R. Co., 68 Mo. 56. § 5501.
 Barnett v. Chicago etc. R. Co., 6 Thomp. & C. (N. Y.) 359; 4 Hun (N. Y.), 114. § 7991.
 Barnett v. Lambert, 15 Mees. & W. 489. §§ 421, 1908.
 Barnett v. Reed, 51 Pa. St. 190. § 6377.
 Barney v. Baltimore, 6 Wall. (U. S.) 280. §§ 4579, 7474.
 Barney v. Newcomb, 9 Cush. (Mass.) 46. §§ 4802, 5151, 7692.
 Barney v. Patterson's Lessee, 6 Har. & J. (Md.) 182. § 3571.
 Barnhill v. Mill Spring & C. Gravel Road Co., 51 Ind. 354. § 5904.
 Barnstead v. Empire Mining Co., 5 Cal. 299. § 4462.
 Baron De Beville's Case, L. R. 7 Eq. 11. § 1603.
 Barr v. Essex Trades' Council (N. J. Eq.), 30 Atl. Rep. 881. § 7782.
 Barr v. New York & C. R. Co., 96 N. Y. 444. §§ 4479, 4480, 4566, 4568.
 Barr v. New York & C. R. Co., 125 N. Y. 263. §§ 4059, 4079, 4450.
 Barr v. New York & C. R. Co., 5 N. Y. Supp. 623; 52 Hun (N. Y.), 555. §§ 4047, 4081.
 Barr v. Pittsburgh Plate-Glass Co., 40 Fed. Rep. 412. § 4504.
 Barr v. Pittsburgh Plate Glass Co., 51 Fed. Rep. 33. §§ 4013, 4059.
 Barrack v. McCulloch, 3 Kay & J. 110. § 2719.
 Barre R. Co. v. Montpelier & C. R. Co., 61 Vt. 1. § 5618.
 Barrell v. Benjamin, 15 Mass. 354. § 8004.
 Barren Creek Ditching Co. v. Beck, 99 Ind. 247. § 531.
 Barrett's Case, 3 De Gex, J. & S. 30. § 1362.
 Barrett's Case, 4 De Gex, J. & S. 416, 768. §§ 1439, 3194, 3205, 3786, 5735.
 Barrett v. Alton & C. R. Co., 13 Ill. 504. §§ 1577, 1707.
 Barrett v. American Telegraph & C. Co., 56 Hun (N. Y.), 430; 31 N. Y. St. Rep. 465; 10 N. Y. Supp. 138. §§ 7505, 7512.
 Barrett v. Copeland, 18 Vt. 67. § 7507.
 Barrett v. Copeland, 20 Vt. 244. § 7283.
 Barrett v. County Court, 40 Mo. 197. § 6064.
 Barrett v. Mead, 10 Allen (Mass.), 337. §§ 2710, 7689.
 Barrett v. Porter, 14 Mass. 143. § 3910.
 Barrett v. Third Av. R. Co., 45 N. Y. 628. § 1476.
 Barrett Min. Co. v. Tappan, 2 Colo. 124, 128. §§ 7631, 7632.
 Barrick v. Austin, 21 Barb. (N. Y.) 241. §§ 4757, 4760.
 Barrick v. Gifford, 47 Ohio St. 180. §§ 1995, 2009, 2587, 8183, 3347, 3357, 3367, 3371, 3470.
 Barril v. Calendar Insulating & C. Co., 50 Hun. (N. Y.), 25. 2 N. Y. Supp. 768. §§ 4682.
 Barrington v. Bank of Washington, 12 Serg. & R. (Pa.) 405, 421. § 5176.
 Barrington v. Mississippi & C. R. Co., 32 Miss. 370. §§ 1224, 1226.
 Barron v. Baltimore, 7 Pet. (U. S.) 243. §§ 6342, 6371, 6373.
 Barron v. Burnside, 121 U. S. 186. §§ 671, 7456, 7467.
 Barron v. Frink, 30 Cal. 488, 489. § 7622.
 Barron v. Paine, 83 Me. 312. §§ 3123, 3392.
 Barrow v. Massachusetts Medical Society, 12 Cush. (Mass.) 402. §§ 857, 873.
 Barrow v. Nashville & C. Turnp. Co., 9 Humph. (Tenn.) 804. §§ 1595, 5805.
 Barrow v. Paxton, 5 Johns. (N. Y.) 258. § 2619.
 Barrow v. Rhinelander, 3 Johns. Ch. (N. Y.) 614. § 2661.
 Barrow Hematite Steel Co., Re, 39 Ch. Div. 582. § 2117.
 Barrows v. National Rubber Co., 12 R. I. 173. § 2437.
 Barry v. Croskey, 2 John. & H. 1. §§ 1472, 1477, 1483, 1486, 6321.
 Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280. §§ 1062, 2154, 2962, 5045, 5645, 5697, 5705, 5730, 5770, 6051, 6131, 6132, 6153.
 Barry v. Missouri & C. R. Co., 27 Fed. Rep. 1. §§ 6210, 6215.
 Barry v. Missouri & C. R. Co., 34 Fed. Rep. 829. §§ 6229, 6230, 6231.
 Barry v. Navan & C. R. Co., 4 L. R. Ir. 68. § 1519.
 Barstow v. City R. Co., 42 Cal. 465. §§ 4684, 5182.

- Barstow v. Savage Mining Co., 64 Cal. 388. §§ 2516, 2587, 2592.
- Bartmeyer v. Iowa, 18 Wall. (U. S.) 129; 31 Iowa, 601. § 5482.
- Bartholomew v. Bentley, 1 Ohio St. 37. §§ 418, 3859, 3896, 3901, 4133, 4218.
- Bartholomew v. Bentley, 15 Ohio, 659. §§ 418, 1472, 1500, 4218.
- Bartholomew v. Bright, 18 Ind. 93. § 1118.
- Bartlett v. Athenaeum Life Soc., 37 Eng. L. & Eq. 187. §§ 4046, 4068.
- Bartlett v. Baker, 3 Hurlst. & Colt. 153. § 7625.
- Bartlett v. Boston Gas Light Co., 117 Mass. 533. § 6358.
- Bartlett v. Boston Gas Light Co., 122 Mass. 209. § 6358.
- Bartlett v. Brickett, 14 Allen (Mass.), 62. § 7608.
- Bartlett v. Crozier, 17 Johns. (N. Y.) 439; 15 Johns. (N. Y.), 250. §§ 6363, 7622.
- Bartlett v. Chouteau Ins. Co., 18 Kan. 369. § 7936.
- Bartlett v. Drew, 57 N. Y. 587; 4 Lans. (N. Y.) 444; 60 Barb. (N. Y.) 648. §§ 2963, 3422, 3430, 3481, 3482, 3486.
- Bartlett v. Keim, 60 N. J. L. 260. § 7141.
- Bartlett v. Medical Society, 32 N. Y. 187. § 881.
- Bartlett v. Mystic River Corp., 151 Mass. 433. § 4694.
- Bartlett v. Nye, 4 Met. (Mass.), 378. § 5835.
- Bartlett v. Pentland, 1 Barn. & Adol. 704. §§ 14, 3357, 3407, 4348.
- Bartlett v. Wilbur, 53 Md. 485. § 7334.
- Bartley v. Bartley, 1 Drew. 233. § 4426.
- Barth v. Himrod, 8 N. Y. 483. § 643.
- Barton's Trust, L. R. 5 Eq. 238. §§ 2167, 2173, 2208, 2210, 2212, 2731.
- Barton's Case, 4 Drew. 535; 4 De Gex & J. 46. § 1763.
- Barton v. Barbour, 104 U. S. 126; 3 McArthur, 212. §§ 6366, 7128.
- Barton v. Enterprise & Co. Asso., 114 Ind. 225. §§ 238, 6848.
- Barton v. Erickson, 14 Neb. 164. § 7756.
- Barton v. London & Co. R. Co., 24 Q. B. Div. 77. §§ 2373, 2548, 2569, 2580.
- Barton v. Port Jackson & Co. Plank Road Co., 17 Barb. (N. Y.) 397. §§ 2054, 3277, 4043, 4046, 4086.
- Bartram v. Central Turnpike Co., 25 Cal. 283. § 5345.
- Barwick v. English & Bank, L. R. 2 Exch. 259; L. R. 8 Q. B. 254. §§ 1475, 4784, 4824, 4929, 5226, 6321.
- Bascom v. Albertson, 34 N. Y. 534. § 5783.
- Bascom v. Rainwater, 30 Mo. App. 483. § 6534.
- Basket v. Hassan, 117 U. S. 602, 614. § 2390.
- Bass v. Chicago & Co. R. Co., 42 Wis. 654. §§ 6387, 6392.
- Bass v. Columbus, 30 Ga. 845. § 590.
- Bass v. Doerman, 112 Ind. 390. § 7061.
- Bass v. O'Brien, 12 Gray (Mass.), 477. §§ 5126, 5137.
- Bassett v. Fish, 75 N. Y. 303; 12 Hun (N. Y.), 209. § 6363.
- Bassett v. Monte Cristo & Co., 15 Nev. 293. §§ 4059, 4086, 5322, 6156.
- Bassett v. St. Albans Hotel Co., 47 Vt. 314. §§ 1063, 1563, 1573, 1986, 2013, 2951, 3020, 3079, 4317.
- Bassett v. Western Union Tel. Co., 45 Mo. App. 566. § 6291.
- Bassford v. Blakeney, 6 Beav. 131. § 4427.
- Basshor v. Dressel, 34 Md. 503. § 512.
- Basshor v. Forbes, 36 Md. 154. §§ 3008, 3842.
- Batard v. Hawes, 2 El. & Bl. 287. § 430.
- Batchelder v. Council Grove Water Co., 131 N. Y. 42. § 6125.
- Bate v. Graham, 11 N. Y. 237. § 6950.
- Battelle v. Northwestern Cement & Co., 37 Minn. 89. § 4064.
- Bateman v. Ashton-Under-Lyns, 3 Hurlst. & N. 323. § 5106.
- Bateman v. Mid-Wales R. Co., L. R. 1 C. P. 499, 509, 510. §§ 5735, 7619.
- Bateman v. Western Star Milling Co. (Tex.), 20 S. W. Rep. 931; 4 Interstate Com. Rep. 260. § 5463.
- Bateman v. Wilcox, 1 Sch. & Lef. 201. § 7819.
- Bates v. Androscoggin & Co. R. Co., 49 Me. 491. §§ 2233, 2290.
- Bates v. Bank of Alabama, 2 Ala. 451. §§ 4891, 5019, 5061, 5107, 5176, 5640, 5674, 5949.
- Bates v. Boston & Co. R. Co., 10 Allen (Mass.), 251. § 5070, 5071.
- Bates v. Elmer Glass Man Co. (N. J. Eq.), 15 Atl. Rep. 246. §§ 6494, 6918, 6924, 7028.
- Bates v. Great Western T. & Co., 134 Ill. 536. §§ 1418, 1567, 3499.
- Bates v. Houston, 66 Ga. 198. § 911.
- Bates v. Keith Iron Co., 7 Met. (Mass.) 224. §§ 4849, 4851, 4899.
- Bates v. Mackinlay, 31 Beav. 280. § 2199.
- Bates v. New Orleans & Co. R. Co., 13 How. Pr. (N. Y.) 516. § 7529.
- Bates v. New York Ins. Co., 3 Johns. Cas. (N. Y.) 238. § 2132.
- Bates v. Planters' & Co. Bank, 8 Port. (Ala.) 99. § 5743.
- Bates v. Sutherland, 15 Johns. (N. Y.) 610. § 5921.
- Bates v. Wiggin, 37 Kan. 44. § 6903.
- Bates v. Wilson, 14 Colo. 140. §§ 1250, 7708.
- Bath's Case, 8 Ch. Div. 334. §§ 1553, 5848.
- Bath v. Caton, 37 Mich. 199. §§ 4096, 4097, 4993, 6276, 6303.
- Bath v. Freeport, 5 Mass. 325. § 7622.
- Bathes v. Decatur County Agric. Soc., 73 Iowa, 11. §§ 5993, 6347, 6353, 7618.
- Battelle v. Northwestern Cement & Co., 37 Minn. 89. §§ 480, 5321.
- Batterson v. Hartford, 50 Conn. 558. §§ 2837, 2840.
- Battle v. Davis, 66 N. C. 252. §§ 6977, 6979.
- Battle v. Howard, 13 Tex. 345. § 611.
- Bauer v. Samson Lodge, 102 Ind. 262. §§ 941, 1034, 5387.
- Baughman v. National Water Works Co., 46 Fed. Rep. 4. §§ 7463, 7465.
- Bauman v. Bowles, 51 Ill. 380. § 1504.
- Baumann v. Manistee Salt & Co., 94 Mich. 363. § 4616.
- Bayard's Appeal, 72 Pa. St. 453. § 7849.
- Bayington v. Pittsburgh & Co. R. Co., 34 Pa. St. 358. §§ 1306, 1309, 1338.
- Bayly v. Liverpool & Co. Ins. Co., 55 Ga. 194. §§ 8003, 8010.
- Baxter v. Chicago Board of Trade, 83 Ill. 146. §§ 508, 909, 4395, 4401.
- Baxter v. Moses, 77 Me. 465, 481. § 7839.
- Baxter v. Nashville & Co. Turnp. Co., 10 Lea (Tenn.), 488. §§ 5364, 6837.
- Baxter v. Winoski Turnp. Co., 22 Vt. 114, 122. § 6359.
- Bayard's Appeal, 72 Pa. St. 453. §§ 7758, 7867.
- Bayard v. Farmers' & Co. Bank, 52 Pa. St. 232. §§ 2468, 2486, 2488, 2528, 2529, 2531, 2534, 2599, 4930.
- Bayard v. Fellows, 28 Barb. (N. Y.) 451. § 6839.
- Bay City & Co. R. Co. v. Austin, 21 Mich. 390. § 4168.
- Bayquerre v. San Francisco, 1 McAllister (U. S.) 175. § 5045.
- Bayless v. Orne, Freeman. Ch. (Miss.) 161. §§ 412, 4479, 4482, 4669, 6598, 6600.
- Bayley v. Manchester & Co. R. Co., L. R. 8 C. P. 148. § 6313.
- Bayley v. Onondaga County & Co. Ins. Co. 6 Hill (N. Y.), 476. §§ 5033, 7590.
- Bayley v. Wolverhampton Water Works Co., 6 Hurlst. & N. 241. §§ 6358, 6362.
- Bayliss v. Lafayette & Co. R. Co., 8 Biss. (U. S.) 193. § 7577.
- Bayliss v. Swift, 40 Iowa, 648. §§ 3462, 3597.
- Bay Meadow Dam Co. v. Gray, 30 Me. 547. § 1550.
- Bayne v. United States, 93 U. S. 642. § 7070.
- Bay View Homestead Assn. v. Williams, 50 Cal. 353. §§ 4731, 4733.
- Beach v. Cooper, 72 Cal. 99. §§ 4485, 4560, 4578.
- Beach v. Fulton Bank, 7 Cow. (N. Y.) 485. § 6305.
- Beach v. Fulton Bank, 3 Wend. (N. Y.) 573. §§ 5712, 5714, 6040.
- Beach v. Leahy, 11 Kan. 23. §§ 582, 588.
- Beach v. Miller, 23 Ill. App. 151. § 4070.
- Beach v. Miller, 130 Ill. 162. §§ 4068, 5317, 6492, 6503, 6504, 6796, 7865.
- Beach v. Schmultz, 20 Ill. 185. § 7085.
- Beach v. Smith, 30 N. Y. 116; 28 Barb. (N. Y.) 254. §§ 1223, 1224.
- Beach v. Walker, 6 Conn. 190, 197. § 590.
- Beadle v. Chenango & Co. Ins. Co., 3 Hill (N. Y.), 161. § 1037.
- Beadles v. Burch, 10 Sim. 332. § 4035.
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 Bean v. Parker, 17 Mass. 591. § 3363.
 Bear Camp River Co. v. Woodman, 2 Me. 404. §§ 501, 503, 529.
 Bearce v. Fossett, 34 Me. 575. § 1780.
 Beard v. Kirk, 11 N. H. 397. §§ 3893, 3895.
 Beard v. Union & Co. Publishing Co., 71 Ala. 60. §§ 7935, 7936.
 Beardsley v. Baldwin, 2 Strange. 1151. § 1829.
 Beardsley v. Ex parte, 1 Drev. 226. § 428.
 Beardsley v. Beardsley, 138 U. S. 262. §§ 2389, 2725.
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 Beardsley v. Knight, 4 Vt. 471. § 5069.
 Bearight v. Payne, 2 Tenn. Ch. 175. § 2945.
 Beaton v. Farmers' Bank, 12 Pet. (U. S.) 102. §§ 7070, 7790, 7882.
 Beatie v. Butler, 21 Mo. 313. § 5238.
 Beattie v. Ebury, L. R. 7 Ch. 102, 777, 788. §§ 2057, 4136, 4143.
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 Beatty v. Neelon, 13 Sup. Ct. Can. 1. § 474.
 Beatty v. Knowler, 4 Pet. (U. S.) 152; 1 McLean (U. S.), 41. §§ 5638, 5718.
 Beaujouis Wine Co., Re, L. R. 3 Ch. App. 15. § 6688.
 Beaumont v. Meredith, 3 Ves. & Bea. 180. § 5167.
 Beaumont v. Scott, 3 Camp. 388. §§ 881, 930.
 Beaupland v. McKeen, 28 Pa. St. 124. § 1486.
 Beaver v. Hartsville University, 34 Ind. 248. §§ 1140, 1362.
 Beaver County v. Armstrong, 44 Pa. St. 63, 68. §§ 6064, 6107, 6113.
 Becher v. Wells Flouring Mill Co., 1 McCrary (U. S.), 62; 1 Fed. Rep. 276. § 3387.
 Becht v. Harris, 4 Minn. 504. § 7672.
 Beck v. Bellamy, 83 N. C. 129. § 4943.
 Beck v. Burdett, 1 Paige. 305. § 6918.
 Beck v. Hanscom, 29 N. H. 313. § 3918.
 Beck v. Henderson, 76 Ga. 360. §§ 1376, 2951, 3683.
 Beck v. Kantorowicz, 3 Kay & J. 230. §§ 457, 458, 462.
 Becker v. Gulf City & Co. R. Co., 80 Tex. 475. §§ 4500, 4507.
 Becker v. Allegheny, 85 Pa. St. 191. § 610.
 Beckett v. Houston, 32 Ind. 393. §§ 1138, 1139, 1140.
 Beckner v. Riverside & Co. Turnp. Co., 65 Ind. 468. §§ 1748, 1824, 5905.
 Beckford v. Wade, 17 Ves. 87, 97. § 1449.
 Beckham v. Drake, 9 Mees. & W. 79, 96. §§ 5028, 5126.
 Beckwith v. Burrough, 13 R. I. 294. §§ 2412, 2413.
 Beckwith v. Burrough, 14 R. I. 366. §§ 2719, 2772, 2774, 2775.
 Beckwith v. Windsor Man. Co., 14 Conn. 594. §§ 5107, 6175.
 Beckwith v. Sibley, 11 Pick. (Mass.) 432. § 3842.
 Bedford v. Bagshaw, 4 H. & N. 538; 29 L. J. (Exch.) 59. §§ 1460, 1462, 1471, 1473, 1500.
 Bedford v. Nashville, 7 Heisk. 409. § 2849.
 Bedford R. Co. v. Bowser, 48 Pa. St. 29. §§ 80, 81, 1308, 1514, 1549, 1550, 3718, 3968, 3995, 4010, 4014, 5016, 7728.
 Beebe v. State, 6 Ind. 501. § 5482.
 Beecher v. Clay Co., 52 Iowa. 140. § 2012.
 Beecher v. Dacey, 45 Mich. 92. § 3157.
 Beecher v. Marquette & Co. Rolling Mill Co., 45 Mich. 103. §§ 6165, 6174.
 Beecher v. Wells Flouring Mill Co., 1 McCrary (U. S.), 62. § 3213.
 Beckman v. Hudson River & Co. R. Co., 35 Fed. Rep. 3. §§ 6210, 6211.
 Beckman v. Saratoga & Co. R. Co., 3 Paige (N. Y.), 45. §§ 5588, 5590, 5592, 5600.
 Beeler v. Turnpike Co., 14 Pa. St. 162. § 6571.
 Beene v. Cahawba & Co. R. Co., 3 Ala. 660. §§ 1138, 1185, 1550, 1577, 1784, 1784, 1823, 7381, 7599.
 Beer Co. v. Massachusetts, 97 U. S. 25. §§ 70, 5408, 5460, 5471, 5472, 5481, 5482.
 Beers v. Beers, 22 Mich. 44. § 1253.
 Beers v. Bridgeport Spring Co., 42 Conn. 17. §§ 2131, 2228, 2230.
 Beers v. Dallas City, 16 Or. 334. § 5638.
 Beers v. Houghton, 9 Pet. (U. S.) 329, 359. §§ 3035, 3036.
 Beers v. Heary, 1 Bail. Ch. (S. C.) 168. § 4768.
 Beers v. Phoenix Glass Co., 14 Barb. (N. Y.) 358. §§ 4729, 4815, 4887, 4958, 5045, 5697, 5741.
 Beers v. New York L. Ins. Co., 66 Hun (N. Y.), 75. 20 N. Y. Supp. 788. §§ 5841, 5852.
 Beers v. Waterbury, 8 Bosw. (N. Y.) 396. §§ 3446, 3787.
 Beeson v. Beeson, 9 Pa. St. 279. § 4030.
 Beeson v. Lang, 85 Pa. St. 197. § 4133.
 Begun v. Anderson, 28 Ind. 79. § 1017.
 Behler v. German & Co. Ins. Co., 68 Ind. 347. §§ 945, 7960.
 Belme v. Dord, 5 N. Y. 95. § 2588.
 Belcher v. Wilcox, 40 Ga. 391. §§ 3092, 3093, 3786, 3836.
 Belcher Sugar Refining Co. v. St. Louis Grain Elev. Co., 101 Mo. 192. §§ 6030, 6031, 6032.
 Belden v. Meeker, 2 Lans. (N. Y.) 470. § 6031.
 Belden v. New York & Co. R. Co., 15 How. Pr. (N. Y.) 17. § 7426.
 Belden v. Seymour, 8 Conn. 304. § 5174.
 Belfast & Co. R. Co. v. Belfast, 77 Me. 445. §§ 2263, 2268, 2269, 2285.
 Belfast & Co. R. Co. v. Cottrell, 66 Me. 185. § 1306.
 Belfast & Co. R. Co. v. Moore, 60 Me. 561. §§ 1187, 1306.
 Belfast Academy v. Salmond, 11 Me. 109. § 5615.
 Belfast Nat. Bank v. Harriman, 68 Me. 522. § 85.
 Belhaven's Case, 3 De Gex, J. & S. 41. § 1802.
 Belhaven's Case, 11 Jur. (N. S.) 572. § 1562.
 Belknap v. Boston & Co. R. Co., 49 N. H. 358. § 6333.
 Belknap v. Davis, 19 Me. 455. § 4722.
 Bell's Appeal, 115 Pa. St. 88. §§ 1167, 1170, 1862, 2317, 3222, 3284, 3301, 3538, 3543, 6570, 6838.
 Bell's Case, 4 App. Cas. 547, 550. §§ 1098, 3198, 3199.
 Bell's Case, 22 Beav. 35. § 1413.
 Bell's Case, L. R. 9 Eq. 706. §§ 7226, 7238.
 Bell v. Byerson, 11 Iowa. 233. § 7738.
 Bell v. Fourth Great Western Turnp. Co., 14 Johns. (N. Y.) 416. § 7734.
 Bell v. Indianapolis & Co. R. Co., 53 Ind. 57. §§ 6949, 7148.
 Bell v. Pennsylvania & Co. R. Co. (N. J. Eq.), 10 Atl. Rep. 741; 9 Cent. Rep. 138. §§ 315, 354.
 Bell v. Prouty, 43 Vt. 289. §§ 5595, 5596.
 Bell v. Reid, 1 Maule & S. 726. § 1094.
 Bell v. Shibley, 33 Barb. (N. Y.) 610. § 6948.
 Bell v. Spaulding, 3 Allen (Mass.), 485. § 3162.
 Bell v. Williams, 1 Head (Tenn.), 229. § 3363.
 Bellas v. Hays, 5 Serg. & R. (Pa.) 427. § 5137.
 Belleville & Co. R. Co. v. Gregory, 15 Ill. 20. §§ 589, 608, 610, 612, 5642, 5665.
 Belleville Mutual Ins. Co. v. Van Winkle, 12 N. J. Eq. 333. § 4098.
 Belleville Savings Bank v. Winalow, 35 Fed. Rep. 471. §§ 4622, 4623, 4637, 4658.
 Belleville Bank v. Higbee, 4 Ohio Circ. Ct. 222. § 3801.
 Bellinger v. Bentley, 4 Thomp. & C. (N. Y.) 71; 1 Hun, (N. Y.) 562. §§ 5165, 5166.
 Bellinger v. New York Central R. Co., 23 N. Y. 42. § 5600.
 Bellona Company's Case, 3 Bland. Ch. (Md.) 442. §§ 5615, 6653.
 Bellows, Ex parte, 1 Mo. 115. § 766.
 Bellows v. Halliwell Bank, 2 Mason (U. S.), 43. § 256.
 Bellows v. Partridge, 12 N. Y. Leg. Obs. 221. § 6477.
 Bellows v. Todd, 39 Iowa, 209. § 3968.
 Bellport v. Tooker, 29 Barb. (N. Y.) 256; 21 N. Y. 367. § 927.
 Bell's Gap Railroad Co. v. Christy, 79 Pa. St. 54. §§ 480, 484, 4388, 5321.
 Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237. § 8089.
 Belmont v. Coleman, 21 N. Y. 96; 1 Bosw. 188. §§ 1082, 3392, 3396, 3399, 3405, 4331.
 Belmont v. Coleman, 1 Bosw. (N. Y.) 188. §§ 1082, 3392, 3399, 4331.
 Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637. §§ 3981, 4520, 4539, 4545, 4554, 4563, 5222.
 Belmont Park Assn. v. Toller, 6 Pa. Co. Ct. 266. § 1785.
 Belo v. Forsyth County Commrs, 82 N. C. 415. §§ 2812, 2815.
 Belo v. Fuller, 84 Tex. 450. § 4140.
 Belohradsky v. Kuhn, 69 Ill. 547, 551. § 7593.
 Beloit & Co. R. Co. v. Palmer, 19 Wis. 574. §§ 1253, 4391.
 Belton v. Hatoh, 109 N. Y. 193. §§ 871, 926.
 Belton Compass Co. v. Saunders, 70 Tex. 699. §§ 1170, 1173, 1205.

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- Benedict v. Denton, Walk. Ch. (Mich.) 336. §§ 5104, 5106.
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- Beneficial Association of Brotherly Unity, 38 Pa. St. 299. §§ 113, 116, 117.
- Benesch v. John Hancock Mut. L. Ins. Co., 32 N. Y. St. Rep. 73. § 4887.
- Benesch v. John Hancock Mut. L. Ins. Co., 34 N. Y. St. Rep. 16; 11 N. Y. Supp. 714. §§ 4854, 4882.
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- Benneson v. Bill, 62 Ill. 408. §§ 6868, 6886.
- Bennet v. Holbeck, 3 Saund. 316, 319. § 5793.
- Bennett's Case, 18 Beav. 339; 5 De Gex, M. & G. 284. §§ 1523, 3263.
- Bennett, Ex parte, 18 Beav. 339. §§ 3255, 4009, 4016, 4022, 4024.
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- Bennett v. Fisher, 26 Iowa. 497. § 590.
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- Bentley v. Shrieve, 4 Md. Ch. 412. §§ 6898, 7812.
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- Benton v. Thornhill, 7 Taunt. 149. § 2617.
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- Bergman v. St. Paul & Co. Asso., 29 Minn. 275. §§ 238, 960, 1011, 1015, 1889, 4401, 5991.
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- Betts v. Towanda Gas. & Co., 97 Pa. St. 367. § 2779.
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- Beverley v. Lincoln Gas Light Co., 6 Ad. & El. 823. § 5059.
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 Bidwell v. Pittsburgh, 85 Pa. St. 412. § 1853.
 Bidwell v. Pittsburgh & C. Co., 114 Pa. St. 535. § 1717.
 Bielenberg v. Montana Union R. Co., 8 Mont. 271. § 5452.
 Bier v. Gorrell, 30 W. Va. 95. §§ 4708, 6494.
 Bigelow v. Andress, 31 Ill. 322. § 6839.
 Bigelow v. Bridge, 8 Mass. 275. § 4904.
 Bigelow v. Congregational Society of Middletown, 11 Vt. 283; 15 Vt. 370. §§ 2942, 3428.
 Bigelow v. Elliot, 1 Cliff. (U. S.) 33. §§ 1377, 1909.
 Bigelow v. Gregory, 73 Ill. 197, 201. §§ 222, 225, 227, 239, 240, 417, 2926, 2975, 2992.
 Bigelow v. Hartford Bridge Co., 14 Conn. 565. § 7781.
 Bigelow v. Randolph, 14 Gray (Mass.), 541, 544. § 6275.
 Bigelow v. Union Freight R. Co., 137 Mass. 478. § 6912.
 Biggs Case, L. R. 1 Eq. 309. §§ 1299, 1552, 1765.
 Bigham v. Chicago & C. R. Co., 79 Iowa, 534. § 4855.
 Bigler v. Waller, 14 Wall. (U. S.) 297. § 6243.
 Biglin v. Friendship Association, 46 Hun (N. Y.), 223. § 2525.
 Bignell, *Re* (1892), 1 Ch. 59. § 6868.
 Bignold, *Ex parte*, 22 Beav. 143. § 5702.
 Bignold, *Ex parte*, 3 Deac. 151. § 5215.
 Bilbee v. London & C. R. Co., 18 C. B. (N. s.) 584, 592. § 6340.
 Bilbie v. Lumley, 2 East, 469. § 1717.
 Bill v. Fourth Great Western Turnp. Co., 14 Johns. (N. Y.) 416. §§ 7665, 7702, 7710.
 Bill v. Richards, 2 Hurl. & N. 311. § 3357.
 Bill v. Western Union Tel. Co., 16 Fed. Rep. 143 § 4032.
 Billings v. Billings, 2 Cal. 107. § 6477.
 Billings v. Morrow, 7 Cal. 171. § 5308.
 Billings v. Robinson, 28 Hun (N. Y.), 122. § 3221.
 Billings v. Robinson, 94 N. Y. 415; aff. 28 Hun, 122. §§ 3221, 3289.
 Billings v. Trask, 130 Hun ffa. (N. Y.), 314. § 4286.
 Billingsley v. Pollock 69 Miss. 759. § 7088.
 Billis v. State, 2 McCord (S. C.), 12. § 7756.
 Bingham, *Re*, 32 N. Y. St. Rep. 782; 10 N. Y. Supp. 325. § 3330.
 Bingham v. Rushing, 5 Ala. 403, 406. §§ 3046, 3454, 3537, 3578, 3583, 3711.
 Bingham v. Stewart, 13 Minn. 106. §§ 5126, 5131, 5132.
 Bingham v. Weiderwax, 1 N. Y. 509. §§ 6718, 6745.
 Binghamton Bridge Case, 3 Wall. (U. S.) 51, 78. § 41, 5398.
 Binney's Case, 2 Bland (Md.), 99. § 7608.
 Binney v. Plumley, 5 Vt. 500. §§ 4963, 7593, 7594.
 Bins v. Weber, 81 Ill. 288. § 610.
 Binsse v. Wood, 37 N. Y. 526, 531. § 4015.
 Bird's Case, 1 Sim. (N. S.) 47. § 248.
 Bird v. Calvert, 22 S. C. 292. § 6559.
 Bird v. Caritat, 2 Johns. (N. Y.) 342. § 7339.
 Bird v. Cockrem, 2 Woods (U. S.), 32. §§ 7134, 7476.
 Bird v. Daggett, 97 Mass. 494. §§ 4724, 4933, 5126, 5236.
 Bird v. Hayden, 1 Rob. (N. Y.) 393; 2 Abb. Pr. (N. s.) 61. §§ 3018, 3052, 4164, 4166, 4167, 4327, 4361.
 Bird v. Littlehales, 3 Swanst. 299, note. § 7027.
 Bird v. Randall, 3 Burr. 1353. § 2459.
 Birge v. Book, 44 Mo. App. 69. § 1544.
 Birkenhead v. Browning, 4 Exch. 425. § 7734.
 Birmingham & C. M. Co. v. Mutual Loan & C. Co., 96 Ala. 364. § 4490.
 Birmingham & C. R. Co., *Re*, 18 Ch. Div. 155. §§ 6838, 6963.
 Birmingham & C. R. Co. v. Birmingham & C. R. Co., 79 Ala. 465. §§ 5345, 7776.
 Birmingham & C. R. Co. v. Locke, 1 Ad. & El. (N. s.) 256. § 1765.
 Birmingham Bank v. Keck, 55 How. Pr. 222. § 3741.
 Birmingham Banking Co., *Ex parte*, L. R. 3 Ch. 651. §§ 1708, 3914.
 Birmingham Co. v. White, 1 Ad. & El. (N. s.) 282. § 4438.
 Birmingham National Bank v. Mosser, 14 Hun (N. Y.), 605. §§ 2030, 3375.
 Birrell v. Schie, 9 Cal. 104. § 3187.
 Bish v. Bradford, 17 Ind. 490. §§ 1369, 1390, 1394, 1975, 3685.
 Bish v. Johnson, 21 Ind. 239. §§ 346, 1290.
 Bishop's Case, L. R. 7 Ch. 296, note. §§ 3255, 3256, 3257.
 Bishop v. Balkis & C. Co., 25 Q. B. Div. 77; 25 Q. B. 512. §§ 2370, 2498, 2501.
 Bishop v. Brainerd, 23 Conn. 289, 299. §§ 47, 337, 347, 355.
 Bishop v. Day, 13 Vt. 81; 37 Am. Dec. 582. § 6841.
 Bishop v. Houghton, 1 E. D. Smith (N. Y.), 566. § 4471.
 Bishop of Chester v. Freeland, Ley, 71, 79. § 1048.
 Bi-Spool & C. Co. v. Acme Man. Co., 153 Mass. 404. § 6542.
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 Bissell v. First Nat. Bank, 69 Pa. St. 415. §§ 4740, 4789, 4801, 5158.
 Bissell v. Hopkins, 3 Cow. (N. Y.) 166. § 2617.
 Bissell v. Jeffersonville, 24 How. (U. S.) 287, 295. §§ 550, 1118.
 Bissell v. Lewis, 4 Mich. 450. § 5154.
 Bissell v. Michigan & C. Bank, 5 McLean (U. S.), 495. § 2723.
 Bissell v. Michigan & C. R. Co., 22 N. Y. 258, 264. §§ 3968, 5871, 5993, 6041.
 Bissitt v. Kentucky River Nav. Co., 15 Fed. Rep. 353. § 3400.
 Bisson v. Curry, 35 Iowa, 72. § 6880.
 Bittner v. Lee, 25 Mo. App. 559. §§ 3669, 3759, 3840.
 Bjorngaard v. Goodhue County Bank, 49 Minn. 483. §§ 5317, 3875.
 Black v. Delaware & C. Canal Co., 22 N. J. Eq. 130, 393. § 337.
 Black v. Delaware & C. Canal Co., 24 N. J. Eq. 455; reversing 22 N. J. Eq. 130. §§ 72, 76, 323, 337, 5358, 5615.
 Black v. Homersham, 4 Exch. Div. 24. § 2183.
 Black v. Huggins, 2 Tenn. Ch. 780. § 4500.
 Black v. Kogel, 75 Mo. 441. § 4943.
 Black v. Shreve, 13 N. J. Eq. 455. § 7740.
 Black v. Womer, 100 Ill. 328. § 2986.
 Black v. Zacharie, 3 How. (U. S.) 453. §§ 2382, 2389, 2392, 3283.
 Black & Co's Case, L. R. 8 Ch. 254, 261. §§ 3784, 3786, 3787, 3791.
 Black & C. Society v. Vandyke, 2 Whart. (Pa.) 309. §§ 820, 904, 913, 914, 1034.
 Blackburn's Case, 8 De Gex, M. & G. 177. § 1192.
 Blackburn's Case, 3 Drewry, 409. § 1529.
 Blackburn v. Selma & C. R. Co., 2 Flipp. (U. S.) 525. § 47.
 Blackburn Building Soc. v. Cunliffe, 29 Ch. Div. 902. §§ 5699, 5702.
 Blacket v. Blizard, 9 Barn. & C. 851. § 3914.
 Blackman v. Branch Bank, 8 Ala. 103. § 4612.
 Blackman v. Central R. Co., 58 Ga. 189. §§ 3509, 4589, 7579, 7583.
 Blackman v. Lehman, 63 Ala. 547. § 6064.
 Blackman v. Wheaton, 13 Minn. 326. § 2774.
 Blackmer v. Home Ins. Co., 115 Ind. 596. § 7930.
 Blackmer v. Royal Ins. Co., 115 Ind. 291. § 7930.
 Blackmore v. Yates, 2 L. R. Ex. 224. § 6137.
 Black River & C. Co. v. Barnard, 31 Barb. (N. Y.) 258. §§ 36, 512.
 Black River & C. Co. v. Clarke, 25 N. Y. 208; 31 Barb. (N. Y.) 258. §§ 1224, 1228, 1846.
 Blackston v. Martin, Lakob, 112, 113. § 499.
 Blackstone Man. Co. v. Blackstone, 13 Gray (Mass.), 488. §§ 3046, 7999, 8028, 8094, 8095.
 Bladlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347. § 6153.
 Blain v. Agar, 1 Sim. 37. §§ 1506, 4518.
 Blain v. First Nat. Bank, 5 Reporter, 33; 2 Cent. L. J. 46. § 4789.
 Blair v. Cantey, 2 Speers L. (S. C.) 34. § 6931.
 Blair v. Compton, 33 Mich. 414, 423. §§ 2788, 2791, 2793.
 Blair v. Gray, 104 U. S. 769. §§ 3453, 3627.
 Blair v. Kilpatrick, 40 Ind. 312, 315. § 5482.
 Blair v. Mansfield Bank, 2 Flipp. (U. S.) 111. § 4789.
 Blair v. Massey, L. R. 5 Ir. Eq. 623. § 4426.
 Blair v. Milwaukee & C. R. Co., 20 Wis. 254. § 5504.
 Blair v. Petrusal Ins. Co., 10 Mo. 559, 567. §§ 4914, 5559, 5850, 7882.
 Blair v. Rutherford, 31 Tex. 465. §§ 1224, 1230.
 Blair v. Steinman, 52 Pa. St. 423. § 8075.
 Blair v. St. Louis & C. R. Co., 22 Fed. Rep. 36. § 265.
 Blair v. St. Louis & C. R. Co., 22 Fed. Rep. 471. §§ 7024, 7029, 7115, 7120.
 Blair v. St. Louis & C. R. Co., 22 Fed. Rep. 769. § 7114.

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- Blake v. Bayley, 16 Gray (Mass.), 531. § 3885.
- Blake v. Brown, 80 Iowa, 277. § 1977.
- Blake v. Buffalo Creek R. Co., 56 N. Y. 485 §§ 4016, 4022, 4024.
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- Blakeley's Executor's Case, 13 Beav. 133; 3 Macn. & G. 726. §§ 3318, 3335.
- Blakeley's Executor's Case, 3 Macn. & G. 734. § 3320.
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- Blalock v. Kernersville Mfg. Co., 110 N. C. 99. § 2062.
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- Blanchard v. Dedham Gaslight Co., 12 Gray (Mass.), 213. §§ 2392, 2403, 2591.
- Blanchard v. Dow, 32 Me. 577. § 3927.
- Blanchard v. Kaull, 44 Cal. 440. §§ 39, 2992, 4216, 5126, 5132, 5942.
- Blanchard v. Maysville & Co. Turnp. Co., 1 Dana (Ky.), 87. § 5174.
- Blanchards & Co. Turning Co. v. Warner, 1 Blatchf. (U. S.) 258, 277. §§ 5642, 5770, 5821.
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- Blandford v. School District, 2 Cush. (Mass.) 39. § 788.
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- Blias v. Matteson, 45 N. Y. 22; 52 Barb. 335. §§ 275, 4009, 4017, 4022, 4027, 4150, 5222.
- Blisset v. Daniel, 10 Hare, 493. §§ 846, 881, 882, 894, 914, 1764, 4022, 4024.
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- Blondheim v. Moore, 11 Md. 365, 374. §§ 6826, 6839, 6880.
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- Blount v. Zink, 55 Mo. 455. § 3615.
- Blouam's Case, 33 Beav. 529. § 1190.
- Blouam v. Metropolitan R. Co., L. R. 3 Ch. 337. §§ 4519, 4565, 4569.
- Bluck v. Mallaloe, 27 Beav. 398. § 4068.
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- Blundell v. Brettargh, 17 Ves. 232, 241. §§ 7403, 7754.
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- Blythe v. Richards, 10 Serg. & R. (Pa.) 261; 13 Am. Dec. 672. § 7507.
- Boaler v. Mayor, 19 Com. B. (N. S.) 76. § 3404.
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- Board of Comm. v. Bearss, 25 Ind. 110. § 620.
- Board of Comm. v. Bright, 189 Ind. 3. §§ 518, 7665.
- Board of Comm. v. Reynolds, 44 Ind. 509. § 2721.
- Board of Education v. Bakewell, 122 Ill. 339. §§ 26, 5386.
- Board of Education v. Greenebaum, 39 Ill. 609. §§ 7758, 5061, 5175, 5176, 5181.
- Board of Education v. Neidenberger, 78 Ill. 58. § 7758.
- Board of Health v. Van Hoesen, 37 Mich. 533. § 5599.
- Board of Internal Imp. v. Scarce, 2 Duv. (Ky.) 576. §§ 69, 5470, 6358.
- Board of Liquidation v. Thoman, 42 La. An. 605. §§ 2816, 2840.
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- Bob v. Woodward, 50 Mo. 95. § 2775.
- Bock v. Perkins, 139 U. S. 628. § 6984.
- Bock v. State, 50 Ind. 281. § 5934.
- Bockes v. Hathorn, 78 N. Y. 222. § 6946.
- Bockover v. Life Assn., 77 Va. 85, 91. §§ 4890, 5973, 5986.
- Bocock v. Alleghany Coal & Co., 82 Va. 913. §§ 4887, 4890, 5973, 5986.
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- Bodley v. Goodrich, 7 How. (U. S.) 276. §§ 6331, 6955.
- Bodman v. American Tract Society, 9 Allen (Mass.), 447. §§ 294, 295.
- Bodwell v. Eastman, 106 Mass. 525. § 14.
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- Boeppler v. Menown, 17 Mo. App. 447. §§ 3386, 3417, 3419, 3553, 3620, 3694, 3686, 6469, 6470.
- Boettcher v. Colorado Nat. Bank, 15 Colo. 16. §§ 7098, 7099.
- Bogardus v. Rosendale & Co., 7 N. Y. 147. §§ 3438, 3495, 3513.
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- Bohn v. Loewer's Gambrinus Brewery Co., 30 N. Y. St. Rep. 424; 9 N. Y. Supp. 514. §§ 4651, 4938, 5974.
- Bohn v. Metropolitan & Co. R. Co., 129 N. Y. 576. § 5626.
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 Bolan v. Williamson, 1 Brev. (S. C.) 181. § 6363.
 Boland v. Whitman, 33 Ind. 64. §§ 7223, 7247, 7253.
 Boldt v. State (Wis.), 35 N. W. Rep. 635. § 7756.
 Bolen v. Crosby, 49 N. Y. 183. §§ 4185, 4190, 4232.
 Bolingbroke v. Swindon Local Board, L. R. 9 C. P. 575. § 6303.
 Bolles v. Bowen, 45 N. H. 124. § 3363.
 Bolles v. Brimfield, 120 U. S. 759. § 590.
 Bolling v. Le Grand, 87 Ala. 482. § 246, 1824.
 Bolton v. Liverpool, 11 Myl. & K. 88. § 7409.
 Bolton v. Natal Land & Co. (1892), 2 Ch. 124. § 2161.
 Bolton v. Pennsylvania Co., 88 Pa. St. 261. §§ 7817, 8073, 8075.
 Bolt v. Ridder, 12 Daly (N. Y.), 329. § 4144.
 Bonner v. American Spiral & Co., 81 N. Y. 469. § 489, 5221.
 Bonafie v. Fowler, 7 Paige (N. Y.), 576. §§ 3341, 3403, 4688, 5106, 6718, 6726, 7720.
 Bonaparte v. Camden & C. R. Co., Baldw. (U. S.) 205. §§ 4993, 5589, 5600.
 Bon Aqua Imp. Co. v. Standard Fire Ins. Co., 34 W. Va. 764. §§ 7647, 7707.
 Bond v. Aitkin, 6 Watts & S. (Pa.) 165. § 5295.
 Bond v. Appleton, 8 Mass. 472. §§ 3050, 3076, 3170, 3181, 3221, 3415.
 Bond v. Clark, 6 Allen (Mass.), 361. §§ 3172, 4213, 4234.
 Bond v. Morse, 9 Allen (Mass.), 471. §§ 3430, 3466, 4311.
 Bond v. Mount Hope Iron Co., 99 Mass. 505. §§ 2378, 2450.
 Bond v. Ward, 7 Mass. 123. § 8064.
 Bond v. Wilson, 8 Kan. 228. § 3363.
 Bone v. Delaware Canal Co. (Pa.), 5 Atl. Rep. 751. § 7364.
 Bone v. Ekless, 5 Hurl. & N. 925. § 1772.
 Bonewitz v. Van Wert County Bank, 41 Ohio St. 78. §§ 3226, 3543.
 Bonham's Case, 8 Coke, 106, a. § 6302.
 Bounsfee v. Williams, 3 How. (U. S.) 574. § 6985.
 Bonnardet v. Taylor, 1 Johns. & H. 383. § 4426.
 Bonneau v. Poydras, 2 Rob. (La.) 1, 20. § 5298.
 Bonnell v. Griswold, 80 N. Y. 128. §§ 4229, 4235.
 Bonnell v. Griswold, 89 N. Y. 122. § 4244.
 Bonnell v. Wheeler, 16 Abb. Fr. (N. S.) (N. Y.) 81. §§ 4191, 4355.
 Bonner v. Hearne, 75 Tex. 242. § 7426.
 Bonner v. New Orleans, 2 Woods (U. S.), 135. § 6085.
 Bonner v. Thomas (Tex. Civ. App.), 20 S. W. Rep. 722. § 7159.
 Bonney v. Morrill, 57 Me. 368, 374. § 4943.
 Bonsee v. Amee, 8 Pick. 236. § 2619.
 Booe v. Junction R. Co., 10 Ind. 93. §§ 71, 72, 75.
 Boogher v. Life Association, 75 Mo. 319. §§ 6276, 6312.
 Boogher v. Maryland Life Ins. Co., 6 Mo. App. 592. § 948.
 Booker, Ex parte, 18 Ark. 338. §§ 80, 1271, 4462.
 Booker, Ex parte, 14 Ch. Div. 317. § 5724.
 Booker v. Young, 12 Gratt. (Va.) 303. §§ 792, 3911, 3914.
 Boom Co. v. Patterson, 98 U. S. 403. § 5604.
 Boomer v. Laine, 10 Wend. (N. Y.) 525. § 3363.
 Boone County v. Lowry, 9 Mo. 23. § 7507.
 Boorman v. Atlantic & C. R. Co., 17 Hun (N. Y.), 555. § 7738.
 Booske v. Gulf Ice Co., 24 Fla. 550. § 522.
 Booth v. Bank of England, 6 Bing. N. C. 415; 7 Cl. & Fin. 509. § 5745.
 Booth v. Campbell, 37 Md. 522. §§ 1849, 2090, 2981, 2983, 3684.
 Booth v. Clark, 17 How. (U. S.) 322, 338. §§ 7334, 7337, 7338.
 Booth v. Farmers' & C. Bank, 4 Lans. (N. Y.) 301. §§ 4650, 5170, 6276.
 Booth v. Robinson, 55 Md. 419, 433. §§ 1108, 4079, 4080, 6133.
 Booth v. St. Louis Fire Engine Man. Co., 40 Fed. Rep. 1. §§ 7448, 7449, 7457, 7488.
 Booth v. Welles, 42 Fed. Rep. 11. § 7235.
 Booth v. Wender, 36 N. J. L. 250. § 7896.
 Borden & Co. v. Turp. Co. v. Camden & C. R. Co., 17 N. J. L. 314. §§ 6342, 6370.
 Borden & Co. v. Turp. Co. v. Lmly, 4 N. J. L. 285. §§ 1154, 1511.
 Bordinan v. Osborn, 23 Pick. (Mass.) 295. §§ 3173, 3295.
 Bordon v. Baltimore, 5 Gill (Md.), 236. § 2813.
 Borland v. Haven, 37 Fed. Rep. 394. §§ 1076, 2938, 3001, 3120, 3262, 3284, 3453, 3455, 3661, 3732, 3963, 4068, 5169, 5707, 6082.
 Borland v. Lewis, 43 Cal. 569. § 6587.
 Born v. Shaw, 29 Pa. St. 268. § 6145.
 Borough of Boffny, Case of, 2 Strange, 1003. § 700.
 Borough of Hackney Newspaper Co., Re, 3 Ch. Div. 669. § 6152.
 Borough of Teverson, The, § 6658.
 Borough Susquehanna Depot v. Simmons, 112 Pa. St. 384. § 6342.
 Bosanquet v. Graham, 6 Ad. & El. (N. S.) 601, note. § 3399.
 Bosanquet v. Shortridge, 4 Exch. 698. §§ 1377, 1882, 3285, 3291, 3909.
 Bosanquet v. Shortridge, 6 Exch. 698. § 1882.
 Bosher v. Richmond & Co. Land Co., 89 Va. 455; 37 Am. St. Rep. 879. § 4053.
 Boss v. Hewitt, 15 Wis. 260. § 6065.
 Boston v. Baldwin, 139 Mass. 315. § 7756.
 Boston v. Beal, 51 Fed. Rep. 306. § 7325.
 Boston v. Brazier, 11 Mass. 447. § 7754.
 Boston v. Sears, 23 Pick. (Mass.) 122, 126; citing Co. Litt. 8 b, 9 b, 94 b; 4 Cruise Dig. 442. § 5112.
 Boston v. Tileston, 11 Mass. 468. § 7756.
 Boston v. Worthington, 10 Gray (Mass.), 496. § 4376.
 Boston & Co. Foundry v. Spooner, 5 Vt. 93. §§ 7665, 7669.
 Boston & Co. Iron Works, Matter of, 23 Fed. Rep. 880. § 4182.
 Boston & Co. Mill Corp. v. Newman, 12 Pick. (Mass.) 467. § 5607.
 Boston & Co. R. Co. v. Bartlett, 3 Cush. (Mass.), 224. § 1307.
 Boston & Co. R. Co. v. County Commr's, 79 Mass. 386. § 5504.
 Boston & Co. R. Co. v. Com., 100 Mass. 399. § 2895.
 Boston & Co. Railroad v. Gilmore, 37 N. H. 410. §§ 5374, 7851.
 Boston & Co. R. Co. v. Midland R. Co., 1 Gray (Mass.), 368. § 1235.
 Boston & Co. R. Co. v. Moring, 15 Gray (Mass.), 211. §§ 227, 237, 246, 701, 1859.
 Boston & Co. R. Co. v. New York & C. R. Co., 13 R. I. 260. § 1111.
 Boston & Co. R. Co. v. Richardson, 135 Mass. 473. §§ 2577, 2582, 2595.
 Boston & Co. R. Co. v. Salem & C. R. Co., 2 Gray (Mass.), 1, 36. §§ 5591, 5615, 5616.
 Boston & Co. Railroad v. State, 32 N. H. 215. §§ 5477, 6427, 6439, 6443.
 Boston & Co. R. Co. v. Wellington, 113 Mass. 79. §§ 1742, 1784, 1981.
 Boston Gas Light Co. v. Old Colony & C. R. Co., 14 Allen (Mass.), 444. § 5600.
 Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49. §§ 3369, 5374, 6466, 6482, 6577, 6593, 6652, 6655, 6660, 6666, 6679.
 Boston Loan Co. v. Boston, 137 Mass. 332. § 8104.
 Boston Music & C. Asso. v. Cory, 129 Mass. 435. § 2409.
 Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 456. § 3296.
 Boston Water Power Co. v. Boston & C. R. Co., 23 Pick. (Mass.) 360, 394. §§ 5615, 5617.
 Bostwick v. Barlow, 14 Hun (N. Y.), 177. § 6363.
 Bostwick v. Detroit Fire Department, 49 Mich. 513. § 921.
 Bostwick v. Menck, 40 N. Y. 383. § 6950.
 Bostwick v. Menck, 4 Daly (N. Y.), 68; reversing 8 Abb. Fr. (N. S.) (N. Y.) 169. § 6950.
 Bosworth v. Bergen, 7 Mod. 459, Lutw. 1324. §§ 849, 1036.
 Bosworth v. Swansey, 10 Met. (Mass.) 363. § 7959.
 Bott v. Burnell, 11 Mass. 163. § 3363.
 Bottomley's Case, 16 Ch. Div. 681. §§ 1766, 1792, 3914.
 Bottomley v. Fisher, 1 Hurlst. & C. 211. §§ 5126, 5153.
 Bottomley v. Port Huron & C. R. Co., 44 Mich. 542. § 7622.
 Bot v. Simonville & Co. Turnpike Co., 88 Ky. 51. §§ 343, 349, 4520, 4528.
 Bouchaud v. Dias, 3 Denio (N. Y.), 238. § 1942.
 Bouch v. Sproule, 12 App. Cas. 385; 29 Ch. Div. 635. §§ 2158, 2210, 2213.
 Boughton v. Carter, 18 Johns. (N. Y.) 405. §§ 6345, 6360.
 Boughton v. Otis, 21 N. Y. 261, 265. §§ 2018, 3052, 4208, 4209, 4233.

- Boughton v. Otis, 29 Barb. (N. Y.) 196. § 4233.
 Bouldin v. Alexander, 15 Wall. (U. S.) 131. § 911.
 Boulter v. Peplow, 9 C. B. 493. § 430.
 Boulton, Ex parte, 1 De Gex & J. 163. §§ 5215, 5240.
 Boulton Carbon Co. v. Mills, 78 Iowa, 460, 464. §§ 1430, 1621, 1673, 1685, 3665, 3786.
 Boulton v. Crowther, 2 Barn. & C. 703. §§ 6342, 6370.
 Boulware v. Davis, 90 Ala. 207. §§ 7337, 7339, 7340, 7617, 7683.
 Bound v. South Carolina R. Co., 51 Fed. Rep. 58. §§ 7054, 7055.
 Bound v. Wisconsin Central R. Co., 45 Wis. 543. §§ 635, 6477.
 Bourne v. Freeth, 9 Barn. & C. 632; 4 Man. & R. 572. §§ 421, 1732, 1800.
 Boussmaker, Ex parte, 13 Ves. 71. § 1094.
 Boutell v. Cowdin, 9 Mass. 254. § 1205.
 Bouton v. McDonough Co., 84 Ill. 384, 396. § 7758.
 Bouton v. Brooklyn, 15 Barb. 375. § 2293.
 Bouton v. Dement, 123 Ill. 142. § 6569.
 Bouton v. Dry Dock Co., 4 E. D. Smith (N. Y.), 420. § 1702.
 Boutwell v. Townsend, 37 Barb. (N. Y.) 205. §§ 3142, 3152.
 Bowas v. Pioneer Tow Line, 2 Sawyer (U. S.), 21. §§ 1377, 1909.
 Bow-Briggs v. Le Prior, 1 Roll. Abr. 368. § 6373.
 Bowden v. Farmers' & C. Bank of Baltimore, 1 Hughes (U. S.), 807. § 2937.
 Bowden v. Johnson, 107 U. S. 251. §§ 3255, 3261.
 Bowden v. M'Leod, 1 Edw. Ch. (N. Y.), 588. § 4554.
 Bowden v. Morris, 1 Hughes (U. S.), 378. § 7286.
 Bowden v. Santos, 1 Hughes (U. S.), 158. § 3255.
 Bowden v. Schatzell, 1 Bailey Eq. (S. C.) 360. §§ 6398, 6931.
 Bowditch v. New England Mut. Life Ins. Co., 141 Mass. 292. § 5714.
 Bowdoinham v. Richmond, 6 Me. 112. § 5381.
 Bowen v. First Nat. Bank, 2 Nat. Bank Cas. 316, note. § 7275.
 Bowen v. Irish Presb. Cong., 6 Bosw. (N. Y.) 245. § 5106.
 Bowen v. Kuehn, 79 Wis. 53. § 1721.
 Bowen v. Lease, 5 Hill (N. Y.), 221. § 6466.
 Bowen & Martin's Case, 22 L. J. (Ch.) 856. § 428.
 Bowen v. Matheson, 14 Allen (Mass.), 499. § 1030.
 Bowen v. Morris, 2 Taunt. 374. § 5126.
 Bowen v. Parkhurst, 24 Ill. 258, 261. § 6477.
 Bower v. Burlington & C. R. Co., 42 Iowa, 546. § 5880.
 Bower v. State Bank, 5 Ark. 234. § 294.
 Bowers v. Evans, 71 Wis. 133. §§ 7099, 7102.
 Bowers v. Hechtman, 45 Minn. 238. §§ 5072, 5091, 5092.
 Bowers v. Johnson, 10 Smedes & M. (Miss.) 169. §§ 1462, 6323.
 Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415. § 6468.
 Bowes v. City of Toronto, 11 Moore P. C. 463. §§ 4022, 4030.
 Bowick v. Miller, 21 Or. 25; 26 Pac. Rep. 861. § 7738.
 Bowie v. Lott, 24 La. An. 214. § 3004.
 Bowie v. Poor School, 75 Va. 300. §§ 3774, 7063.
 Bowker v. Goodwin, 7 Nev. 135. § 2480.
 Bowker v. Hill, 60 Me. 172. § 4733.
 Bowker v. Mill River Assn., 7 Allen (Mass.), 100. § 1547.
 Bowlby v. Bell, 3 C. B. 284. § 1068.
 Bowler v. Huston, 30 Gratt. (Va.) 266. § 3363.
 Bowler v. Lane, 3 Met. (Ky.) 311. § 6383.
 Bowling Green v. Carson, 10 Bush (Ky.), 64. §§ 1025, 1028.
 Bowling Green & C. R. Co. v. Warren County Court, 10 Bush (Ky.), 711. §§ 5659, 5662.
 Bowman's Case, 67 Mo. 146. § 7755.
 Bowman v. Bell, 14 Sim. 392. § 6879.
 Bowman v. Chicago & C. R. Co., 125 U. S. 465. § 7879.
 Bowman v. Cunningham, 78 Ill. 48. § 7769.
 Bowman v. Union Pac. R. Co., 3 Dill. (U. S.) 367. § 7475.
 Bowman v. Wathen, 1 How. (U. S.) 189. § 3774.
 Bowman v. Wood, 15 Mass. 534. § 2622.
 Bowman Dairy Co. v. Mooney, 41 Mo. App. 665. §§ 5963, 5999, 6002.
 Bowne v. Douglass, 38 Barb. (N. Y.) 312. § 5137.
 Bowne v. Joy, 9 Johns. (N. Y.) 221. § 6211.
 Bowyer v. Pritchard, 11 Price, 115. § 7413.
 Box v. Allen, 1 Dick. 49. § 7774.
 Boyce v. Greene, Batty, 608. § 1067.
 Boyce v. Grundy, 3 Pet. (U. S.) 215. § 1506.
 Boyce v. Montauk Gas Coal Co., 37 W. Va. 73. §§ 5105, 5106.
 Boyce v. Sebring, 66 Mich. 210. § 611.
 Boyce v. Smith, 16 Mo. 517. § 2771.
 Boyce v. St. Louis, 29 Barb. (N. Y.) 650. §§ 7905, 7913, 7919, 7920, 7921.
 Boyce v. Trustees, 46 Md. 359. §§ 508, 518, 532, 7649, 7650, 7708.
 Boyd's Appeal (Pa.), 15 Atl. Rep. 736. § 7854.
 Boyd v. Alabama, 94 U. S. 643. § 5125.
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 Boyd v. Chesapeake & C. Canal Co., 17 Md. 195. §§ 5220, 7508, 7804, 7808.
 Boyd v. Conshocken Worsted Mills, 149 Pa. St. 363. § 2181.
 Boyd v. Emmerson, 2 Ad. & El. 184. § 4814.
 Boyd v. Hall, 56 Ga. 563. §§ 3500, 3502, 3786, 3813.
 Boyd v. Johnston, 89 Tenn. 284. § 5129.
 Boyd v. Negley, 40 Pa. St. 377. § 5600.
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 Boyd v. Plum, 7 Wend. (N. Y.) 309. § 5740.
 Boyd v. Royal Ins. Co., 111 N. C. 372. §§ 6978, 6979, 6981, 6983.
 Boyd v. Sappington, 4 Watts (Pa.), 247. § 4855.
 Boyd v. Sims, 87 Tenn. 771. §§ 4468, 4500, 4503, 4508, 4510.
 Boyer v. Boyer, 113 U. S. 689. § 2874.
 Boyke v. Thurber, 50 Hun (N. Y.), 259. § 4242.
 Boykin v. Shaffer, 13 La. An. 129. §§ 5941, 6148.
 Boylan v. Huguet, 3 Nev. 345. §§ 2450, 2453, 2479, 2480.
 Boynton v. Andrews, 63 N. Y. § 1564.
 Boynton v. Hatch, 47 N. Y. 225. §§ 1595, 1609, 1619, 1626, 1643.
 Boynton v. Jackway, 10 Paige (N. Y.), 307. § 6969.
 Boynton v. Lynn Gaslight Co., 124 Mass. 197. § 6007.
 Boynton v. Payrow, 67 Me. 597. § 2656.
 Boynton Saw & File Co., Re, 34 Hun (N. Y.), 369. § 6873.
 Brabbitt v. Chicago & C. R. Co., 38 Wis. 289. § 6350.
 Brabham v. Hinds County, 54 Miss. 363. § 7362.
 Bracerville Coal Co. v. People, 147 Ill. 66. §§ 5493, 5496.
 Bracken v. Kennedy, 4 Ill. 553. § 3446.
 Bracken v. Miller, & Watts & S. (Pa.) 102, 110. § 5194.
 Bracken v. William & Mary College, 1 Call (Va.), 161; 3 Call (Va.), 573. § 25.
 Brackett v. Barney, 28 N. Y. 341. § 1253.
 Brackett v. Persons Unknown, 53 Me. 228. § 7693.
 Bradbury v. Barnes, 19 Cal. 120. § 4009.
 Braddock v. Philadelphia & C. R. Co., 45 N. J. L. 363. §§ 481, 1341, 1747, 1755.
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 Bradford v. Jenks, 2 McLean (U. S.), 130. § 6984.
 Bradford v. Water Lot Co., 58 Ga. 230. § 7865.
 Bradlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347. §§ 5126, 5146, 5152.
 Bradlee v. Warren Savings Bank, 127 Mass. 107. §§ 4721, 4723.
 Bradley v. Ballard, 55 Ill. 413. §§ 4519, 4534, 6015, 6016, 6082, 6159.
 Bradley v. Bander, 36 Ohio St. 28. §§ 2810, 2824, 2848.
 Bradley v. Baxter, 15 Barb. (N. Y.) 122. § 643.
 Bradley v. Case, 3 Scam. (Ill.) 585. § 25.
 Bradley v. Chase, 22 Me. 511. § 2733.
 Bradley v. Eyre, 11 Mees. & W. 432. §§ 3357, 3392.
 Bradley v. Franklin County, 65 Mo. 638. § 590.
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 Bradley v. Marine & River Phosphate Min. & C. Co., 3 Hughes (U. S.), 28. § 6944.
 Bradley v. McKee, 5 Cranch C. C. (U. S.) 298. § 4962.
 Bradley v. New York & C. R. Co., 21 Conn. 294. § 5593.
 Bradley v. People, 4 Wall. (U. S.) 459. §§ 2813, 2854, 2857, 2868.
 Bradley v. Richardson, 2 Blatchf. (U. S.) 343. § 7589.
 Bradley v. Urquhart, 2 D. (N. s.) 1042. § 3357.
 Bradley v. Warburg, 11 Mees. & W. 452. § 3357.
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 Bradley Fertilizer Co. v. South. Pub. Co. (N. Y. City Ct.), 21 N. Y. Supp. 472. § 8009.

Bradshaw—Bridgman TABLE OF CASES CITED.

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 Bradstreet v. Bank of Royalton, 42 Vt. 128. § 5016.
 Bradstreet Co. v. Gill, 73 Tex. 115. § 7981.
 Bradt v. Benedict, 17 N. Y. 93. §§ 6619, 6663, 6681.
 Brady v. Brooklyn, 1 Barb. (N. Y.) 584. §§ 5045, 5046, 5049, 7754.
 Brady v. Hill, 1 Mo. 315. § 3158.
 Brady v. New York, 2 Bosw. (N. Y.) 173, 175; 7 Abb. Fr. (N. Y.) 234; 16 How. Fr. (N. Y.) 432; 20 N. Y. 312. §§ 4874, 5288, 5736.
 Brady v. New York, 1 Sandf. (N. Y.) 569. § 4369.
 Brady v. West, 50 Miss. 63. § 634.
 Brady v. Whitney, 24 Mich. 154, 156. § 2454.
 Bragg v. People, 78 Ill. 323. § 5338.
 Brailey v. Southborough, 6 Cush. (Mass.) 141. § 6373.
 Brainerd v. Clapp, 10 Cush. (Mass.) 6. § 5600.
 Brainerd v. Jones, 18 N. Y. 35. § 3133.
 Brainerd v. Railroad Co., 48 Vt. 107. § 7406.
 Brainerd v. Shannon, 60 Me. 312. § 8076.
 Brainerd v. New York & Co. R. Co., 25 N. Y. 496. §§ 5064, 6107.
 Brainerd v. Peck, 34 Vt. 496. § 6194.
 Brantree Water Supply Co. v. Brantree, 146 Mass. 482. §§ 220, 227.
 Brathwaite v. Skofield, 9 Barn. & C. 401. §§ 435, 5167.
 Bramah v. Roberts, 3 Bing. N. C. 963. §§ 3967, 4875, 5735.
 Braman v. Bingham, 26 N. Y. 491. § 1253.
 Branch v. Baker, 53 Ga. 502. §§ 3093, 3440, 3459.
 Branch v. Charleston, 92 U. S. 677. §§ 366, 368, 369.
 Branch v. Dawson, 33 Minn. 399. § 7323.
 Branch v. Jesup, 106 U. S. 468. §§ 2254, 5879.
 Branch v. Knapp, 61 Ga. 614. § 3417.
 Branch v. Roberts, 50 Barb. (N. Y.) 435. § 4137.
 Branch v. Walker, 52 N. C. 87, 89. § 4943.
 Branch v. Roberts, 50 Barb. (N. Y.) 436. § 4153.
 Branch v. Wilmington & Co. R. Co., 77 N. C. 347. § 5513.
 Branch Bank v. Collins, 7 Ala. 95. §§ 3968, 4010, 4113, 4384, 4387, 4873.
 Branch Bank v. Crocheron, 5 Ala. 250. § 5753.
 Branch Bank v. Harrison, 2 Port. (Ala.) 540. §§ 5045, 5049.
 Branch Bank v. Knox, 1 Ala. 148. § 5750.
 Branch Bank v. Jones, 5 Ala. 487. § 7760.
 Branch Bank v. Poe, 1 Ala. 396. § 4756.
 Branch Bank v. Scott, 7 Ala. 107. § 4384.
 Branch Bank v. Steele, 10 Ala. 915. § 5529.
 Branker v. Roberts, 7 Jur. (N. S.) 1185. § 846.
 Brand v. Godwin, 3 N. Y. Supp. 807; 8 N. Y. Supp. 339. §§ 4191, 4230, 4244, 4246, 4253, 4331.
 Brand v. Lawrenceville Branch R. Co., 77 Ga. 506. §§ 1332, 3696.
 Brandao v. Barnett, 1 Man. & Gr. 903; 6 Man. & Gr. 630; 12 Cl. & Fin. 787. § 2703.
 Brander v. Brander, 4 Ves. 801. §§ 2199, 2212.
 Brandon v. State, 16 Ind. 197. § 623.
 Brandon Iron Co. v. Gleason, 24 Vt. 223. §§ 6659, 6660, 6681.
 Branham v. Record, 42 Ind. 181, 199. § 1317.
 Brannin v. Connecticut & Co. R. Co., 31 Vt. 214. § 5331.
 Brant v. Ehlen, 59 Md. 1. §§ 1605, 1624, 1680, 2598.
 Brashears v. Western Union Tel. Co., 45 Mo. App. 433. § 6291.
 Braslin v. Somerville Horse R. Co., 145 Mass. 64, 67. §§ 5880, 5885, 6241.
 Brason v. Dean, 3 Mod. 39. § 5542.
 Brass v. North Dakota, 153 U. S. 391. §§ 5530, 5531, 5534, 5540.
 Brand v. Donaldsonville, 28 La. An. 558. § 6050.
 Brauser v. New England Fire Ins. Co., 21 Wis. 506. §§ 7658, 8007, 8069, 8070, 8073.
 Bray v. Farwell, 81 N. Y. 600, 608. §§ 14, 1235, 1724, 1728, 1730, 1731.
 Bray v. Seligman, 75 Mo. 31. § 3505.
 Bray v. Wallingford, 20 Conn. 416, 418. § 7790.
 Brayton v. New England Coal Mining Co., 11 Gray (Mass.), 493. §§ 3704, 4346, 4372.
 Brearley v. Delaware & Co. Canal Co., 20 N. J. L. 236, 238. §§ 6314.
 Brecht v. Corby, 7 Mo. App. 300. § 8070.
 Breckbill v. Lancaster Turnp. Co., 3 Dall. (U. S.) 496. § 7392.
 Breckinridge v. Duncan, 2 A. K. Marsh. (Ky.) 50. § 578.
 Bredin's Appeal, 92 Pa. St. 247. § 1049.
 Bredin v. Dubarry, 14 Serg. & R. (Pa.) 27, 30. § 5299.
 Bredow v. Mutual Savings Assn., 28 Mo. 181. § 1952.
 Breech-Loading Armoury Co., Re, L. R. 5 Eq. 214. § 3786.
 Breed v. First Nat. Bank, 4 Colo. 481. § 5311.
 Breedlove v. Martinsville & Co. R. Co., 12 Ind. 114. § 1748, 1925.
 Breene v. Merchants' & Co. Bank, 11 Colo. 97. §§ 6194, 6495, 7360, 7793.
 Brethaupt v. Bank, 1 Pet. (U. S.) 238. §§ 7447, 7457.
 Breitung v. Lindauer, 37 Mich. 217. §§ 4168, 4222, 4333, 4356.
 Brennan v. Tracy, 2 Mo. App. 540. § 6422.
 Brent v. Bank of Washington, 10 Pet. (U. S.) 596, 614. §§ 2320, 3233, 3246, 7070.
 Brent v. Bank of Washington, 2 Cranch. C. C. (U. S.) 517. § 2318.
 Brent v. State, 43 Ala. 297. § 656.
 Brentford & Tramway Co., Re, 26 Ch. Div. 537. § 6838.
 Bresler v. Butler, 60 Mich. 40. § 3703.
 Bressler v. Wayne County, 25 Neb. 468. § 2872.
 Brett's Case, L. R. 6 Ch. 800. §§ 1650, 3169.
 Brett v. Beales, 1 Moo. & M. 416. §§ 1351, 7740.
 Brett and Johnson's Case, Comb. 214. § 823.
 Brewer v. Boskin Theater, 104 Mass. 378. §§ 4479, 4499, 4500, 4504, 4505, 4518, 4556, 4578, 4582, 4587, 4601.
 Brewer v. Bowman, 9 Ga. 37. § 5536.
 Brewer v. Chelsea & Co. Ins. Co., 14 Gray (Mass.), 203. § 945.
 Brewer v. Michigan Salt Assn., 53 Mich. 351. § 3438.
 Brewer v. New Gloucester, 14 Mass. 216. §§ 2925, 3333.
 Brewster v. Hammet, 4 Conn. 540. § 1034.
 Brewster v. Hatch, 122 N. Y. 349. §§ 4053, 4145.
 Brewster v. Hatch, 10 Abb. N. Cas. (N. Y.) 400. §§ 4479, 4480.
 Brewster v. Hatch, 42 Hun (N. Y.), 659; 4 N. Y. St. Rep. 617. § 4504.
 Brewster v. Robert, 15 Pick. (Mass.) 302, 307. § 3914.
 Brewster v. Hartley, 37 Cal. 15. §§ 733, 734, 1011, 1012, 5528, 2051, 2528, 2615, 2619, 2622, 3277, 5060.
 Brewster v. Hough, 10 N. H. 138. §§ 5569, 5617.
 Brewster v. Kitchell, 1 Salk. 198; 1 Ld. Raym. 317. 321. § 5542.
 Brewster v. McCall, 15 Conn. 374. §§ 295, 5788.
 Brewster v. Michigan & Co. R. Co., 5 How. Fr. (N. Y.) 183. §§ 4846, 7529, 8037.
 Brewster v. Sime, 42 Cal. 139. §§ 2537, 2593, 2636.
 Brewster v. Stratman, 4 Mo. App. 41. §§ 4011, 4040, 4072.
 Brewster v. Syracuse, 19 N. Y. 116. §§ 609, 610, 611, 615.
 Brewster v. Van Liew, 119 Ill. 554. §§ 2696, 2698.
 Brickley v. Edwards, 131 Ind. 3. §§ 7617, 7648.
 Brick Presbyterian Church v. Mayor & Co., 5 Cow. (N. Y.) 538. §§ 939, 1017, 4457, 5417, 5199, 5542, 5550.
 Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9. § 4756.
 Bridge v. Gordon, 1 Pick. (Mass.) 296. § 5181.
 Bridge Co. v. Bragg, 2 N. H. 102. § 5366.
 Bridge Co. v. Hoboken Land & Co., 13 N. J. Eq. 81; 1 Wall. (U. S.) 116. §§ 5349, 5398, 5401.
 Bridge Co. v. Kline, Bright. (Pa.) 320. § 5714.
 Bridgeford v. Hall, 18 La. An. 211. § 618.
 Bridgeport v. Railroad Co., 15 Conn. 475. §§ 590, 1118, 5021, 5042.
 Bridgeport Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; 19 How. Fr. (N. Y.) 51. §§ 5739, 5740, 5949.
 Bridgeport Bank v. New York & Co. R. Co., 30 Conn. 231. §§ 2376, 4796, 4933, 5191, 5120, 5226.
 Bridgeport Fire Ins. Co. v. Wilson, 34 N. Y. 275. § 4015.
 Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556. §§ 3363, 7526.
 Bridger's Case, L. R. 4 Ch. 266. §§ 1550, 1796.
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 Bridgewater Engineering Co., Re, 12 Ch. Div. 181. § 3122, 6998.
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 Bridgewater Nav. Co., Re (1891), 1 Ch. 155. § 2158.
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 Bridgewater & Co. Plank Road Co. v. Robbins, 23 Barb. (N. Y.) 682. § 5933.
 Bridgton v. Bennett, 23 Me. 422. § 4865.
 Bridgman v. Green, 2 Ves. Sr. 627. §§ 1462, 6332.

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- Brien v. Paul, 3 Tenn. Ch. 357. § 7026.
- Briewick v. Mayor & Co. of Brunswick, 51 Ga. 639. § 619.
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- Briggs v. Cornwell, 9 Daly (N. Y.), 433. § 1450.
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- Briggs v. Parkman, 2 Metc. (Mass.) 258. § 2617.
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- Brigham v. Mead, 10 Allen (Mass.), 245. §§ 1138, 1568, 1577, 3283, 3308, 3309.
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- Bright v. Lord, 51 Ind. 272. §§ 2172, 2178.
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- Brine v. Great Western R. Co., 31 L. J. (Q. B.) 101. § 6343.
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- Brinham v. Wallersburg Coal Co., 47 Pa. St. 43. §§ 2926, 3020, 3449, 3472, 3813, 4325, 4377, 4462.
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- Brinkerhoff v. Marvin, 5 Johns. Ch. 320. § 6153.
- Brinley v. Hambleton, 67 Md. 169. §§ 3227, 3308.
- Brinley v. Grou, 60 Conn. 66. § 2210.
- Brinley v. Mann, 2 Cush. (Mass.) 337. §§ 5074, 5075, 5084, 5086, 5171.
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- British American Land Co. v. Ames, 6 Metc. (Mass.) 391. §§ 7664, 7666, 7977.
- British & C. Tel. Co. v. Colson, L. R. 6 Exch. 103. § 1179.
- British Cast-Plate Manufacturers v. Meredith, 4 T. R. 794. §§ 6342, 6370.
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- British Guardian Life Assurance Co., *Re*, 14 Ch. Div. 335. § 4106.
- British Mut. Banking Co. v. Charnwood Forest R. Co., 18 Q. B. Div. 714; 56 L. J. (Q. B.) 449. § 4696.
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- British Seamless Paper Box Co., *Re*, 17 Ch. Div. 467. § 4025.
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- Brittain v. Newland, 2 Dev. & Bat. (N. O.) 363. § 290.
- Britton v. Gradon, 1 Ld. Raym. 119. § 1816.
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- Broadbent v. Imperial Gas Co., 7 De Gex, M. & G. 436. § 7768.
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- Brock v. Northwestern Fuel Co., 130 U. S. 341. §§ 7456, 7633.
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- Brockenbrough v. James River & C. Co., 1 Patt. & H. (Va.) 94. §§ 1773, 1787.
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- Brookway v. Innes, 39 Mich. 47. § 3146.
- Brookway v. Ireland, 61 How. Pr. (N. Y.) 372. § 4245.
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- Brodhead v. Shoemaker, 44 Fed. Rep. 518. § 7471.
- Brokaw v. New Jersey & C. Trans. Co., 32 N. J. L. 328. §§ 3968, 6283, 6298, 6305.
- Bromley v. Goodwin, 95 Ill. 118. § 3095.
- Bromley v. Smith, 1 Sim. 8. § 4565.
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- Brouson v. Mann, 13 Johns. (N. Y.) 460. § 6711.
- Bronson v. Railroad Co., 2 Black (U. S.) 524. § 6877.
- Bronson v. Schulten, 104 U. S. 415. § 6232.
- Bronson v. Wilmington & C. Life Ins. Co., 85 N. C. 411. §§ 3487, 3518, 3526, 3530, 3536.
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- Brookman v. Rothschild, 3 Sim. 153. § 2645.
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- Brouwer v. Appelby, 1 Sandf. S. C. (N. Y.) 158, 170. §§ 1146, 1546, 4010, 4614, 4622, 4637, 6950, 7231, 7244, 7705.
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- Brown v. Carbonate Bank, 3 Fed. Rep. 776. § 7289.
- Brown v. Castles, 11 Cunn. (Mass.) 350. § 1392.
- Brown v. Chase, Walk. Ch. (Mich.) 43. § 6826.
- Brown v. Chesterville Academy Soc., 3 Rich. Eq. (S. C.) 362. § 5821.
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- Brown v. Com., 3 Grant Cas. (Pa.) 209. § 737.
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- Brown v. Crooke, 4 N. Y. 51. §§ 1546, 7244.
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- Brown v. Davis, 9 N. H. 76. § 3363.
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- Brown v. Donnell, 49 Me. 421. §§ 4633, 4960, 4965, 5176.
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- Brown v. Republican Mountain Silver Mines, 17 Col. 421. §§ 4380, 4384, 4386.
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- Browne v. Collins, L. R. 12 Eq. § 2206.
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- Brownlow v. Metropolitan Board, 18 C. B. (N. s.) 546; 13 C. B. (N. s.) 768. § 6363.
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- Bruce v. Smith, 44 Ind. 5. §§ 2339, 2392.
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- Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21. §§ 4650, 5030, 5127, 5129.
- Brunton v. Trustees v. Mincanton Highway Board, L. R. 5 Q. B. 437. § 5942.
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- Bruyn v. Receivers, 9 Cow. (N. Y.) 413, note. §§ 7065, 7069.
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- Buck v. Colbath, 3 Wall. U. S. 334. §§ 6211, 6984.
- Buck v. Collins, 51 Ga. 391. § 4421.
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- Buckeridge v. Ingram, 2 Ves. Jr. 652. § 1066.
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- Buckfield Branch R. Co. v. Irish, 39 Me. 44. § 1185.
- Buckland v. Conway, 16 Mass. 396. § 7754.
- Buckland v. Niles, 8 Mo. App. 587. §§ 3607, 3686.
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- Buckley v. Knapp, 48 Mo. 152. § 6398.
- Buckley v. Palmer, 2 Salk. 430. § 833.
- Buckley v. Whitcomb, 121 N. Y. 107. § 4041.
- Bucklin v. Thompson, 1 J. J. Marsh. (Ky.) 223. § 2617.
- Buckmaster v. Consumers Ice Co., 5 Daly (N. Y.), 313. § 2425.
- Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co., 50 Pa. St. 91, 100. §§ 7774, 7781.
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- Buehler v. Gloninger, 2 Watts (Pa.), 226. § 6939.
- Buell v. Buckingham, 16 Iowa, 284. §§ 3914, 3929.
- 4012, 4046, 4070, 6466, 6498, 6541.
- Buell v. Warner, 33 Vt. 570. §§ 4317, 4340, 4341, 4474, 4582.
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- Buffalo & C. R. Co. v. Buffalo, 5 Hill (N. Y.), 209. § 5507.
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- Buffalo & C. R. Co. v. Cary, 26 N. Y. 77. §§ 218, 507, 509, 518, 1849, 1851, 1852, 1853, 1870, 2975, 4354, 6598, 6600, 7651, 7689, 7697.
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- Buffington v. Bardon, 80 Wis. 635. §§ 3115, 5321.
- Buffum v. Chadwick, 8 Mass. 103. §§ 5133, 7593, 7595.
- Buford v. Brown, 6 B. Mon. (Ky.) 553. § 1449.
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- Bugbee v. Stevens, 63 Vt. 185. § 2824.
- Buie v. Fayetteville, 79 N. C. 267. §§ 2850, 2866.
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- Bulkley v. Derby Fishing Co., 2 Conn. 252. §§ 4487, 5020, 5021, 1539, 5646.
- Bulkley v. New York & C. R. Co., 27 Conn. 479. § 5504.
- Bulkley v. Stewart, 1 Day (Conn.) 130. § 1717.
- Bulkley v. Whitcomb, 121 N. Y. 107. §§ 3798, 4040.
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- Bull v. Conroe, 13 Wis. 233. § 4170.
- Bullard v. Bank, 18 Wall. (U. S.) 589. §§ 1013, 1032, 2319, 2490, 2594.
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- Bullard v. Kinney, 10 Cal. 60. § 14.
- Bullard v. Nantucket Bank, 5 Mass. 89. § 7614.
- Bullard v. Randall, 1 Gray (Mass.), 605. §§ 4778, 4897.

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 Bullock v. Consumers' Lumber Co. (Cal.), 31 Pac. Rep. 367. § 4556.
 Bullock v. Falmouth & Co. Turnpike Co., 85 Ky. 184. § 1311, 5942.
 Bulmer's Case, 33 Beav. 435. §§ 3318, 3330.
 Bulow v. City Council, 1 Not. & McC. (S. C.) 527. § 8092.
 Bult v. Morrell, 12 Ad. & El. 745. §§ 5126, 5735.
 Bulwer's Case, 33 Beav. 435. §§ 3318, 3330.
 Bungardner v. Leavitt, 35 W. Va. 194. §§ 2728, 2729.
 Buncombe v. McCarron, 1 Dev. & B. (N. C.) 306. § 5061.
 Buncombe County v. Tommey, 115 U. S. 122. § 7758.
 Buncombe Turnp. Co. v. McCarron, 1 Dev. & B. (N. C.) 306. §§ 531, 6600, 7665, 7689, 7702.
 Buncombe Turnp. Co. v. Mills, 10 Ired. L. (N. C.) 30. § 5916.
 Bundy v. Jackson, 24 Fed. Rep. 628. § 4046.
 Bunn's Case, 2 De Gex, F. & J. 275. § 3303.
 Bunnell v. Empire Laundry Machinery Co., 24 N. Y. St. 675; 5 N. Y. Supp. 591. § 4081.
 Bunnell v. Collinsville Savings Soc., 38 Conn. 203. § 6710.
 Burbank v. Posey, 7 Bush (Ky.), 372. § 5132.
 Burbank v. Whitney, 24 Pick. (Mass.) 146. § 5835.
 Burbridge, Ex parte, 1 Deac. 131. § 5211.
 Burch v. Davenport & Co. R. Co., 46 Iowa, 449. § 7468.
 Burch v. Glover, 1 Wash. 250. §§ 3378, 3475, 3762.
 Burch v. Moore, 1 Wash. 249. §§ 3378, 3475, 3762.
 Burch v. Taylor, 1 Wash. 245. §§ 3378, 3475, 3762.
 Burden v. Burden, 42 Hun (N. Y.), 655; 3 N. Y. St. Rep. 776. § 4415.
 Burden v. Stein, 27 Ala. 104. § 5510.
 Burdett v. Willet, 5 Vern. 638. § 7084.
 Burdine v. Grand Lodge, 37 Ala. 478. § 7756.
 Burdon v. Barkus, 4 De Gex, F. & J. 42. § 4548.
 Burger v. Farmers' Mut. Ins. Co., 71 Pa. St. 422. § 5987.
 Burger v. Grand Rapids & Co. R. Co., 22 Fed. Rep. 561. § 7891.
 Burger v. St. Louis & Co. R. Co., 52 Mo. App. 119. § 5878.
 Burgess' Case, 15 Ch. Div. 509. § 1439.
 Burgess v. Clark, 13 Ired. L. (N. C.) 109. § 5607.
 Burgess v. Seligman, 107 U. S. 20. §§ 1697, 1902, 2933, 2936, 3215, 3702, 7502.
 Burgess v. Smith, 2 Barb. Ch. (N. Y.) 276. § 3439.
 Burgess v. St. Louis & Co. R. Co., 99 Mo. App. 496. §§ 4494, 5314.
 Burham v. San Francisco Fuse Manuf. Co., 76 Cal. 26. §§ 1808, 4553.
 Burhop v. Milwaukee, 21 Wis. 257. § 6178.
 Burk v. Louisville & Co. R. Co., 7 Heisk. (Tenn.) 451. § 6352.
 Burke v. Cleveland & Co. R. Co., 22 Week L. Bul. (Ohio) 11. § 337.
 Burke v. Concord R. Co., 61 N. H. 160. §§ 5872, 5873.
 Burke v. Dublin Trunk & Co. R. Co., 37 L. J. Q. B. 50. § 3357.
 Burke v. Smith, 16 Wall. (U. S.) 390, 396. §§ 1310, 1312, 1332, 1514, 1550, 1551, 1569, 1577, 2499, 2951, 3654, 3773, 4014, 7282.
 Burkholder v. Beeten, 65 Pa. St. 496. §§ 2711, 4733.
 Burkinshaw v. Nicolls, H. L. 3 App. Cas. 1004. §§ 1592, 1608, 1680, 1681, 1684, 3583, 3715, 3716.
 Burks v. Bragg, 89 Ala. 204. § 7738.
 Burten v. Shannon, 14 Gray (Mass.), 435. § 4334.
 Burlingame v. Brewster, 79 Ill. 515. §§ 5126, 5129, 5132, 5152.
 Burlingame v. Burlingame, 7 Cow. (N. Y.) 92, 94. § 5182.
 Burlington v. Burlington Street Railway Co., 49 Iowa, 144. § 1019.
 Burlington v. Gilbert, 31 Iowa, 366. § 1853.
 Burlington v. Kellar, 18 Iowa, 65. § 1013.
 Burlington & Co. R. Co. v. Boestler, 15 Iowa, 555. §§ 1332, 1350, 1577.
 Burlington & Co. R. Co. v. Palmer, 42 Iowa, 218. § 1345.
 Burlington & Co. R. Co. v. Verry, 48 Iowa, 458. § 7142.
 Burlington & Co. R. Co. v. White, 5 Iowa, 409. § 1293.
 Burlington Ferry v. Davis, 48 Iowa, 133. § 1028.
 Burlinson's Case, 3 De Gex & Sm. 18. §§ 1098, 3275.
 Burls v. Smith, 7 Bing. 705. § 5167.
 Burmester v. Norris, 6 Exch. 796. §§ 71, 3969, 3988, 5735, 5957, 5979.
 Burn v. Burn, 3 Ves. 573, 576. § 6141.
 Burnap v. Cook, 52 Ill. 169, 171. § 7593.
 Burnap v. Haskins Steam Engine Co., 127 Mass. 588. §§ 2989, 3133, 3161.
 Burnes v. Pennell, 2 H. L. 497, 520. §§ 14, 1205, 4922.
 Burnett v. Lynch, 5 Barn. & C. 589. § 3308.
 Burnett v. Western Union Tel. Co., 39 Mo. App. 599, 614. § 6231.
 Burnham v. Bowen, 111 U. S. 776. §§ 7052, 7114, 7116, 7117, 7118, 7119, 7168.
 Burnham v. Grand Trunk R. Co., 63 Mo. 298. § 6309.
 Burnham v. Northwestern Ins. Co., 36 Iowa, 632. § 1579.
 Burnham v. San Francisco Fuse Man. Co., 76 Cal. 24. § 6696.
 Burnham v. Savings Bank, 5 N. H. 446. §§ 291, 3729, 7608, 7614.
 Burnham v. Webster, 19 Me. 232. §§ 5045, 5133, 5158.
 Burnley v. Cook, 13 Tex. 586. § 7771.
 Burns, Ex parte, 1 Tenn. Ch. 83. § 110.
 Burns v. Beck & Co. Hardware Co., 88 Ga. 471. §§ 1582, 2985, 3527, 3671, 4145, 4380, 4383, 6568.
 Burns v. Commencement Bay Land & Co., 4 Wash. 558. § 4380.
 Burns v. Multnomah R. Co., 15 Fed. Rep. 177. § 5659.
 Burns v. Provincial Ins. Co., 35 Barb. (N. Y.) 525; 13 Abb. Pr. (N. Y.) 425. § 7790.
 Burns v. Thayer, 101 Mass. 426. § 3187.
 Burnside v. Dayrell, 3 Exch. 224; 19 L. J. (Exch.) 46. §§ 421, 449.
 Burr v. Beers, 24 N. Y. 180. § 381.
 Burr v. McDonald, 3 Grant. (Va.) 215. §§ 788, 802, 805, 3393, 3945, 3976, 5698.
 Burr v. Wilcox, 22 N. Y. 551; affirmed 6 Bosw. 198. §§ 1138, 1139, 1140, 1577, 1948, 3133, 3136, 3193.
 Burrall v. Bushwick R. Co., 75 N. Y. 211. §§ 1060, 1071, 2389.
 Burrell v. Associate Reformed Church, 44 Barb. (N. Y.) 282. § 927.
 Burrill v. Nahant Bank, 3 Metc. (Mass.) 163. §§ 3945, 3954, 3955, 3968, 3970, 3985, 4742, 4887, 5105, 5106, 5327.
 Burroughs v. Bunnell, 70 Md. 18. § 6941.
 Burroughs v. Gaither, 65 Md. 171. § 7005.
 Burroughs v. Housatonic R. Co., 15 Conn. 124. §§ 6342, 6370.
 Burroughs v. North Carolina R. Co., 67 N. C. 376. §§ 2172, 2173, 2174, 2239.
 Burrows v. Lock, 10 Ves. 470. §§ 1382, 1388, 1425, 1467, 1468, 1505.
 Burrows v. Molloy, 2 Jones & Lat. 521. § 6243.
 Burrows v. Bashford, 22 Wis. 103. § 5257.
 Burrows v. March Gas and Coke Co., L. R. 5 Exch. 67; L. R. 7 Exch. 96. §§ 1476, 6358.
 Burrows v. Smith, 10 N. Y. 550. §§ 238, 1269, 1319, 1332, 1335, 5253.
 Burt v. Batavia Paper Man. Co., 86 Ill. 66. § 5234.
 Burt v. British Nation Life Ass. Co., 4 De Gex & J. 158. § 1521, 4359.
 Burt v. Farrar, 24 Barb. (N. Y.) 518. §§ 1180, 1322.
 Burt v. Rattle, 31 Ohio St. 116. §§ 2265, 2277, 6131.
 Burt v. Grand Lodge, 44 Mich. 208. §§ 914, 4399.
 Burt v. Grand Lodge, 66 Mich. 85. § 4399.
 Burt v. Merchants Ins. Co., 106 Mass. 356. § 5598.
 Burt v. Wilson, 28 Cal. 632. § 5018.
 Burtis v. Buffalo & Co. R. Co., 24 N. Y. 269. § 5871.
 Burton's Appeal, 57 Pa. St. 213. §§ 68, 5396.
 Burton v. Peterson, 12 Phila. (Pa.) 397. §§ 2593, 2636.
 Burton v. Rutherford, 49 Mo. 255, 258. § 3329.
 Burton v. Schildbach, 45 Mich. 504, 511. § 506.
 Burton v. Union Pac. R. Co., 3 Dill. (U. S.) 336. § 7475.
 Burton & Saddlers' Co., Re, 31 L. J. (Q. B.) 62. §§ 4416, 4421, 4427.
 Busby v. North American Life Ins. Co., 40 Md. 572. § 5306.
 Busby v. Hooper, 35 Md. 15. §§ 741, 1177, 1139, 1185, 1249, 4498.
 Busenback v. Attica & Co. Gravel Road Co., 43 Ind. 265. § 5942.
 Bush v. Cartwright, 7 Or. 329. § 3351.
 Bush v. Lathrop, 22 N. Y. 535. §§ 2587, 2633.
 Bush v. Peckard, 3 Harr. (Del.) 385. § 7593.
 Bush v. Peru Bridge Co., 3 Ind. 21. § 5399.
 Bush v. Seabury, 8 Johns. (N. Y.) 418. § 1028.

- Bush v. Shipman, 4 Scam. (Ill.) 186. § 25.
 Bush v. Wadsworth, 60 Mich. 255. § 4673.
 Bush v. Western, Finch's Prec. in Ch. 530. § 7776.
 Bushby v. New York & Co. R. Co., 107 N. Y. 374. § 6349.
 Bushel v. Com. Ins. Co., 15 Serg. & R. (Pa.) 173. § 5046, 7790, 8030, 8031.
 Bushnell v. Beloit, 10 Wis. 195. §§ 1118, 1120, 5869.
 Bushnell v. Chicago & C. R. Co., 69 Iowa, 620. § 4855.
 Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67. §§ 6032, 6039.
 Bushong v. Taylor, 82 Mo. 660. § 5005.
 Bushwick & Co. Bridge Co. v. Ebbetts, 3 Edw. Ch. (N. Y.) 353. § 59.
 Busk's Case, 3 De Gex & S. 267. § 1523.
 Buss v. Gilbert, 2 Maule & S. 70. § 3112.
 Bustros v. White, L. R. 1 Q. B. Div. 423. § 4435.
 Butcher v. Providence Gas Co., 18 Alb. L. J. 372. § 6358.
 Butchers' & Co. Bank v. McDonald, 130 Mass. 264. §§ 518, 522.
 Butchers and Drovers' Bank v. Pulitzer, 11 Mo. App. 594. §§ 6664, 6666.
 Butchers' Beneficial Association, 35 Pa. St. 151. §§ 113, 115, 1028.
 Butchers' Beneficial Association, 38 Pa. St. 298. §§ 113, 115, 117, 861.
 Butchers' Union Co. v. Crescent City Co., 111 U. S. 746. §§ 651, 5490.
 Butler, Ex parte, 1 Atk. 215. § 815.
 Butler v. Aspinwall, 33 Fed. Rep. 217. §§ 1888, 7284.
 Butler v. Chambers, 38 Minn. 69. § 5183.
 Butler v. Coleman, 3 Nat. Bk. Cas. 291. §§ 7275, 7273.
 Butler v. Coleman, 124 U. S. 721, 726. §§ 7275, 7277.
 Butler v. Cornwall Iron Co., 22 Conn. 335. §§ 3908, 4018.
 Butler v. Cumpston, L. R. 7 Eq. 16. § 3275.
 Butler v. Dunham, 27 Ill. 474. § 1118.
 Butler v. Glen Cove Starch Co., 18 Hun (N. Y.), 47. § 2240.
 Butler v. Knight, L. R. 2 Ex. 109. § 4943.
 Butler v. Merchants' Ins. Co., 14 Ala. 777. § 2547.
 Butler v. Palmer, 1 Hill (N. Y.), 324. §§ 590, 4168.
 Butler v. Rahm, 46 Md. 841. § 5354.
 Butler v. Smalley, 101 N. Y. 71. §§ 4228, 4233.
 Butler v. Walker, 80 Ill. 345. §§ 2961, 2955.
 Butler v. Watkins, 13 Wall. (U. S.) 456. § 6321.
 Butler University v. Spoonover, 114 Ind. 381. §§ 1140, 1144, 1145, 1889.
 Butterfield v. Seligman, 17 Mich. 95. § 7622.
 Butterfield's Overland Dispatch Co. v. Wedeles, 1 N. Mex. 528. § 7665.
 Butternut's Turnp. Co. v. North, 1 Hill (N. Y.), 518. § 1306.
 Buttershall v. Davis, 31 Barb. (N. Y.) 323. §§ 1211, 1212.
 Butterworth v. Gould, 41 N. Y. 450. § 2141.
 Butterworth v. Kennedy, 5 Bosw. (N. Y.) 143. §§ 2656, 3842.
 Butterworth v. O'Brien, 28 Barb. (N. Y.) 187; 7 Abb. Pr. (N. Y.) 456; 16 How. Pr. (N. Y.) 503. § 6948.
 Butterworth v. O'Brien, 24 How. Pr. (N. Y.) 438; 39 Barb. 192. §§ 4121, 6947, 6952, 6961.
 Buton v. Hoffman, 61 Wis. 20. § 6653.
 Buton v. Wightman, Cro. Eliz. 338. § 687.
 Buttrick v. Nashua & Co. R. Co., 62 N. H. 413. §§ 2409, 2768, 2770.
 Butts v. Outbertson, 6 Ga. 166. §§ 4962, 5046, 5730.
 Butts v. Francis, 4 Conn. 424. § 3363.
 Butts v. Wood, 38 Barb. (N. Y.) 181; 37 N. Y. 317. §§ 4009, 4022, 4024, 4059, 4060, 4079, 4380, 4381, 4382, 4389, 4479, 4493, 4683.
 Butts v. Wood, 38 Barb. (N. Y.) 181. §§ 4080, 4493.
 Bwch-y-plwm Lead Mining Co. v. Baynes, L. R. 2 Exch. 324. §§ 1365, 1424, 1431, 1442, 6335.
 Byers v. Franklin Coal Co., 14 Allen (Mass.), 470. §§ 4476, 7579, 7580.
 Byers v. Franklin Coal Co., 106 Mass. 131. §§ 3124, 4184, 4346, 4371, 5955.
 Byers v. Rollins, 13 Colo. 22. §§ 781, 1497, 1502, 2083, 2605, 4479, 4500, 4578.
 Bryington v. Mississippi & Co. R. Co., 11 Iowa, 502. § 7659.
 Bryant v. McGuire, 3 Head (Tenn.), 530. § 6382.
 Byrd v. Ralston, 3 Head (Tenn.), 477. § 1118.
 Byrne v. Missouri, 8 Pet. (U. S.) 40. § 5761.
 Bywaters v. Paris & Co. R. Co., 73 Tex. 624. § 1975.
 Cabell v. Grubbs, 48 Mo. 353. § 5092.
 Cable v. Gaty, 34 Mo. 573. §§ 4182.
 Cable v. McCune, 26 Mo. 371. §§ 3017, 3018, 3052, 3111, 3113, 3114, 4167, 4182.
 Cabot & Co. Bridge v. Chapin, 6 Cush. (Mass.) 56. §§ 1322, 1724, 1726, 1728, 1853, 1866, 3993.
 Cadle v. Baker, 20 Wall. (U. S.) 650. §§ 3417, 3419, 3752, 7266.
 Cadle v. Tracy, 11 Blatchf. (U. S.) 101. § 7323.
 Cadogan v. Kennet, Corp. 432. §§ 2617, 2774.
 Cady v. Centerville & Co. R. Co., 48 Mich. 133. § 7760.
 Cady v. Conger, 19 N. Y. 255. § 2293.
 Cady v. Potter, 55 Barb. (N. Y.) 463. § 2400.
 Cady v. Sanford, 53 Vt. 632. § 4223.
 Caffin v. Kirwan, 7 La. An. 221. § 2615.
 Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580. §§ 7339, 7341.
 Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 128-37. §§ 518, 726, 849, 958, 1036, 1037, 3893, 3894, 3914, 3932, 4612, 4624, 5173, 6600, 6655, 6681, 7624, 7689, 7696, 7705, 7721, 7722, 7748.
 Cahokia v. Rautenberg, 88 Ill. 219, 220. § 5129.
 Cahoon Barnet Man. Co. v. Rubber & Co. Harness Co., 45 Fed. Rep. 532. § 4140.
 Caillard v. Caillard, 25 Beav. 512. § 6880.
 Cain v. Pullen, 34 La. An. 511. § 4428.
 Cairnes v. Bleeker, 12 Johns. (N. Y.) 300. § 5300.
 Cairo & C. R. Co. v. Mahoney, 82 Ill. 73. §§ 4945, 4984.
 Cairo & C. R. Co. v. Sparta, 77 Ill. 505. § 590.
 Cake v. Pottsville Bank, 116 Pa. St. 264. §§ 4621, 4659.
 Calder v. Bull, 3 Dall. (U. S.), 386. § 3014.
 Cald. v. Dobell, L. R. 6 C. P. 486. § 5030.
 Caldicott v. Griffiths, 3 Ex. 898. § 5167.
 Caldwell v. Alton, 33 Ill. 416. § 1028.
 Caldwell v. Branch Bank, 11 Ala. 549. § 4758.
 Caldwell v. Justices of Burke, 4 Jones Eq. (N. C.) 323. § 1118.
 Caldwell v. Mohawk Valley Nat. Bank, 64 Barb. (N. Y.) 333. § 4745.
 Caldwell v. New Jersey Steam Nav. Co., 47 N. Y. 282. § 6333.
 Caldwell v. Vicksburg & Co. R. Co., 40 La. An. 753. § 7423.
 Caley v. Philadelphia & Co. R. Co., 80 Pa. St. 363. §§ 1286, 1287, 1308, 1321.
 Calhoun v. Calhoun, 81 Ga. 91. § 7738.
 Calhoun v. King, 5 Ala. 523. §§ 2567, 4152.
 California v. Central Pacific R. Co., 127 U. S. 1, 41. §§ 671, 5558, 5561, 5587.
 California Ins. Co. v. Gracey, 15 Colo. 70. § 4887.
 California Mut. L. Ins. Co., Re, 81 Cal. 364. § 7760.
 California R. Co. v. Rutherford, 62 Fed. Rep. 796. § 7782.
 California Southern R. Co. v. Southern Pac. R. Co., 65 Cal. 394. §§ 7423, 7432.
 California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398. §§ 578, 580, 647, 5342, 5362, 5369, 5398.
 California Sugar Manuf. Co. v. Schaefer, 57 Cal. 396. § 1252.
 Calisher's Case, L. R. 5 Eq. 214. §§ 3786, 3791.
 Calking v. Baldwin, 4 Wend. (N. Y.) 667. § 6343.
 Calkins v. Cheney, 92 Ill. 463. § 927.
 Callahan v. Louisville & Co. R. Co., 11 Fed. Rep. 536. § 7891.
 Callanan v. Edwards, 32 N. Y. 483. § 2338, 2341.
 Callanan v. Judd, 23 Wis. 353. § 1311.
 Callanan v. Windsor, 73 Iowa, 193. §§ 1676, 3829.
 Callaway County v. Foster, 93 U. S. 567. § 366.
 Callaway Min. & Co. v. Clark, 32 Mo. 305. §§ 5770, 5955.
 Callender v. Marsh, 1 Pick. (Mass.), 417. § 6370.
 Callender v. Painesville & Co. R. Co., 11 Ohio St. 516. §§ 532, 1870, 5254.
 Caloric Engine & Co. Co., Re, 52 L. T. (N. S.) 846. § 3876.
 Calumet Canal & Dock Co. v. Russell, 68 Ill. 426. § 5092.
 Calvert v. Hannibal & Co. R. Co., 34 Mo. 242. § 6286.
 Cambrian Railways Company's Scheme, Re, L. R. 3 Ch. 294. § 274.
 Cambridge v. Cambridge R. Co., 10 Allen (Mass.), 50. § 5544.
 Cambridge R. Co. v. Charles River Street R. Co., 139 Mass. 454. § 5623.
 Cambridge University v. Archbishop of York, 10 Mod. 208. § 290.
 Cambridge Water Works v. Somerville Dyeing Co., 4 Allen (Mass.), 239. §§ 3351, 3354, 3521, 4327, 6560.
 Cambridge Water Works Co., v. Somerville Dyeing Co., 14 Gray (Mass.), 193. § 3527.

Camden—Carpenter TABLE OF CASES CITED.

- Camden v. Allen, 2 Dutch. (N. J.) 398. § 1117.
 Camden v. Doremus, 3 How. (U. S.) 535. § 2015.
 Camden v. Stuart, 144 U. S. 104. § 3711.
 Camden & Co. R. Co. v. Briggs, 22 N. J. L. 623. § 5177.
 Camden & Co. R. Co. v. Elkins, 37 N. J. Eq. 273. § 700.
 Camden & Co. R. Co. v. May's Landing & Co. R. Co., 43 N. J. L. 530. §§ 6119, 5879, 5888, 6016, 6025.
 Camden & Co. R. Co. v. Remer, 4 Barb. (N. Y.) 127. §§ 7658, 7661.
 Camden & Co. v. Swede Iron Co., 32 N. J. L. 15. §§ 7769, 7995, 8003, 8030.
 Camden Safe Deposit & Co. v. Ingham, 40 N. J. Eq. 3. § 5837.
 Came v. Brighani, 39 Me. 35. §§ 938, 1082, 3392, 3406, 3451, 3504, 3554, 3552, 3729, 4531, 5045, 5730, 5754, 7639.
 Cameron v. Havemeyer, 25 Abb. N. Cas. (N. Y.) 438; 12 N. Y. Supp. 126. §§ 6414, 6818.
 Cameron v. Seaman, 69 N. Y. 396. §§ 4164, 4225, 4228, 4233.
 Cameron v. Tome, 64 Md. 507, 511. § 6116.
 Cammell v. Sewell, 5 Hurlst. & N. 728. § 7340.
 Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186. §§ 3905, 3913, 3331, 3932.
 Camp v. Barney, 4 Hun (N. Y.), 373. § 7128.
 Camp v. Byrne, 41 Mo. 525. §§ 529, 1853, 1870, 1871.
 Camp v. Scott, 14 Vt. 387. § 5.52.
 Camp v. Taylor (N. J.), 19 Atl. Rep. 968. §§ 4572, 4578, 4580, 4586, 7409, 7878.
 Campau v. Detroit, 14 Mich. 276. § 658.
 Campbell's Case, 4 Ch. Div. 470. § 4070.
 Campbell v. Adams, 30 Barb. (N. Y.) 132. § 7236.
 Campbell v. American Zylonite Co., 132 N. Y. 455. §§ 2245, 2252, 2388, 2601.
 Campbell v. American Zylonite Co., 3 N. Y. Supp. 822; 55 N. Y. Super. Ct. 552. § 3222.
 Campbell v. Argenta & Co. Min. Co., 51 Fed. Rep. 1. § 6165.
 Campbell v. Brunk, 25 Ill. 225. § 7589.
 Campbell v. Humphries, 2 Scam. (Ill.) 478. § 7293.
 Campbell v. Hyde, 1 D. Chip. (Vt.) 65. § 1430.
 Campbell v. Kenosha, 5 Wall. (U. S.) 194. § 590.
 Campbell v. Marietta & Co. K. Co., 23 Ohio St. 188. § 262.
 Campbell v. Merchants' Ins. Co., 37 N. H. 35. §§ 3972, 5191, 7749.
 Campbell v. Mississippi Union Bank, 7 Miss. (6 * How.) 625. §§ 658, 6685, 7720.
 Campbell v. Morgan, 4 Ill. App. 100. § 1497.
 Campbell v. Morris, 3 Har. & McH. (Md.) 535, 554. §§ 2899, 8001.
 Campbell v. Paris & Co. R. Co., 71 Ill. 611. § 1121.
 Campbell v. Phelps, 1 Pick. (Mass.) 62. § 4184.
 Campbell v. Pittsburgh & W. R. Co., 137 Pa. 574. § 6237.
 Campbell v. Pope, 96 Mo. 468. §§ 4623, 5047, 5051, 5054, 5057, 5236, 5235, 5296, 5298, 5308, 7760.
 Campbell v. Portland Sugar Co., 62 Me. 552. § 4096.
 Campbell v. Poultney, 6 Gill & J. (Md.) 94. §§ 739, 741.
 Campbell v. Walker, 5 Ves. 678. § 6225.
 Campbell v. Webster, 15 Gray (Mass.), 28. § 3363.
 Campbell v. Wolf, 35 Mo. 459. § 1832.
 Campbell County v. Knoxville & Co. R. Co., 6 Coldw. (Tenn.) 598. § 1118.
 Canada Southern R. Co. v. Gebhard, 109 U. S. 527. §§ 273, 274, 3453.
 Canal Bank v. Holland, 5 La. An. 363. §§ 1968, 3906.
 Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 304. §§ 3967, 4087, 4875, 5045.
 Canal Co. v. Archer, 9 Gill & J. (Md.) 479. § 5583.
 Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1. §§ 5382, 5419, 5589, 6600.
 Canal & Banking Co. v. New Orleans, 99 U. S. 97. § 2863.
 Canandaque Academy v. McKechnie, 19 Hun (N. Y.) 62. §§ 5106, 7661.
 Candee v. Lord, 2 N. Y. 269. § 6877.
 Canfield v. Minneapolis & Co. Assn., 14 Fed. Rep. 301; 4 McCr. (U. S.) 645. §§ 2659, 2677.
 Cann v. Eakins, 23 Nova Scotia. 475. § 3974.
 Cannon, Ex parte, 30 Ch. Div. 629. § 3786.
 Cannon v. Hemphill, 7 Tex. 184. § 608.
 Cannon v. Janvier, 3 Houst. (Del.) 27. § 7830.
 Cannon v. United States, 118 U. S. 355. § 6232.
 Cannon River Man. Assn. v. Rogers, 51 Minn. 388. § 3909.
 Cantrell v. Colwell, 3 Head (Tenn.), 471. § 6299.
 Cape's Executors' Case, 2 De Gex M. & G. 573. §§ 14, 3222.
 Cape Girardeau & Co. R. Co. v. Kimmel, 58 Mo. 83. § 7740.
 Cape Girardeau v. Riley, 72 Mo. 220. § 1021.
 Cape May & Co. Nav. Co., Matter of, 51 N. J. L. 78. §§ 731, 743, 781.
 Cape Sable Co's Case, 3 Bland Ch. (Md.) 606. §§ 5016, 7392, 7423, 7560.
 Capell v. Child, Crompt & J. 558, 579. § 881.
 Caphart v. Dodd, 3 Bush (Ky.), 584. §§ 5126, 5132.
 Capper's Case, L. R., 3 Ch. 455. §§ 3235, 3271.
 Capper, Ex parte, 1 Sim. (N. S.) 178. §§ 426, 428.
 Capron v. Strout, 11 Nev. 304. § 3145.
 Carbondale & Co. Road (Pa.), In re, 13 Atl. Rep. 913. § 619.
 Card v. Carr, 1 C. B. (N. S.) 197. § 3914.
 Carder v. Commrs, 16 Ohio St. 353. § 290.
 Cardiff Sav. Bank, R. 45 Ch. Div. 537. § 4121.
 Cardot v. Barney, 63 N. Y. 281. § 7156.
 Carew's Estate, 31 Beav. 39. §§ 5211, 5226, 5228.
 Carew v. Rutherford, 106 Mass. 1, 10. §§ 1030, 2099.
 Carey v. Cincinnati & Co. R. Co., 5 Iowa, 357. §§ 397, 3462, 4934, 5672.
 Carey v. Giles, 9 Ga. 253. §§ 5419, 5421, 6858.
 Carey v. Giles, 10 Ga. 9. §§ 4792, 4794, 6718, 6720.
 Carey v. Houston & Co. R. Co., 45 Fed. Rep. 438. § 4492.
 Carey v. McDougald, 7 Ga. 84. §§ 4747, 4789, 4795.
 Carey v. Nagle, 2 Biss. (U. S.) 242. § 4 Abb. (U. S.) 155. § 5859.
 Carey v. Philadelphia & Co., 33 Cal. 694. § 5175.
 Carey v. Whadsworth (Ala.), 11 South. Rep. 350. § 6503.
 Carey v. Woodward, 53 Ala. 375. § 1569.
 Cargill v. Bower, 10 Ch. Div. 502. §§ 1484, 1485.
 Carlen v. Drury, 1 Ves. & B. 154. §§ 912, 3312, 6732, 6834.
 Carleton v. Bickford, 13 Gray (Mass.), 591. § 3363.
 Carley v. Hodges, 19 Hun (N. Y.), 187. § 4203.
 Carli v. Stillwater & Co. R. Co., 16 Minn. 260. § 5626.
 Carling's Case, 1 Ch. Div. 115. §§ 459, 1592, 1642, 1800, 3563, 4154.
 Carling's Case, L. R., 20 Eq. 580. §§ 4024, 4038, 4154.
 Carling v. London & Co. Bank, 56 L. J. (Ch.) 321. §§ 1386, 1439.
 Carlisle v. Oahawba & Co. R. Co., 4 La. 70. § 1743.
 Carlisle v. Evansville & Co. R. Co., 13 Ind. 477. §§ 1311, 1395.
 Carlisle v. Saginaw & Co. R. Co., 27 Mich. 315. §§ 1151, 1161, 1177.
 Carlisle v. South Eastern R. Co., 2 Hall & Tw. 366; 1 Macn. & G. 689. §§ 4518, 4578.
 Carlisle v. Terre Haute & Co. R. Co., 6 Ind. 316. § 75.
 Carlisle v. Wilson, 5 East, 2. § 5930.
 Carl v. Brown, 2 Mich. 401. § 5752.
 Carlow v. Aultman, 28 Neb. 672. §§ 7913, 7915, 7918, 7922.
 Carly v. Giles, 10 Ga. 9. § 4790.
 Carlyon v. Lannan, 4 Nev. 156. § 2480.
 Carmichael's Case, 17 Sim. 163. § 428.
 Carmichael v. Trustees, 3 How. (Miss.) 84. §§ 7665, 7669.
 Carmody v. Powers, 60 Mich. 26. §§ 480, 481.
 Carnahan v. Exporters' & Co. Oil Co., 11 N. Y. Supp. 172; 32 N. Y. St. Rep. 1117. § 7508.
 Carnahan v. Western Union Tel. Co., 89 Ind. 526. § 5461.
 Carneal v. Banks, 10 Wheat. (U. S.) 181. § 7453.
 Carnegie v. Morrison, 2 Metc. (Mass.) 381. § 5154.
 Carolina Iron Co. v. Abernathy, 94 N. C. 545. § 223.
 Carondelet Canal & Co. v. Tedesco, 37 La. An. 100. § 5440.
 Carothers v. Alexander, 74 Tex. 309. § 1074.
 Carothers v. Philadelphia Co., 118 Pa. St. 468. § 611.
 Carpenter's Case, 5 De Gex & Sm. 402. § 473.
 Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 51. §§ 6141, 6163, 6189.
 Carpenter v. Catlin, 44 Barb. (N. Y.) 75. §§ 261, 375, 6247.
 Carpenter v. Central Park R. Co., 11 Abb. Pr. (N. S.) 416; 4 Daly, 550. §§ 1476, 5235.
 Carpenter v. Danforth, 52 Barb. (N. Y.) 581, §§ 2721, 4034.
 Carpenter v. Dexter, 8 Wall. (U. S.) 513. § 5092.
 Carpenter v. Farnsworth, 106 Mass. 561. §§ 5150, 5170.
 Carpenter v. Holcomb, 105 Mass. 280. § 2706.

- Carpenter v. Jennings, 77 Ill. 250. § 5626.
 Carpenter v. King, 9 Metc. (Mass.) 511. § 4779.
 Carpenter v. Landaff, 42 N. H. 218. § 5626.
 Carpenter v. Marine Bank, 14 Wis. 705, note. §§ 3476, 3483, 3486, 3493, 3509, 3515.
 Carpenter v. Mason, 3 Scam. (Ill.) 376. § 1207.
 Carpenter v. Mercantile Bank, 17 Ind. 253. § 7665.
 Carpenter v. Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 403. § 1024.
 Carpenter v. New York & C. R. Co., 5 Abb. Pr. (N. Y.) 277. § 1497.
 Carpenter v. People, 8 Col. 116. § 588.
 Carpenter v. Roberts, 56 How. Pr. (N. Y.) 216. § 4578.
 Carpenter v. Underwood, 19 N. Y. 520. § 6477.
 Carpenter v. Westinghouse Air-Brake Co., 32 Fed. Rep. 434. §§ 7475, 8021.
 Carpenter v. Delaware Ls. Co., 2 Binn. (Pa.) 264. § 7365.
 Carpentier v. Minturn, 65 Barb. (N. Y.) 293. §§ 7553, 7629.
 Carr v. Chartiers, 25 Pa. St. 337. § 4704.
 Carr v. City of St. Louis, 9 Mo. 191. § 1012.
 Carr v. Commercial Bank, 16 Wis. 52. § 3363.
 Carr v. Commercial Bank of Racine, 19 Wis. 272. § 7512.
 Carr v. Hamilton, 129 U. S. 252, 262. § 7298.
 Carr v. Houser, 46 Ga. 477. § 7014.
 Carr v. Le Fevre, 27 Pa. St. 413. §§ 1512, 1619, 1620, 1642, 1643, 1644, 6121, 6064.
 Carr v. Lewis Coal Co., 96 Mo. 149. § 2604, 6234.
 Carr v. Lewis Coal Co., 15 Mo. App. 551. § 2604.
 Carr v. Risher, 5 N. Y. Supp. 371. § 4169.
 Carr v. Union Mut. Fire Ins. Co., 28 Mo. App. 215. § 6743.
 Carr v. Union Mut. Fire Ins. Co., 33 Mo. App. 291. § 7226.
 Carr v. Waldron, 44 Mo. 393. § 1832.
 Carraher v. Mulligan, 28 N. Y. St. Rep. 439. §§ 4228, 4233.
 Carralli's Claim, L. R. 4 Ch. 174. § 3793.
 Carrick's Case, 1 Sim. (n. s.) 503. §§ 421, 426, 428, 1156.
 Carrier v. Schoharie Turnp. Co., 18 Johns. (N. Y.) 56. § 5919.
 Carrington v. Commercial & C. Ins. Co., 1 Bosw. (N. Y.) 152. §§ 6718, 6719.
 Carroll v. Green, 92 U. S. 509. §§ 1986, 1989, 1993, 4362, 7839.
 Carroll v. Charter Oak Ins. Co., 10 Abb. Pr. (n. s.) (N. Y.) 173; 1 Abb. App. Dec. (N. Y.) 321. § 5265.
 Carroll v. Cone, 40 Barb. 220. §§ 4618, 4971, 5093.
 Carroll v. East St. Louis, 67 Ill. 568. §§ 5784, 7884, 7913, 7914, 7916, 7917.
 Carroll v. Hinkley, 46 Me. 81. §§ 3021, 3033.
 Carroll v. Missouri Pac. R. Co., 88 Mo. 239. § 5514.
 Carroll v. Mullanphy Savings Bank, 8 Mo. App. 249, 253. §§ 849, 956, 957, 1031, 1032, 2322, 2391, 2490, 2677, 3233.
 Carroll v. Siebenthaler, 37 Cal. 193. § 4708.
 Carron Iron Co. v. MacLaren, 5 H. L. Cas. 416. §§ 7450, 7998, 7999.
 Carson v. Arctic Mining Co., 5 Mich. 288. § 1185.
 Carson v. Coleman, 11 N. J. Eq. 106. § 5626.
 Carson v. Iowa City Gaslight Co., 80 Iowa, 638. §§ 2300, 2720, 4498.
 Carson v. Lucas, 13 B. Mon. (Ky.) 213. §§ 5132, 5133.
 Carson v. Oates, 64 N. C. 115. § 3520.
 Carson City Sav. Bank v. Carson City Elev. Co., 90 Mich. 550. §§ 6015, 6016, 6019.
 Cartan v. Father Matthew Society, 3 Daly (N. Y.), 20. §§ 1010, 1052.
 Carter v. Balfour, 19 Ala. 894. § 235.
 Carter v. Barnabiston, 1 P. Wms. 505. § 4369.
 Carter v. Bradley, 58 Ill. 101. § 1084.
 Carter v. Burley, 9 N. H. 558. § 5070.
 Carter v. Clark, 89 Ind. 238. § 5909.
 Carter v. Darby, 15 Ala. 696. § 5246.
 Carter v. Dean of Ely, 7 Sim. 211. § 5058.
 Carter v. Dow, 16 Wis. 298. § 1028.
 Carter v. Ford Plate Glass Co., 85 Ind. 180. § 275.
 Carter v. Howe Machine Co., 51 Md. 290. § 6312.
 Carter v. Neal, 24 Ga. 346. § 7045.
 Carter v. Union Trint. Co., 54 Ark. 576. §§ 1517, 3718.
 Carter County v. Sinton, 120 U. S. 517. § 611.
 Cartilage v. First Nat. Bank, 71 Mo. 508. § 2865.
 Cartmell's Case, 9 Ch. 691. §§ 1515, 1522, 1706.
 Cartwright v. Chabert, 3 Tex. 261. § 7552.
 Cartwright v. Dickinson, 88 Tenn. 476. §§ 1493, 1535, 3553.
 Carver v. Braintree Man. Co., 2 Story (U. S.), 432, 437. §§ 3015, 2110, 3113, 3173, 4182.
 Carver v. Detroit & C. Plank Road Co., 61 Mich. 584. § 5937.
 Carver Co. v. Manufacturers' Ins. Co., 6 Gray (Mass.), 214. §§ 4622, 4629, 4717.
 Cary v. Holmes, 2 Allen (Mass.), 498. §§ 3817, 3825.
 Cary v. Holmes, 16 Gray (Mass.), 127. § 3818.
 Cary v. Marston, 56 Barb. (N. Y.) 29. §§ 11, 7790.
 Cary v. Schoharie Valley & C. Co., 4 Thomp. & C. (N. Y.) 285. § 298.
 Cary v. Webster, 1 Strange, 480. § 4096.
 Caryll v. McElrath, 3 Sand. (S. C.) 176. §§ 518, 1546, 4621, 4638, 6002, 7244.
 Cascade & C. Ins. Co. v. Journal Pub. Co., 1 Wash. 452. § 3906.
 Case v. Bank, 100 U. S. 446. §§ 4766, 7269.
 Case v. Beauregard, 99 U. S. 119; 101 U. S. 688. § 332.
 Case v. Benedict, 9 Cush. (Mass.) 540. § 518.
 Case v. Boughton, 11 Wend. (N. Y.) 106. § 1787.
 Case v. Citizens' Nat. Bank, 2 Woods (U. S.), 23; affirmed, 100 U. S. 476. §§ 7041, 7271, 7273.
 Case v. Hawkins, 53 Miss. 702. §§ 4622, 4637.
 Case v. Kelly, 133 U. S. 21. §§ 5800, 5808, 6002.
 Case v. Potter, 8 Johns. (N. Y.) 211. § 7733.
 Case v. Small, 4 Woods (U. S.), 78; 10 Fed. Rep. 722 §§ 3265, 7281, 7284.
 Case v. Terrell, 11 Wall. (U. S.) 199. §§ 7283, 7321.
 Case M. Co. v. Sorxman, 138 U. S. 431. § 4849.
 Casey v. Calli, 94 U. S. 673. §§ 248, 1853, 1879.
 Casey v. Carver, 96 U. S. 467. § 2615.
 Casey v. Cincinnati Typographical Union, 45 Fed. Rep. 135. § 7782.
 Casey v. Credit Mobilier, 2 Woods (U. S.), 77. § 7272.
 Casey v. Galli, 94 U. S. 673. §§ 7284, 7286, 7288, 7290.
 Casey v. Inloes, 1 Gill (Md.), 430. § 5246.
 Casey v. Schneider, 96 U. S. 496. § 2615.
 Cason v. Seidner, 77 Va. 293. § 6568.
 Cass v. Chicago & C. R. Co., 25 Neb. 348. § 8129.
 Cass v. Dillon, 2 Ohio St. 607. § 1118.
 Cass v. Higenbotam, 100 N. Y. 248. § 2856.
 Cass v. New York & C. R. Co., 1 E. D. Smith (N. Y.), 522. § 7415.
 Cass v. Pittsburgh & C. R. Co., 80 Pa. St. 31. § 3225.
 Cass County v. Chicago & C. R. Co., 25 Neb. 348. § 8129.
 Cassell v. Dows, 1 Blatchf. (U. S.) 335. § 5154.
 Cassell v. Lexington & C. Turnp. Co. (Ky.), 9 S. W. Rep. 502. §§ 624, 5383, 5441, 5342.
 Casserly v. Witherbee, 119 N. Y. 522. § 6996.
 Castellani v. Hobson, L. R. 10 Eq. 47. §§ 3255, 3283, 3308.
 Castello's Case, L. R. 8 Eq. 504. §§ 3170, 3273.
 Castle v. Belfast Foundry Co., 72 Me. 167. §§ 4643, 4645.
 Castle v. Bullard, 23 How. (U. S.) 189. § 1475.
 Castleman v. Holmes, 4 J. J. Marsh. (Ky.) 1. §§ 3089, 3092, 3187, 3271, 3432, 3437, 3438, 3544, 3701.
 Caston's Case, 12 App. (Can.) 486. § 1147.
 Catawissa R. Co. v. Titus, 49 Pa. St. 277. § 6239.
 Caterly v. Union Pacific R. Co., 2 Idaho, 540. § 5452.
 Cates v. Sparkman, 73 Tex. 619. § 4485.
 Catholic Cathedral Church v. Manning, 72 Md. 116. §§ 5774, 5789, 5820.
 Catholic Church v. Tobbein, 82 Mo. 418. §§ 509, 5774, 7652.
 Catlin v. Baldwin, 47 Conn. 183. § 6887.
 Catlin v. Eagle Bank, 6 Conn. 233. §§ 2959, 6466, 6494, 6666.
 Catlin v. Green, 120 N. Y. 441. §§ 4494, 4495, 5898.
 Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477. §§ 7334, 7338, 7344.
 Catskill Bank v. Stall, 15 Wend. (N. Y.) 364. §§ 5740, 5838.
 Cattron v. First Universalist Society, 46 Iowa, 106. §§ 4622, 4641, 5126.
 Caulkins v. Gaslight Co., 85 Tenn. 683. §§ 2486, 2489, 2532, 2534, 2536, 2539, 2540, 2593.
 Causton v. Burke, 2 Har. & G. (Md.) 295. § 3446.
 Cave v. Cave, 15 Ch. Div. 639. § 5209.
 Cavendish-Bentinck v. Fenn, 12 App. Cas. 652. § 4025.
 Cavin v. Gleason, 105 N. Y. 256. §§ 7100, 7103, 7104, 7105.
 Cawley, Re, 42 Ch. Div. 209. §§ 1746, 2301, 2327, 2331.

Cayler—Chamberlain TABLE OF CASES CITED.

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 Cayuga & Co. R. Co. v. Kyle, 64 N. Y. 185. §§ 1849, 1857.
 Cayuga & Co. R. Co. v. Kyle, 5 Thomp. & C. (N. Y.) 659. § 1285.
 Cayuga Bridge Co. v. Magee, 2 Paige (N. Y.), 116. § 5670.
 Cayuga County Nat. Bank v. Dunklin, 29 Mo. App. 442. § 7642.
 Cazeaux v. Mall, 25 Barb. (N. Y.) 578. §§ 1462, 1472, 1500, 1503, 1504, 4582.
 Cearloss v. State, 44 Md. 403. § 5480.
 Cecil, Matter of, 36 How. Fr. (N. Y.) 477. §§ 749, 765.
 Cedar Falls & Co. R. Co. v. Rich, 33 Iowa, 113. § 1342.
 Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297. § 7574.
 Cedar Rapids Ins. Co. v. Butler, 83 Iowa, 124. § 1438.
 Ceeder v. Loud & Son's Lumber Co., 86 Mich. 541. §§ 4617, 4618, 4623, 4626, 4627, 4854, 4860, 4882.
 Center v. McQuesten, 18 Kan. 476. § 7810.
 Central Ag. & Co. Asso. v. Alabama & Co. Co., 70 Ala. 120. §§ 502, 512, 522, 590, 1849, 1850, 1858, 3255, 3347, 3359, 3521, 3650.
 Central & Co. R. Co. v. Morris, 68 Tex. 49. §§ 5880, 5884, 7517.
 Central & Co. R. Co. v. People, 5 Colo. 39. § 6791.
 Central & Co. R. Co. v. Twenty-third St. R., 53 How. Pr. (N. Y.) 45. §§ 4428, 7738.
 Central & Co. Telephone Co. v. Bradbury, 106 Ind. 1. § 5530.
 Central & Co. Telephone Co. v. State, 118 Ind. 194. § 5530.
 Central Bank of Canada, Re, 25 Can. L. J. 238. §§ 248, 1147, 1228, 1402, 1439, 1879.
 Central Bank v. Empire Stone Dressing Co., 26 Barb. (N. Y.) 23. §§ 5739, 5740, 5759.
 Central Bank v. Gibson, 11 Ga. 453. §§ 6857, 7427.
 Central Bank v. Lang, 1 Bosw. (N. Y.) 202. § 5755.
 Central Bank v. Williston, 138 Mass. 244. § 2409.
 Central Branch Union Pac. R. Co. v. Western Union Tel. Co., 3 Fed. Rep. 417. § 5337.
 Central Bridge v. Abbott, 4 Cush. (Mass.) 473. § 2317.
 Central Bridge Corp. v. Butler, 2 Gray (Mass.), 130. § 5930.
 Central Bridge Corp. v. Lowell, 15 Gray (Mass.), 106. §§ 5440, 5615, 5616, 5618.
 Central City Sav. Bank v. Walker, 66 N. Y. 424. § 2992.
 Central Cross-town R. Co. v. Twenty-third Street R. Co., 54 How. Pr. (N. Y.) 168. § 611.
 Central Ex. Co. v. St. Louis & Co. R. Co., 40 Fed. Rep. 426. § 7523.
 Central Gold Min. Co. v. Platt, 3 Daly (N. Y.), 263, 272. §§ 6135, 6156, 6189.
 Central Land Co. v. Oshloun, 16 W. Va. 361. § 7665.
 Central Man. Co. v. Hartshorne, 3 Conn. 199. §§ 7658, 7659, 7661.
 Central Nat. Bank v. United States, 137 U. S. 355, 365. §§ 2903, 2904, 2906.
 Central Nat. Bank v. White, 37 N. Y. Super. 297. § 7738.
 Central Nat. Bank v. Williston, 138 Mass. 244. § 3289.
 Central Nat. Bank v. Worcester & Co. Railroad, 13 Allen (Mass.), 105. § 6730.
 Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454. § 2181.
 Central Park & Co. Ins. Co. v. Callaghan, 41 Barb. (N. Y.) 448. § 5715.
 Central Plank Road Co. v. Clemens, 16 Mo. 359. §§ 82, 1407, 1494, 1853, 1973, 1981, 1982.
 Central Plank Road Co. v. Sammons, 27 Ala. 330. § 7805.
 Central R. & Co. Co. v. Carr, 76 Ala. 388. § 8005.
 Central R. & Co. Co. v. Cheatham, 85 Ala. 292. § 5899.
 Central R. & Co. Co. v. Claghorn, 1 Speer's Eq. (S. C.) 545. §§ 4062, 5205, 6498, 6499.
 Central R. & Co. Co. v. Georgia Construction & Co., 32 S. C. 319. §§ 8001, 8002, 8059, 8065.
 Central R. & Co. Co. v. Georgia, 92 U. S. 665. §§ 365, 368, 389, 395, 396.
 Central R. & Co. Co. v. Logan, 77 Ga. 804. § 8046.
 Central R. & Co. Co. v. Smith, 76 Ga. 572. §§ 5838, 5993, 6007, 6281.
 Central R. & Co. Co. v. State, 54 Ga. 401. § 337.
 Central R. & Co. Co. v. Ward, 37 Ga. 515. §§ 2497, 2503.
 Central R. Co. v. Brinson, 64 Ga. 475. § 5884.
 Central R. Co. v. Collins, 40 Ga. 582-617. §§ 71, 1102, 1104, 2070, 4520, 4532, 4588.
 Central R. Co. v. Mills, 113 U. S. 249. § 7474.
 Central R. Co. v. Kisch, L. R. 2 H. L. 1413; L. R. 5 Eq. 262. § 1405.
 Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475. §§ 1102, 5719.
 Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24. §§ 4682, 5659, 5356, 5358, 5360, 5880, 5881, 5890, 5968, 5980, 5992, 5999, 6000, 6410.
 Central Trust Co. v. East Tenn. & Co. R. Co., 30 Fed. Rep. 895. §§ 6260, 7050.
 Central Trust Co. v. Marietta & Co. R. Co., 43 Fed. Rep. 14. §§ 4589, 4590.
 Central Trust Co. v. Marietta & Co. R. Co., 43 Fed. Rep. 32, 850. § 7213.
 Central Trust Co. v. McGeorge, 151 U. S. 129. §§ 7554, 7556.
 Central Trust Co. v. New York & Co. R. Co., 110 N. Y. 250. §§ 7000, 7002.
 Central Trust Co. v. New York City & Co. R. Co. 18 Abb. N. Cas. (N. Y.) 381. § 6057.
 Central Trust Co. v. New York City & Co. R. Co., 33 Hun (N. Y.), 513. § 6212.
 Central Trust Co. v. Railway Co., MS. §§ 7207, 7211.
 Central Trust Co. v. Sheffield & Co. R. Co., 44 Fed. Rep. 526. § 7576.
 Central Trust Co. v. Sloan, 65 Iowa, 655. §§ 5450, 7160.
 Central Trust Co. v. St. Louis & Co. R. Co., 40 Fed. Rep. 426, 428. §§ 7132, 7517.
 Central Trust Co. v. St. Louis & Co. R. Co., 41 Fed. Rep. 551. §§ 7120, 7024, 7132, 7133, 7891.
 Central Trust Co. v. Wabash & Co. R. Co., 23 Fed. Rep. 863. § 6843.
 Central Trust Co. v. Wabash & Co. R. Co., 28 Fed. Rep. 871. § 7050.
 Central Trust Co. v. Wabash & Co. R. Co., 30 Fed. Rep. 332. § 7116.
 Central Trust Co. v. Wabash, St. Louis & Co. R. Co., 32 Fed. Rep. 566. §§ 7123, 7204.
 Central Trust Co. v. Wabash & Co. R. Co., 34 Fed. Rep. 254. § 7305.
 Central Trust Co. v. Wabash & Co. R. Co., 34 Fed. Rep. 259. § 6999.
 Central Trust Co. v. Wabash & Co. R. Co., 52 Fed. Rep. 903. § 7007.
 Central Turnp. Corp. v. Valentine, 10 Pick. (Mass.) 142. §§ 246, 1335, 1704, 1724, 1738, 1950, 3993.
 Centre Turnp. Co. v. McConaby, 16 Serg. & R. 140. §§ 446, 501, 1376, 1396, 1399, 1400, 1853, 2991, 6334.
 Centre Turnp. Co. v. Smith, 12 Vt. 212. § 5931.
 Centre Turnp. Co. v. Vandusen, 10 Vt. 197. §§ 5916, 5919.
 Centreville v. Woods, 57 Ind. 192. § 4376.
 Chadbourne v. Sumner, 16 N. H. 129. § 7507.
 Chadsey v. McCreary, 27 Ill. 253. §§ 5129, 5133.
 Chadwell, Ex parte, 59 Tenn. 98. §§ 110, 125.
 Chadwick v. Clarke, 1 Com. B. 700. § 3446.
 Chadwick v. Proprietors of Haverhill Bridge, 2 Dane Abr. 686. § 5405.
 Chafee v. Fourth Nat. Bank, 71 Me. 514. § 6955.
 Chafee v. Sprague Man. Co., 14 R. I. 168. § 2656.
 Chaffe v. Ludeling, 27 La. An. 607. § 6140.
 Chaffee v. Middlesex R. Co., 146 Mass. 224. §§ 6064, 6093, 6107.
 Chaffee County, v. Potter, 142 U. S. 355. § 5262.
 Chaffin v. Cummings, 37 Me. 76. §§ 1138, 1139, 1140, 1224, 1377, 1879, 1907, 3357, 3729.
 Chagrin Falls & Co. Plank Road Co. v. Cane, 2 Ohio St. 419. § 5906.
 Chellis v. Atchison & Co. R. Co., 16 Kan. 117. § 5592.
 Chalk v. Tennent, 57 L. T. (N. S.) 598. § 3404.
 Chalk v. Chalk, 1 Conn. 76. § 5817.
 Chalmers v. Mut. Fire Ins. Co., 3 Low. Can. Jur. 2. § 4697.
 Chamberlain v. Bromberg, 83 Ala. 576. §§ 3557, 6466, 6469.
 Chamberlain v. Burlington, 19 Iowa, 395. § 1119.
 Chamberlain v. Chamberlain, 43 N. Y. 424. §§ 5737, 5829.
 Chamberlain v. Greenleaf, 4 Abb. N. Cas. (N. Y.) 178. § 6996.
 Chamberlain v. Lincoln, 129 Mass. 70. §§ 912, 6603.
 Chamberlain v. Pacific Wool Growing Co., 54 Cal. 103. §§ 4042, 4381, 5129.
 Chamberlain v. Painsville & Co. R. Co., 15 Ohio St. 225. §§ 704, 1224, 1317, 1336, 1339, 1352.

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- Chamberlain v. Thompson, 10 Conn. 243. § 6917.
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- Chamberlain of London v. Compton, 7 Dowl. & Ry. 601. § 1038.
- Chamberlin v. Huguenot Co., 118 Mass. 532, 533. §§ 3020, 3351, 3552, 3741.
- Chamberlin v. Mammoth Mining Co., 20 Mo. 96. § 4630.
- Chambers v. Calhoun, 18 Pa. St. 13. § 1176.
- Chambers v. Falkner, 65 Ala. 418. §§ 5712, 6008.
- Chambers v. King & Co. Manufactory, 16 Kan. 270. § 7503.
- Chambers v. Lewis, 28 N. Y. 454. §§ 4323, 4370.
- Chambers v. Manchester & C. R. Co., 5 Best & S. 588. §§ 5702, 5979.
- Chambers v. Manchester & C. R. Co., 33 L. J. (N. S.) 238. § 3988.
- Chambers v. Mason, 5 C. B. (N. S.) 59. § 4943.
- Chambers v. Smith, 23 Co. 174. § 5329.
- Chambers v. St. Louis, 29 Mo. 543, 576. §§ 1595, 5794, 5799, 6033, 6035, 7406.
- Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120. §§ 2340, 2376, 2389, 3291.
- Champion v. Memphis & C. R. Co., 35 Miss. 692. §§ 72, 74, 1272, 1285, 1289.
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- Champlin v. Parish, 11 Paige (N. Y.), 405. § 5018.
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- Chandler v. Bacon, 30 Fed. Rep. 538. §§ 457, 459, 461.
- Chandler v. Brown, 77 Ill. 333. §§ 3494, 3499, 6864, 6962.
- Chandler v. Dore, 84 Ill. 275. § 6962.
- Chandler v. Hoag, 5 Thomp. & C. (N. Y.) 197; 2 Hun (N. Y.), 613. §§ 3901, 4207.
- Chandler v. Keith, 43 Iowa, 99. § 3386.
- Chandler v. Monmouth Bank, 13 N. J. L. 255. § 4386, 4387.
- Chandler v. Northern Cross R. Co., 18 Ill. 190. §§ 1140, 1972, 5642, 5643.
- Chandler v. Siddle, 3 Dill. (U. S.) 477. §§ 1702, 1703, 7337.
- Chapleo v. Brunswick Building Soc., 6 Q. B. Div. 696. §§ 5599, 5702.
- Chaplin v. Clark, 4 Exch. 402. §§ 440, 447.
- Chaplin v. Highway Commrs, 129 Ill. 651. § 5625.
- Chapman's Case, L. R. 2 Eq. 567. §§ 1260, 4154.
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- Chapman v. Comstock, 58 Hun (N. Y.), 325; 11 N. Y. Supp. 930. §§ 4209, 4361, 4363.
- Chapman v. Cumming, 17 N. J. L. 11. § 3363.
- Chapman v. Derby, 2 Vern. 117. § 7399.
- Chapman v. Douglas, 5 Daly (N. Y.), 244. § 6920.
- Chapman v. Douglas Co., 107 U. S. 348. § 6005.
- Chapman v. Gale, 32 N. H. 141. § 2665.
- Chapman v. Mad River & C. R. Co., 6 Ohio St. 119. § 343.
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- Chapman v. New Orleans Gas & C. Co., 4 La. An. 153. § 4465.
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- Chapman v. Rose, 56 N. Y. 137. § 4724.
- Chapman v. Weimer, 4 Ohio St. 481. §§ 6141, 6145.
- Chapman v. Baker's Case, L. R. 3 Eq. 360. §§ 3192, 3194, 3198.
- Chapin v. Thompson, 4 Hun (N. Y.), 779, 782. § 4015.
- Chapin v. Vermont & C. R. Co., 8 Gray (Mass.), 575. §§ 6064, 6086.
- Chappell's Case, L. R. 6 Ch. 902. § 3258.
- Chapple's Case, 5 De Gex & S. 400. § 3209.
- Charitable Association v. Baldwin, 1 Metc. (Mass.) 359. §§ 788, 7592.
- Charitable Corporation v. Sutton, 2 Atk. 400; 9 Mod. 349. §§ 469, 2057, 4009, 4095, 4106, 4120, 4295, 4477.
- Charity Hospital v. New Orleans Gas Light Co., 40 La. An. 382. § 387.
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- Charles River Bridge Co. v. Warren Bridge, 7 Pick. (Mass.) 344. §§ 87, 501, 529, 2991, 5403, 6602.
- Charleston v. Baptist Church, 4 Strobb. L. (S. C.) 303. § 1025.
- Charleston v. Branch, 15 Wall. (U. S.) 470. §§ 368, 369.
- Charleston v. Goldsmith, 2 Speer (S. C.), 428. § 1025.
- Charleston v. People's Nat. Bank, 5 S. C. 103. § 2880.
- Charleston Ins. Co. v. Sebring, 5 Rich. Eq. (S. C.) 342. §§ 4518, 4566, 4578.
- Charlestown Root & C. Co. v. Dunsmore, 60 N. H. 85. §§ 3974, 4107.
- Charlotte & C. R. Co. v. Blakely, 3 Strobb. (S. C.) 245. §§ 1216, 1332.
- Charlotte & C. R. Co. v. Gibbes, 27 S. O. 385. §§ 387, 5424.
- Charlotte Bank v. Charlotte, 85 N. C. 433. § 72.
- Charlton v. Hay, 31 L. T. (N. S.) 437; 23 W. R. 129. §§ 457, 476.
- Charlton v. Newcastle & C. R. Co., 5 Jur. (N. S.) 1096; 7 Week. Rep. 731. §§ 348, 5838.
- Charnock v. Colfax Township, 51 Iowa, 70. § 7758.
- Charnock v. Oak Life Ins. Co. v. Sawyer, 44 Wis. 387. § 7936.
- Charter of American Electropathic Institute, Re, 14 Phila. (Pa.) 128. § 119.
- Charter of Butchers' Beneficial Assn., Re, 35 Pa. St. 151. § 116.
- Charter of Church of Holy Communion, Re, 14 Phila. (Pa.) 121. § 112.
- Charter of Journalists' Fund, Re, 8 Phila. (Pa.) 272. § 116.
- Charter of Philadelphia Artisans' Institute, Re, 8 Phila. (Pa.) 229. §§ 111, 113.
- Charter of Rev. David Mulholland Benevolent Society, Re, 10 Phila. (Pa.) 19. § 115.
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- Chase v. Seearles, 45 N. H. 511. § 6905.
- Chase v. South Pac. Coast R. Co., 83 Cal. 468. § 7428.
- Chase v. Sycamore & C. R. Co., 38 Ill. 215. §§ 1158, 1332, 1333, 1577, 1919, 7732, 7740.
- Chase v. Tuttle, 55 Conn. 455. §§ 790, 3859, 3934, 3936, 6473, 6479.
- Chase v. Vanderbilt, 62 N. Y. 307. §§ 4465, 7575.
- Chase v. Vanderbilt, 37 N. Y. Super. 344. § 2160.
- Chase's Patent Elevator Co. v. Boston Tow Boat Co., 152 Mass. 423. §§ 2983, 7958, 7979.
- Chase's Patent Elevator Co. v. Boston Towboat Co., 155 Mass. 211. § 7642.
- Chautauque Co. Bank v. Risley, 19 N. Y. 369, 381. § 7883.
- Chautauque County Bank v. White, 6 N. Y. 236. § 5246.
- Chater v. Becket, 7 T. R. 201. § 1049.
- Chater v. San Francisco Sugar Refining Co., 19 Cal. 219. §§ 2728, 2756.
- Chattahoochee Nat. Bank v. Schley, 58 Ga. 369. § 5951.
- Chattanooga & C. R. Co. v. Davis, 89 Ga. 708. § 5877.
- Chattanooga & C. R. Co. v. Liddell, 85 Ga. 482. § 6378.
- Chattanooga & C. R. Co. v. McLendon, 86 Ga. 517. § 6378.
- Chautauque Co. Bank v. Risley, 19 N. Y. 369. §§ 5814, 5967, 7128.
- Chautauque County Bank v. White, 6 N. Y. 236. § 7011.
- Cheale v. Kenward, 3 De Gex & J. 27. § 2728.
- Chealy v. Brewer, 7 Mass. 259. § 6898.
- Cheeny v. Clark, 3 Vt. 431. § 5167.
- Cheeny v. Lafayette & C. R. Co., 68 Ill. 570. §§ 4380, 4384, 4385, 4387.
- Cheer v. Bank of Baltimore, 14 Md. 299. § 4701.

Cheetham—Chicago TABLE OF CASES CITED.

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 Cheever v. Meyer, 52 Vt. 65. §§ 2634, 2637.
 Cheever v. Minton, 12 Colo. 557. § 5234.
 Chelmsford v. Demarest, 7 Gray (Mass.), 1, 5. §§ 4902, 4904.
 Cheltenham & Co. R. Co. v. Daniel, 2 Ad. & El. (N. S.) 281. § 1800.
 Cheltenham Fire Brick Co. v. Cook, 44 Mo. 29. § 4914.
 Chemical Nat. Bank v. Bailey, 12 Blatchf. (U. S.) 490. §§ 7314, 7320, 7322.
 Chemical Nat. Bank v. Colwell, 29 N. Y. St. Rep. 726; 9 N. Y. Supp. 285. §§ 4959, 4961.
 Chemical Nat. Bank v. Colwell, 132 N. Y. 250; 9 N. Y. Supp. 285, 288. §§ 3286, 3238, 3302, 3851, 3859, 3836, 3887.
 Chemical Nat. Bank v. Colwell, 14 Daly (N. Y.), 361; 14 N. Y. St. Rep. 582. § 4190.
 Chemical Nat. Bank v. First Nat. Bank (Ky.), 20 S. W. Rep. 535. § 4721.
 Chemical Nat. Bank v. Kohner, 58 How. Pr. (N. Y.) 267; 8 Daly (N. Y.), 530. § 4752.
 Chemical Nat. Bank v. Wagner (Ky.), 20 S. W. Rep. 535. §§ 4721, 4724.
 Chemung Canal Bank v. Lowery, 93 U. S. 72. § 8001.
 Chesapeake & Co. Ins. Co., 19 Wend. (N. Y.) 635. § 745.
 Chesapeake Bank v. Noyes, 9 Cow. 194. § 7690.
 Chesapeake Bridge Co. v. Lewis, 63 Barb. (N. Y.) 111. §§ 4455, 7731.
 Chesapeake Mutual Ins. Co., Re, 19 Wend. (N. Y.) 635. § 3864.
 Cheraw & Co. R. Co. v. Garland, 14 S. C. 63. §§ 227, 1739, 7661.
 Cheraw & Co. R. Co. v. White, 10 S. C. 155. §§ 1511, 1513.
 Cheraw & Co. R. Co. v. White, 14 S. C. 51. §§ 227, 7658, 7661.
 Cherley v. Smith, Adams, 20. § 5930.
 Cherokee Iron Co. v. Jones, 62 Ga. 276. §§ 86, 4520, 4532, 5955.
 Cherry v. Colonial Bank of Australasia, L. R. 3 P. C. 24. §§ 4135, 5038.
 Cherry v. Frost, 7 Lea (Tenn.), 1. §§ 2593, 2636.
 Cherry v. Heming, 4 Ex. 631. § 5089.
 Cherry v. Lamar, 58 Ga. 541. §§ 1994, 2003.
 Cherry v. North & South R. Co., 59 Ga. 446. § 7503.
 Chesapeake & Co. Canal Co. v. Baltimore & Co. R. Co., 4 Gill & J. (Md.), 1, 40. §§ 5707, 5577, 6598, 6602.
 Chesapeake & Co. Canal Co. v. Blair, 45 Md. 102. §§ 2044, 6107.
 Chesapeake & Co. Canal Co. v. Key, 3 Cranch C. C. (U. S.) 599. §§ 5601, 5659.
 Chesapeake & Co. Canal Co. v. Knapp, 9 Pet. (U. S.) 541. §§ 5046, 5174, 7392.
 Chesapeake & Co. Canal Co. v. Robertson & Cranch C. C. (U. S.) 291. §§ 71, 915, 1719.
 Chesapeake & Co. R. Co. v. Griest, 85 Ky. 619. §§ 3345, 3347.
 Chesapeake & Co. R. Co. v. Heath, 87 Ky. 651. § 7435.
 Chesapeake & Co. R. Co. v. Paine, 29 Gratt. (Va.) 502. § 7813.
 Chesapeake & Co. R. Co. v. Robertson, 4 Cranch C. C. (U. S.) 291. § 1278.
 Chesapeake & Co. R. Co. v. State, 16 Lea (Tenn.), 300. § 5683.
 Chesapeake & Co. R. Co. v. Virginia, 94 U. S. 713. § 368.
 Chesapeake & Co. Tel. Co. v. Baltimore & Co. Tel. Co., 66 Md. 399. §§ 5493, 5530.
 Chesapeake Bank v. First Nat. Bank, 40 Md. 269. § 7278.
 Cheshire v. County Comm'rs, 118 Mass. 386. § 8134.
 Cheshire Turnpike v. Stevens, 10 N. H. 133. §§ 5913, 5919.
 Chesley v. Pierce, 32 N. H. 402. §§ 1140, 1220, 3170, 3173, 3177.
 Chester v. Dickerson, 54 N. Y. 1. § 1475.
 Chester County v. Brower, 117 Pa. St. 647. § 5625.
 Chester Glass Co. v. Dewey, 16 Mass. 94. §§ 501, 518, 523, 1140, 1187, 1550, 1794, 1852, 1853, 1962, 2394, 5962, 6028, 7689.
 Chestney v. Coon, 3 Johns. (N. Y.) 150. § 5922.
 Chestnut v. Pennell, 92 Ill. 55. § 3407.
 Chestnut v. Shane, 16 Ohio, 599. § 590.
 Chestnut Hill & Co. Turnp. Co. v. Rutter, 4 Serg. & R. (Pa.) 6. §§ 5045, 5046, 6275, 6279, 6305, 7392.
 Chestnut-Hill Reservoir Co. v. Chase, 14 Conn. 123. § 3961.
 Chetlain v. Republic Ins. Co., 26 Ill. 220. §§ 1970, 1971, 2062, 3968, 4479, 6555.
 Chew v. Bank of Baltimore, 14 Md. 299. §§ 2395, 2427, 2457, 2493.
 Chew v. Ellingwood, 86 Mo. 260. §§ 6468, 6473.
 Chew v. Henrietta & Co., 2 Fed. Rep. 5. §§ 4697, 6082.
 Chew v. Keok, 4 Rawle (Pa.), 163. § 5104.
 Chewalola Lime Works v. Dismukes, 87 Ala. 344. §§ 5638, 5955, 5963, 5969, 6007.
 Chicago v. Baer, 41 Ill. 306. § 5626.
 Chicago v. Cameron, 120 Ill. 447. §§ 6082, 6164, 6184.
 Chicago v. Cameron, 22 Ill. App. 91. § 4569.
 Chicago v. Chicago & Co. R. Co., 105 Ill. 73. §§ 6586, 6591.
 Chicago v. Evans, 24 Ill. 52. § 7784.
 Chicago v. Hall, 103 Ill. 342. § 3840.
 Chicago v. Martin, 49 Ill. 241. §§ 6377, 6380.
 Chicago v. McGinn, 51 Ill. 266. § 1095.
 Chicago v. McGraw, 75 Ill. 566. § 7304.
 Chicago v. Robbins, 2 Black (U. S.) 418. § 4376.
 Chicago v. Rumpf, 45 Ill. 90. § 1028.
 Chicago v. Sheldon, 9 Wall. (U. S.), 50. § 7205.
 Chicago v. Turner, 80 Ill. 419, 420. § 7394.
 Chicago & Co. Bridge Co. v. Anglo-American Packing & Co., 46 Fed. Rep. 584. §§ 3392, 7797.
 Chicago & Co. Gaslight Co. v. Lake, 130 Ill. 42, 60. § 7769.
 Chicago & Co. R. Co. v. Ackley, 94 U. S. 179. §§ 5530, 5533, 5543.
 Chicago & Co. R. Co. v. Auditor-General, 53 Mich. 79. § 8130.
 Chicago & Co. R. Co. v. Ayres, 140 Ill. 644. §§ 5872, 5873.
 Chicago & Co. R. Co. v. Bank of North America, 82 Ill. 493. §§ 7423, 7424.
 Chicago & Co. R. Co. v. Becker, 32 Fed. Rep. 849. §§ 5539, 5540, 5546.
 Chicago & Co. R. Co. v. Boone Co., 44 Ill. 240, 247. §§ 4617, 4618.
 Chicago & Co. R. Co. v. Carter, 20 Ill. 390. § 4337.
 Chicago & Co. R. Co. v. Casey, 9 Ill. App. 632. §§ 6275, 6298.
 Chicago & Co. R. Co. v. Cason, 133 Ind. 49. §§ 6826, 6830, 6881.
 Chicago & Co. R. Co. v. Chicago, 90 Ill. 573. § 5626.
 Chicago & Co. R. Co. v. Chicago & Co. R. Co., 112 Ill. 589. § 5686.
 Chicago & Co. R. Co. v. Coleman, 18 Ill. 297. §§ 4617, 4618, 4683.
 Chicago & Co. R. Co. v. Derkes, 103 Ind. 520. §§ 6016, 6021, 6022, 6025.
 Chicago & Co. R. Co. v. Dickson, 63 Ill. 151. §§ 6275, 6298, 6395.
 Chicago & Co. R. Co. v. Fell, 22 Ill. 333. §§ 6305, 7516, 7539.
 Chicago & Co. R. Co. v. Fosdick, 106 U. S. 47. §§ 6122, 6210, 6212, 6243, 6244, 6245.
 Chicago & Co. R. Co. v. Griffin, 68 Ill. 499. §§ 6309, 6391.
 Chicago & Co. R. Co. v. Guffey, 120 U. S. 569. § 2823.
 Chicago & Co. R. Co. v. Haggerty, 67 Ill. 113. §§ 5504, 5507.
 Chicago & Co. R. Co. v. Iowa, 94 U. S. 155. §§ 592, 5930, 5930, 5934, 5935, 5938, 5939, 5941, 5943.
 Chicago & Co. R. Co. v. James, 22 Wis. 194. §§ 3950, 4974, 4981, 4985.
 Chicago & Co. R. Co. v. James, 24 Wis. 388. § 5832.
 Chicago & Co. R. Co. v. Keisel, 43 Iowa, 39. § 288.
 Chicago & Co. R. Co. v. Keokuk & Packet Co., 108 Ill. 317. §§ 7334, 7339, 7341.
 Chicago & Co. R. Co. v. Lewis, 53 Iowa, 101. § 7964.
 Chicago & Co. R. Co. v. Loewenthal, 93 Ill. 433. § 6067.
 Chicago & Co. R. Co. v. Manning, 23 Neb. 552. §§ 8019, 8042.
 Chicago & Co. R. Co. v. Marseilles, 84 Ill. 145, 643. § 2052.
 Chicago & Co. R. Co. v. McCarthy, 20 Ill. 385. § 6303.
 Chicago & Co. R. Co. v. McGraw, 104 Mo. 282. § 5626.
 Chicago & Co. R. Co. v. McLellan, 84 Ill. 109, 116. § 1022.
 Chicago & Co. R. Co. v. Minnesota, 134 U. S. 418. §§ 91, 580, 643, 644, 5433, 5500, 5530, 5531, 5533, 5537, 5540, 5543, 5546.
 Chicago & Co. R. Co. v. Moffitt, 75 Ill. 524. § 365.
 Chicago & Co. R. Co. v. Ozark Township, 46 Kan. 415. § 4899.
 Chicago & Co. R. Co. v. Page, 1 Biss. (U. S.) 461. § 2908.
 Chicago & Co. R. Co. v. Parks, 18 Ill. 460. § 6299.
 Chicago & Co. R. Co. v. People, 67 Ill. 11. § 5530.
 Chicago & Co. R. Co. v. People, 73 Ill. 541. § 6585.

TABLE OF CASES CITED. Chicago—Cincinnati

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Chicago & Co. R. Co. v. People, 120 Ill. 667. § 6352.
Chicago & Co. R. Co. v. Pyne, 30 Fed. Rep. 86. § 6088.
Chicago & Co. R. Co. v. Ragland, 84 Ill. 375. §§ 8076, 8077.
Chicago & Co. R. Co. v. Reidy, 66 Ill. 43. § 5504.
Chicago & Co. R. Co. v. Reno, 113 Ill. 39. § 7769.
Chicago & Co. R. Co. v. School District No. 1, 25 Neb. 359. § 8129.
Chicago & Co. R. Co. v. Smith, 62 Ill. 268. §§ 1120, 5600.
Chicago & Co. R. Co. v. Stafford County Commrs, 36 Kan. 121. § 501.
Chicago & Co. R. Co. v. Sturgis, 44 Mich. 538. § 7822.
Chicago & Co. R. Co. v. Sykes, 96 Ill. 162. §§ 6275, 6298.
Chicago & Co. R. Co. v. Third Nat. Bank, 134 U. S. 276; 26 Fed. Rep. 820. §§ 2858, 5897, 5898, 6543.
Chicago & Co. R. Co. v. Town of Lake, 71 Ill. 333. §§ 5592, 5615.
Chicago & Co. R. Co. v. Union Pac. R. Co., 47 Fed. Rep. 15. §§ 3952, 4622, 4647, 4658.
Chicago & Co. R. Co. v. Walker, 9 Lea (Tenn.), 475. § 8049.
Chicago & Co. R. Co. v. Wellman, 153 U. S. 339. §§ 5500, 5530, 5533, 5543.
Chicago & Co. R. Co. v. Whipple, 22 Ill. 105. §§ 5359, 6293, 6505.
Chicago & Co. R. Co. v. Wiebe, 25 Neb. 542. § 5625.
Chicago & Co. R. Co. v. Wilson, 17 Ill. 123. § 5600.
Chicago & Co. R. Co. v. Young, 96 Mo. 38. § 825.
Chicago Building Soc. v. Crowell, 65 Ill. 453. §§ 4883, 4887, 6159.
Chicago Coffin Co. v. Fritz, 41 Mo. App. 389. § 498.
Chicago Dock & Co. v. Garrity, 115 Ill. 155. § 5600.
Chicago Gaslight Co. v. People's Gaslight Co., 121 Ill. 530. §§ 5998, 6406.
Chicago Hanson Cab. Co. v. Yerkes, 141 Ill. 320. §§ 4480, 4504, 6549, 6550.
Chicago Life Ins. Co. v. Needles, 113 U. S. 574. §§ 5473, 5475.
Chicago Mut. Life & Co. Asso. v. Hunt, 127 Ill. 257. § 5703.
Chicago R. Co. v. Scurr, 59 Miss. 456. § 6380.
Chick v. Trevett, 20 Me. 462. §§ 5005, 5128, 5132, 5152.
Chicora Company v. Crewa, 6 S. C. 243. § 653.
Chidell v. Galsworthy, 6 C. B. (N. S.) 471. § 6141.
Chicote v. Conley, 36 Ohio St. 515. § 8076.
Child v. Boston & Co. Iron Works, 137 Mass. 516. §§ 3113, 4182.
Child v. Coffin, 17 Mass. 74. §§ 3020, 3170, 3182, 3319, 3399, 4344, 4345.
Child v. Hugg, 41 Cal. 519. §§ 2674, 2677.
Child v. New York & Co. R. Co., 129 Mass. 170. §§ 263, 6246, 6258.
Child v. Hudson's Bay Co., 2 P. Wms., 207. §§ 955, 3238.
Childs v. Bank of Missouri, 17 Mo. 213. §§ 6301, 6310, 6312.
Childs v. Harris Man. Co., 104 N. Y. 477. §§ 8009, 8035.
Childs v. Hurd, 32 W. Va. 66. §§ 227, 239.
Childs v. Smith, 65 Barb. (N. Y.) 45, 53. §§ 219, 430.
Childs v. Smith, 46 N. Y. 34. § 507.
Chiles v. Drake, 2 Metc. (Ky.) 145. §§ 618, 6379, 6393.
Chillicothe Savings Asso. v. Ruegger, 60 Mo. 218. § 7661.
Chilton v. London & Co. R. Co., 16 Mees. & W. 212. § 6313.
Chilvers v. People, 11 Mich. 43. § 1028.
China Steamship Co., Re, L. R. 7 Eq. 240. § 3803.
Chinoelamouche Lumber & Boom Co. v. Com., 100 Pa. St. 438. § 5382.
Chinnery v. Blackman, 3 Doug. 391. § 6932.
Chinnock's Case, John. (Eng. Ch.) 714. §§ 3203, 3255, 3256.
Chin Yan, Ex parte, 60 Cal. 78. § 1021.
Chin v. Beard, 11 Mo. App. 21, 26. § 7581.
Chipman v. Foster, 119 Mass. 189. § 5146.
Chippendale, Ex parte, 4 De Gex, M. & G. 19. §§ 4370, 5702, 6028.
Chisholm v. Forney, 65 Iowa, 333. § 1623.
Chittenden v. Darden, 2 Woods (U. S.), 437. § 8064.
Chittenden v. Thannhauser, 47 Fed. Rep. 410. § 4244.
Chittenham v. Railway Co., 2 Ad. & El. (N. S.) 281, § 1853.
Chittinston v. Penhurst, 2 Salk. 475. § 3944.
Oholiar-Potosi Min. Co. v. Kennedy, 3 Nev. 361, 372. § 7841.
Chollette v. Omaha & Co. R. Co., 26 Neb. 159. § 5355.
Cholmondely v. Clinton, 1 Jac. & Walk. 1, 138. § 3774.
Choppin v. Wilson, 27 La. An. 444. § 1084.
Chorley, Ex parte, L. R. 11 Eq. 157. § 3401.
Chouquette v. Barada, 28 Mo. 491. §§ 4895, 5104, 5105.
Chouquette v. Barada, 33 Mo. 249. § 5105.
Chouteau v. Allen, 70 Mo. 280. §§ 2822, 2673, 2677, 4009, 4048, 4053, 4128, 5057, 5083, 5090, 5092, 5200, 5201, 5240, 5291, 5292, 5293, 5296, 5298, 7577, 7581.
Chouteau v. Dean, 7 Mo. App. 210. §§ 1511, 1513, 1517, 1562, 1566, 1579, 1646, 1647, 1668, 1669, 1671, 2348, 3468.
Chouteau v. Goddin, 39 Mo. 229. § 5246.
Chouteau v. Suydam, 21 N. Y. 179. § 5094.
Chouteau Ins. Co. v. Floyd, 74 Mo. 286, 290. §§ 1400, 1404, 1517, 1710, 1712, 1961, 1971, 1979, 4040.
Chouteau Ins. Co. v. Holmes, 68 Mo. 601. § 3927.
Chouteau Spring Co. v. Harris, 20 Mo. 382. §§ 13, 1028, 1031, 2310, 2377, 2389, 2894, 2490, 2393, 3221, 3232, 3283.
Chown v. Parrot, 14 O. B. (N. S.) 74. § 4943.
Christ Church v. Savannah, 22 Ga. 656. § 5794.
Christensen v. Colby, 43 Hun (N. Y.), 362. § 3786.
Christensen v. Eno, 106 N. Y. 97. §§ 1060, 1066, 1587, 1589, 6527.
Christensen v. Illinois & Co. Bridge Co., 5 N. Y. Supp. 925, 52 Hun (N. Y.), 478. § 6527.
Christenson v. Quintard (Sup. Ct.), 49 N. Y. St. Rep. 61; 8 N. Y. Supp. 400. §§ 1586, 1587, 3255.
Christian's Appeal, 102 Pa. St. 184. § 7042.
Christian v. American & Co., 89 Ala. 198. §§ 7922, 7935, 7950, 7955, 7958, 7965, 7966, 7979.
Christian Church v. Johnson, 53 Ind. 273. §§ 5045, 5049.
Christian Society v. Macomber, 3 Metc. (Mass.) 235. §§ 7613, 7665, 7669.
Christianson v. Linford, 3 Rob. (N. Y.) 224. § 5246.
Christian Union v. Yount, 101 U. S. 352. §§ 7918, 5784, 5787.
Christian University v. Jordan, 29 Mo. 63. §§ 1968, 4734, 5177, 5299, 5952, 7406.
Christnaas v. Russell, 5 Wall. (U. S.) 290. §§ 1994, 3037, 3754.
Christopher v. New York, 13 Barb. (N. Y.) 567. § 4520.
Christy v. Myers, 21 Mo. 112. § 3615.
Chubb v. Upton, 95 U. S. 665. §§ 78, 80, 102, 502, 518, 1138, 1450, 1454, 1579, 1549, 1350, 1858, 1885, 2253, 4354, 7651.
Church v. Imperial Gas Co., 6 Ad. & El. 846, 861. §§ 5059, 5286.
Church v. Kelsey, 121 U. S. 282. § 5450.
Church v. La Fayette Fire Ins. Co., 66 N. Y. 222. § 5265.
Church Extension v. Smith, 56 Md. 362, 389. § 5829.
Churchill v. Morse, 23 Iowa, 229. § 7060.
Churchill v. Onderdonk, 59 N. Y. 134. § 7622.
Church of Jesus Christ v. United States, 136 U. S. 1, § 5808.
Chy Lung v. Freeman, 92 U. S. 275. §§ 5460, 5481.
Chynoweth's Case, 15 Ch. Div. 13. § 3257.
Cicero v. Clifford, 53 Ind. 191. § 6107.
Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274. §§ 7658, 5665.
Cicotte v. Anciaux, 53 Mich. 227. § 4435.
Cicotte v. Catholic & Co. Church of St. Anne, 60 Mich. 552. § 2645.
Cincinnati v. Cameron, 33 Ohio St. 336, 364. §§ 5018, 5294, 5303.
Cincinnati v. Penny, 21 Ohio, 499, 503. § 6275.
Cincinnati & Co. R. Co., Ex parte, 78 Ala. 258. §§ 7810, 7818.
Cincinnati & Co. R. Co. Re, (Ohio) 6 West, L. J. 353. § 5626.
Cincinnati & Co. R. Co. v. Citizens Nat. Bank (Super. Ct. Cin.), 24 Ohio L. J. 198. §§ 2501, 2503, 2586, 2600, 2740, 2741.
Cincinnati & Co. R. Co. v. Clarkson, 7 Ind. 595. § 5532.
Cincinnati & Co. R. Co. v. Clifford, 113 Ind. 460. § 5441.
Cincinnati & Co. R. Co. v. Clinton, 1 Ohio St. 77. § 643.
Cincinnati & Co. R. Co. v. Cole, 29 Ohio St. 126. §§ 97, 6390.
Cincinnati & Co. R. Co. v. Com., 81 Ky. 492, 512. § 5449.
Cincinnati & Co. R. Co. v. Danville & Co. R. Co., 75 Ill. 113. § 507.

Cincinnati—Clarke TABLE OF CASES CITED.

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Cincinnati & Co. v. McDougall, 108 Ind. 179. § 7658.
Cincinnati & Co. v. Pearce, 28 Ind. 508. § 1140.
Cincinnati & Co. v. Sullivan, 32 Ohio St. 152. § 5510.
Cincinnati & Co. Street Railway v. Cummins, 14 Ohio St. 523. § 7772.
Cincinnati & Co. v. Tarap, Co. v. Neil, 9 Ohio, 11. § 5928.
Cincinnati College v. State, 19 Ohio, 110. § 2823.
Cincinnati Cooperation Co. v. O'Keeffe, 120 N. Y. 603. § 4225.
Cincinnati Cooperation Co. v. O'Keeffe, 44 Hun (N. Y.), 64. § 4233.
Cincinnati Mutual Health Assurance Co. v. Rosenthal, 55 Ill. 85. §§ 7950, 7953, 7959.
Cincinnati Nat. Bank v. Tilden, 50 N. Y. St. Rep. 336; 22 N. Y. Supp. 11. § 7049.
Cincinnati Southern R. Co. v. Com. (Ky.), 7 Am. & Eng. Rail. Cas. 91. § 6429.
Citizens & Co. Asso. v. Webster, 25 Barb. (N. Y.) 263. § 1020.
Citizens & Co. Savings Bank v. Gillespie, 115 Pa. St. 564. §§ 1703, 3222, 3356, 3537, 3650, 3664.
Citizens Bank v. Deynoodt, 25 La. An. 628. § 5437.
Citizens Bank v. Elliott, 55 Iowa, 104. § 4689.
Citizens Bank v. Hyams, 42 La. An. 729, 733. § 3772.
Citizens Bank v. Parson, 32 Mo. 191. § 1657.
Citizens Gas-Light Co. v. Louisville Gas Co., 81 Ky. 263. § 648.
Citizens Ins. Co. v. Glasgow, 9 Mo. 417. § 4588.
Citizens Ins. Co. v. Sortwell 8 Allen (Mass.), 217. § 704.
Citizens Loan Asso. v. Logan, 29 N. J. Eq. 110. §§ 4109, 4120, 4314.
Citizens Mut. Ins. Co. v. Lott, 45 Ala. 185. §§ 2144, 2286.
Citizens Mut. Ins. Co. v. Sortwell, 8 Allen (Mass.), 217. § 709, 5270.
Citizens Nat. Bank v. Cincinnati & Co., 29 Ohio L. J. 15. § 5115.
Citizens Nat. Bank v. Elliott, 55 Iowa, 104. §§ 4386, 4684.
Citizens Passenger R. Co. v. Philadelphia, 49 Pa. St. 251. §§ 2903, 2907.
Citizens Street R. Co. v. Jones, 34 Fed. Rep. 579. §§ 5345, 5399, 5400.
Citizens Street Ry. Co. v. Robbins, 128 Ind. 449. §§ 2530, 2544, 2782, 2795.
Citizens Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1. §§ 590, 5398.
City v. Lamson, 9 Wall. (U. S.) 477. §§ 1118, 5426, 6107, 6109, 6111, 6115.
City & Co. Life Ins. Co. v. Twining, 19 Kan. 349. § 5855.
City Bank, Ex parte, L. R. 3 Ch. 758. § 5735.
City Bank, Re, 10 Paige (N. Y.), 378. § 7025.
City Bank v. Babcock, 1 Holmes (U. S.), 180. § 2674.
City Bank v. Baltimore, 7 Har. & J. (Md.) 104. § 4777.
City Bank v. Bartlett, 71 Ga. 797. § 1376.
City Bank v. Beach, 1 Blatchf. (U. S.) 425. §§ 5638, 5750.
City Bank v. Bruce, 17 N. Y. 507. §§ 2082, 2069, 3979.
City Bank v. Crossland, 65 Ga. 734. §§ 3416, 3431, 3742, 3829.
City Bank v. McClellan, 21 Wis. 112. § 4662.
City Bank v. Park Bank, 32 Hun (N. Y.), 105. §§ 4620, 4626.
City Bank v. Perkins, 29 N. Y. 554. §§ 4789, 4806, 4803.
City Bank v. Perkins, 4 Bosw. (N. Y.) 420. §§ 4746, 4748, 4804, 5705.
City Council v. Baptist Church, 4 Strobh. L. (S. C.) 306. § 1017.
City Council of Montgomery v. Plank Road Co., 31 Ala. 76. § 5638.
City Council v. Moorhead, 2 Rich. L. (S. C.) 430. § 5104.
City Fire & Co. Ins. Co. v. Carrugi, 41 Ga. 660. §§ 5378, 7993, 7994, 8024, 8050.
City Hotel v. Dickinson, 6 Gray (Mass.), 586. §§ 1185, 7369.
City Ins. Co. v. Commercial Bank, 68 Ill. 348. §§ 6721, 6730, 7720, 7793, 8062.
City Loan & Co. Asso. v. Goodrich, 48 Ga. 445; 54 Ga. 98. § 6739.
City Nat. Bank v. Cupp, 59 Tex. 268. § 7798.
City Nat. Bank v. Phelps, 86 N. Y. 491. § 2018.
City Nat. Bank v. Paducah, 2 Flip. (U. S.) 61. §§ 2872, 2874, 2875, 2882, 2883.
City Pottery Co. v. Yates, 37 N. J. Eq. 543. § 6842.
City Terminus Hotel Co., Re, L. R. 14 Eq. 10. § 3788.
Clack v. White, 2 Swan (Tenn.), 540. § 5596.
Clafin v. Beach, 4 Met. (Mass.) 392. § 6860.
Clafin v. Farmers & Co. Bank, 35 Barb. (N. Y.) 540. § 5158.
Clafin v. Farmers & Co. Bank, 25 N. Y. 293; reversing 35 Barb. 540. §§ 4613, 4610, 4818.
Clafin v. Houseman, Assignee, 93 U. S. 130. §§ 673, 7320, 7436.
Clafin v. McDermott, 12 Fed. Rep. 375. § 3060.
Clafin v. Ostrom, 54 N. Y. 581. § 381.
Clafin v. South Carolina R. Co., 8 Fed. Rep. 118; 4 Hughes (U. S.), 12. § 6231.
Clafin v. South Carolina R. Co., 4 Hughes (U. S.), 12. § 6265.
Clair v. Cox, 108 U. S. 350, 355. §§ 7994, 7998.
Clare v. State, 68 Ind. 17. § 586.
Clarisy v. Metropolitan Fire Department, 7 Abb. Pr. (N. Y.) 352. § 7390.
Clark's Case, 5 Coke Rep. 64. § 1038.
Clark's Case, 1 Vent. 327. § 810.
Clark, Re, 14 C. B. (N. S.) 678. § 4154.
Clark v. American Coal Co., 86 Iowa, 436. §§ 4381, 4633.
Clark v. Averill, 31 Vt. 512. § 8076.
Clark v. Bernard, 108 U. S. 436. §§ 320, 7890, 7893.
Clark v. Bever, 139 U. S. 96. §§ 1595, 1596, 1665, 1666.
Clark v. Board of Directors, 24 Iowa, 266. § 7829.
Clark v. Broadway, 3 Keyes (N. Y.), 13. § 7302.
Clark v. Brooklyn Bank, 1 Edw. (N. Y.) 361. §§ 1247, 1248.
Clark v. Central & Co. 50 Fed. Rep. 338. § 3873.
Clark v. Chapman, 45 Ga. 486. §§ 7423, 7511, 7804, 7808.
Clark v. Commonwealth, 29 Pa. St. 129. § 7341.
Clark v. Connecticut Pent Co., 35 Conn. 303. § 7341.
Clark v. Des Moines, 19 Iowa, 199. §§ 602, 6064.
Clark v. Dunham Lumber Co., 86 Ala. 220. § 4670.
Clark v. Edgar, 12 Mo. App. 345; 84 Mo. 106. §§ 1503, 4142, 4146.
Clark v. Farmers' Woolen Man. Co., 15 Wend. (N. Y.) 256. §§ 4001, 4849, 4887, 5044, 5121, 5176, 5730, 5734.
Clark v. Farrington, 11 Wis. 306, 330. §§ 1220, 1654, 5781.
Clark v. Flint, 22 Pick. (Mass.) 231. § 6917.
Clark v. German Security Bank, 61 Miss. 611. § 2412.
Clark v. Gifford, 10 Wend. (N. Y.) 313. § 1253.
Clark v. Hannibal & Co. R. Co.; 36 Mo. 202. § 5470.
Clark v. Iowa City, 20 Wall. (U. S.) 583. §§ 6064, 6106, 6111, 6115.
Clark v. Iselin, 21 Wall. (U. S.) 360. § 7272.
Clark v. Janesville, 10 Wis. 135. §§ 1118, 1120, 5869, 6064.
Clark v. Jones, 87 Ala. 474. §§ 500, 7711.
Clark v. Lake St. Clair & Co. Ice Co., 24 Mich. 508. § 5934.
Clark v. Le Cren, 9 Barn. & C. 52. § 1028.
Clark v. Main Shore R. Co., 81 Me. 477. § 7886.
Clark v. Metropolitan Bank, 3 Duer (N. Y.), 241. § 4841.
Clark v. Middleton, 19 Mo. 53. § 502.
Clark v. Monongahela Nav. Co., 10 Watts (Pa.), 364. §§ 72, 1217, 1228, 1853, 1914, 2247.
Clark v. Myers, 11 Hun (N. Y.), 609. § 3446.
Clark v. New England Mutual Fire Ins. Co., 6 Cush. (Mass.) 542. § 945.
Clark v. Polk County, 19 Iowa, 248, 256. § 6054.
Clark v. Port of Mobile, 10 Ins. L. J. 357. § 7930.
Clark v. Potter County, 1 Pa. St. 159, 163. § 290.
Clark v. Pratt, 47 Me. 55. §§ 4624, 4661, 4662, 5108.
Clark v. Randall, 9 Wis. 135. § 4943.
Clark v. Reyburn, 8 Wall. (U. S.) 318. § 6243.
Clark v. San Francisco, 53 Cal. 306. § 6504.
Clark v. Shaw, 79 Ind. 164. § 3863.
Clark v. Titcomb, 42 Barb. (N. Y.) 122. §§ 4633, 4638, 4802, 5126, 5133, 5754, 5757, 6131, 6466.
Clark v. Turner, 73 Ga. 1. § 1492.
Clark v. Van Riemtsdyk, 9 Cranch (U. S.), 153. § 3261.
Clark v. Washington, 12 Wheat. (U. S.) 40. §§ 4574, 6275, 6276.
Clarke, Ex parte, 20 L. J. (Ch.) 14. § 428.
Clarke v. Birmingham & Co. Bridge Co., 41 Pa. St. 147, 158. § 5668.

- Clarke v. Blackmar, 47 N. Y. 150. § 5800.
 Clarke v. Brookway, 3 Keyes (N. Y.), 13. § 6965.
 Clarke v. Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361. § 38, 1240.
 Clarke v. Central R. & Co., 50 Fed. Rep. 338. § 2071, 3876, 5892, 7885.
 Clarke v. Cuckfield Union, 21 L. J. (Q. B.) 349. § 5059.
 Clarke v. Dickson, 6 C. B. (N. s.) 453. §§ 1462, 1472, 1500.
 Clarke v. Dickson, El. Bl. & El. 148. § 1447.
 Clarke v. Hancock Company, 27 Ill. 305. § 1118.
 Clarke v. Hawkins, 5 R. I. 219. §§ 6965, 6968, 7302.
 Clarke v. Imperial Gas Co., 4 Barn. & Ad. 315. §§ 3969, 5106.
 Clarke v. Janesville, 1 Biss. (U. S.) 98. §§ 664, 6107.
 Clarke v. Lincoln Lumber Co., 59 Wis. §§ 470, 655, 6092.
 Clarke v. New Jersey Steam Nav. Co., 1 Story (U. S.) 531. § 7977.
 Clarke v. Omaha & Co. R. Co., 4 Neb. 458. §§ 1888, 4497, 5353, 5356, 6140.
 Clarke v. Rochester, 28 N. Y. 605. §§ 643, 1118, 1120.
 Clarke v. Rochester, 5 Abb. Pr. (N. Y.) 124; 14 How. Pr. (N. Y.) 211. § 5600.
 Clarke v. City of Rochester, 24 Barb. (N. Y.) 446. §§ 1118, 5588.
 Clarke v. School District, 3 R. I. 199. §§ 5415, 5730.
 Clarke v. Spence, 4 Ad. & El. 448. § 431.
 Clarke v. Thomas, 34 Ohio St. 46. §§ 1451, 2086, 2102, 2103, 6962.
 Clarke Nat. Bank v. Bank of Albion, 52 Barb. (N. Y.) 593. §§ 4815, 4816, 4818, 4820.
 Clarkson v. Clarkson, 18 Barb. (N. Y.) 646. § 2199.
 Clapp v. Day, 2 Me. 305. § 7595.
 Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379. §§ 2172, 2173, 2731.
 Clapp v. Burlington, 42 Vt. 579. § 2850.
 Clapp v. Cedar County, 5 Iowa, 15. §§ 1118, 1430, 6084.
 Clapp v. Emery, 98 Ill. 523. § 7096.
 Clapp v. Hancock Bank, 1 Allen (Mass.), 394. § 7820.
 Clapp v. Nordmeyer, 25 Fed. Rep. 71. § 6534.
 Clapp v. Peterson, 104 Ill. 26. § 2062.
 Clason v. Milwaukee, 30 Wis. 316. § 1025.
 Clay v. Rufford, 19 Eng. L. & Eq. 350. § 3983.
 Clay v. Smith, 3 Pet. (U. S.) 411. § 6955.
 Clay v. Southern, 7 Ex. 717. § 5167.
 Clay Fire & Ice Co. v. Huron Salt & Co., 31 Mich. 346. §§ 7337, 7560, 7967.
 Clayson v. Milwaukee, 30 Wis. 316. § 1021.
 Clayton's Case, 1 Mer. 572. § 7108.
 Clayton, Re, 59 Conn. 510. § 5482.
 Clayton v. Ore Knob Co., 109 N. C. 385. § 1957.
 Clayton Mills Co. Re, 37 Ch. Div. 28. § 2054.
 Cleage v. Hyden, 6 Heisk. (Tenn.) 73. § 7756.
 Clearwater v. Meredith, 1 Wall. (U. S.) 25, 40. §§ 72, 75, 315, 343, 344, 395, 1270, 1271.
 Cleason v. Shaw, 5 Watts (Pa.), 468. § 1166.
 Cleaveland v. Stewart, 3 Ga. 283, 291. §§ 24, 25.
 Cleaveland v. Ware, 98 Mass. 409. §§ 5920, 5924.
 Clegg v. Aikens, 5 Abb. N. Cas. (N. Y.) 95. § 7570.
 Clegg v. Edmondson, 8 De Gex & M. 787. §§ 1793, 4534.
 Clegg v. Hamilton & Co., 61 Iowa, 121. §§ 239, 277.
 Clegg v. Richardson County School District, 8 Neb. 178. §§ 598, 599.
 Cleghorn v. New York & Co. R. Co., 56 N. Y. 44. §§ 6333, 6387.
 Clem v. Newcastle & Co. R. Co., 9 Ind. 488. §§ 1311, 1396.
 Clement's Inn, Case of, 1 Keb. 135. § 15.
 Clements v. Bowes, 1 Drew, 684. §§ 445, 446, 2057, 4014, 4565.
 Clements v. Hall, 1 De Gex & J. 173. § 1798.
 Clements v. Moore, 6 Wall. (U. S.) 299, 312. § 2774.
 Clements v. Todd, 1 Exch. 268. §§ 447, 1156.
 Clendenin v. Frazier, 1 Ind. 553. § 4858.
 Clerc's Case, 6 Coke Rep. 18. § 5808.
 Clerk's Office v. Bank, 66 N. C. 214. § 4126.
 Clerk's Case, Cro. Jac. 506. § 810.
 Clerks' Savings Bank v. Thomas, 2 Mo. App. 357. § 5223.
 Cleve v. Financial Corp., L. R. 16 Eq. 363. §§ 1048, 6688.
 Cleveland v. Burnham, 55 Wis. 598. §§ 3180, 3183.
 Cleveland v. Burnham, 64 Wis. 347. §§ 3136, 3310.
 Cleveland v. Clap, 5 Mass. 201. § 7816.
 Cleveland v. Erie, 27 Pa. St. 380, 388. § 639.
 Cleveland v. Marine Bank, 17 Wis. 545. §§ 3476, 3486, 3493, 3509, 3513, 3515, 3521, 6559.
 Cleveland v. Wick, 18 Ohio St. 303. § 5626.
 Cleveland & R. Co. v. Keary, 3 Ohio St. 201. § 6350.
 Cleveland & Co. R. Co. v. Robbins, 35 Ohio St. 483. §§ 2044, 2487, 2517.
 Cleveland & Co. R. Co. v. Speer, 56 Pa. St. 325. §§ 6342, 6370.
 Cleveland Cotton Mill Co. v. Cleveland County, 108 N. C. 678. § 5286.
 Cleveland Iron Co. v. Ennor, 14 N. E. Rep. 673. § 6127.
 Cleveland Rolling Mill Co. v. Crawford (Ill. C. C.), 9 Rail. & Corp. L. J. 171. §§ 2957, 3392, 6503.
 Cleveland Rolling Mill Co. v. Texas & St. Louis Ry. Co., 23 Fed. Rep. 720. § 2791.
 Cleveland Rolling Mill Co. v. Texas & Co. R. Co., 27 Fed. Rep. 230. § 2934.
 Clews v. Bank, 89 N. Y. 418. § 4833.
 Clews v. Bank, 105 N. Y. 398. §§ 4833, 4834.
 Clews v. Bank, 114 N. Y. 70. § 4833.
 Clews v. Bardon, 36 Fed. Rep. 617. § 4107, 4113.
 Clews v. First Mortgage Bondholders & Co., 54 Ga. 315. § 6071.
 Clews v. Woodstock Iron Co., 44 Fed. Rep. 31. §§ 7556, 7596, 8030.
 Clifton v. State, 73 Ala. 473. § 6444.
 Clifton Heights Land Co. v. Randall, 82 Iowa, 89. § 5115.
 Clinch v. Financial Co., L. R. 4 Ch. App. 117. § 72, 75.
 Clinch v. Financial Corp., L. R. 5 Eq. 450. §§ 4518, 4519, 4566, 4585.
 Clinkscapes v. Pendleton Man. Co., 9 S. C. 318. § 7059.
 Clinton v. Phillips, 58 Ill. 102. § 1024.
 Clinton & R. Co. v. Eason, 14 La. An. 828. § 2733.
 Clinton Bank v. Hart, 19 Ohio, 372. § 7385.
 Olive v. Olive, Kay, 609. §§ 2206, 2239.
 Close v. Glenwood Cemetery, 107 U. S. 466. §§ 67, 5410, 5411, 5448.
 Close v. Noye (Buff. Super. Ct.), 52 N. Y. St. Rep. 271. § 5408.
 Clothier v. Webster, 12 C. B. (N. s.) 790; 9 Jur. (N. s.) 231. § 6363.
 Clothworkers' Co., Ex parte, 21 Q. B. Div. 475. § 3209.
 Clough v. Monroe, 34 N. H. 381. § 3363.
 Clow v. Van Loan, 6 Thomp. & C. (N. Y.) 458; 4 Hun (N. Y.), 184. § 5368.
 Clowes v. Hawley, 12 Johns. (N. Y.) 484. §§ 2476, 2477.
 Clowes v. Brettell, 11 Mees. & W. 461. § 3357.
 Clyde v. Rogers, 24 Hun (N. Y.), 145. § 4435.
 Clymer v. Willis, 3 Cal. 363. § 6931.
 Clymer Distilling Co., Re, 2 Pa. Co. Ct. 111. § 6494.
 Coal v. Ryan, 52 Barb. (N. Y.) 168. § 1184.
 Coal Co. v. Blatchford, 11 Wall. (U. S.) 172. §§ 7453, 7457.
 Coal Consumers' Assn., Re, 4 Ch. Div. 625. § 3122.
 Coaldale Coal Co. v. State Bank, 142 Pa. St. 288. § 6526.
 Coalfield Co. v. Peck, 98 Ill. 139. § 3584.
 Coann v. Atlanta Cotton Factory Co., 14 Fed. Rep. 4. § 6233.
 Coates' Case, L. R. 17 Eq. 169. §§ 1578, 1605, 1608, 1618.
 Coates v. Mayor, 7 Cow. (N. Y.) 585. § 1017.
 Coates v. New York, 7 Cow. (N. Y.) 585. §§ 5470, 5486.
 Coats v. Clarence R. Co., 1 Russ. & M. 181. § 7768.
 Coats v. Darby, 2 N. Y. 517. § 2519.
 Coats v. Donnell, 94 N. Y. 168; affirming 48 N. Y. Super. Ct. 46. § 4748.
 Coats v. Louisville & N. R. Co., 92 Ky. 263. § 2448.
 Cobb v. Coleman, 14 Tex. 594. § 1349.
 Cobb v. New England Mut. Ins. Co., 6 Gray (Mass.), 192. § 7465.
 Coburn v. Boston Paper Maché Co., 10 Gray (Mass.), 243. §§ 3741, 5277.
 Coburn v. Ellenwood, 4 N. H. 99. §§ 5074, 5075.
 Coburn v. Wheelock, 34 N. Y. 440. § 3827.
 Cochecho Nat. Bank v. Haskell, 51 N. H. 116. §§ 4750, 4751, 4779.
 Cochran v. Arnold, 58 Pa. St. 399. §§ 502, 518, 529, 7689, 7708, 7709.
 Cochran v. McCleary, 22 Iowa, 75. § 6803.
 Cochran v. Miller, 74 Ala. 50. § 6218.

Cochran—Colorado TABLE OF CASES CITED.

- Cochran v. Van Surlay, 20 Wend. 365. § 590.
Cochran v. Wiechers, 119 N. Y. 399. §§ 3026, 3320.
Cochs v. Gray, 1 Griff. 77. § 2663.
Cock v. Stewart, 85 Mo. 575. § 659.
Cockburn's Case, 4 De Gex & S. 177. § 1523.
Cockburn v. Erewash Canal Co., 11 Week. Rep. 34. § 6343.
Cockburn v. Thompson, 16 Ves. 321. § 4565.
Cockburn v. Union Bank, 13 La. An. 289. §§ 4403, 4417, 4427, 4431.
Cockerell v. Aucompte, 2 C. B. (n. s.) 440. § 5167.
Cockerell v. Van Diemen's Land Co., 18 C. B. 454. § 1777.
Cockerill v. Cincinnati Mut. Ins. Co., 16 Ohio, 148. § 5175.
Cocks v. Barker, 49 N. Y. 110. § 1253.
Codd v. Rathbone, 19 N. Y. 37. § 23.
Codwise v. Gelston, 10 Johns. (N. Y.) 507, 522. § 2994.
Codwise v. Gleason, 3 Day (Conn.), 12. § 5760.
Coe v. Columbus & C. R. Co., 10 Ohio St. 372. §§ 257, 5341, 5353, 5355, 5362, 5373, 5374, 5537, 6053, 6056, 6057, 6140, 6143, 6145, 6155, 6202, 6216, 6219, 6220, 6221, 6227, 6228, 6246, 6259, 6898, 7847, 7848, 7853, 7859.
Coe v. Delaware & C. R. Co., 34 N. J. Eq. 266; affirming, 31 N. J. Eq. 105. § 6196.
Coe v. East & C. R. Co., 52 Fed. Rep. 531. §§ 4079, 4085.
Coe v. Errol, 116 U. S. 517, 524. §§ 8095, 8111, 8112, 8114.
Coe v. McBrown, 22 Ind. 252. § 6145.
Coe v. New Jersey Midland R. Co., 27 N. J. Eq. 37. § 7207.
Coe v. Schultz, 47 Barb. (N. Y.) 64. § 5621.
Coe v. Wise, 37 L. J. (Q. B.) 262; 7 Best & S. 831; L. R. 1 Q. B. 711; 14 L. T. (n. s.) 891. §§ 6362, 6363, 6364.
Cœur d'Alene & C. Min. Co. v. Miners' Union, 51 Fed. Rep. 260. § 7782.
Coffey v. Brian, 10 Moore, 341; 3 Bing. 54. § 1255.
Coffey v. National Bank, 46 Mo. 140. § 256.
Coffin v. Bramlitt, 42 Miss. 194. § 7085.
Coffin v. Collins, 17 Me. 440. §§ 1924, 1931, 3857.
Coffin v. Left Hand Ditch Co., 6 Colo. 443. § 618.
Coffin v. Ransdell, 110 Ind. 417. §§ 1604, 1618, 1624, 1627.
Coffin v. Reynolds, 37 N. Y. 640. §§ 3146, 3148, 4692.
Coffin v. Rich, 45 Me. 507. §§ 2925, 3013, 3016, 3021, 3033, 3046, 5472.
Coffing v. Carnahan, 122 Ind. 427. § 7738.
Coffing v. Taylor, 16 Ill. 457. § 1568.
Coffman v. Keightly, 24 Ind. 505. § 620.
Cogel v. Mickow, 11 Minn. 479. § 690.
Coggs v. Bernard, 2 Ld. Raym. 909. §§ 2616, 6358.
Cogswell v. Bull, 39 Cal. 320. §§ 4500, 4508, 4510.
Cogswell v. Bullock, 13 Allen (Mass.), 90. §§ 709, 7734.
Cogswell v. Essex Mill Corp., 6 Pick. (Mass.) 94. § 5607.
Cogswell v. New York & C. R. Co., 103 N. Y. 10. § 5911.
Cogswill v. Cogswill, 2 Edw. Ch. (N. Y.) 231. § 2199.
Cohoe v. Cooper, 8 Blackf. (Ind.) 115. § 1430.
Cohen v. Dry Dock & C. R. Co., 69 N. Y. 170. § 6299.
Cohen v. Gwynn, 4 Md. Ch. 357. §§ 2501, 4701.
Cohen v. Meyers, 42 Ga. 46. § 6840.
Cohen v. New York Mutual Life Ins. Co., 50 N. Y. 610. § 3375.
Cohen v. Wilkinson, 12 Beav. 125; 1 Hall & Tw. 554. §§ 4513, 4519, 4566.
Cohens v. Virginia, 6 Wheat. (U. S.) 264. §§ 5735, 7468, 7477.
Cohn v. Borst, 36 Hun (N. Y.), 562. § 7602.
Cohn v. Central & C. R. Co., 71 Cal. 488. §§ 7423, 7428.
Cohn v. Lehman, 93 Mo. 574. § 7678.
Cohn v. Louisville & C. R. Co., 39 Fed. Rep. 227. § 7472.
Coil v. Pittsburgh Female College, 40 Pa. St. 439. § 6800.
Coit v. Gold & C. Co., 119 U. S. 345. §§ 1611, 1618, 1619, 1624, 2087, 2089, 3712.
Coit v. N. C. & O. A. Amalgamating Co., 14 Fed. Rep. 12. §§ 2021, 3711.
Coite v. Connecticut Mutual Life Ins. Co., 36 Conn. 312. § 5560.
Coite v. Society for Savings, 32 Conn. 173. §§ 5556, 6710.
Colburn v. Ellenwood, 4 N. H. 101. § 39.
Colburn v. First Baptist Church, 60 Mich. 198. § 5127.
Colburn v. Patmore, 1 Crompt. Mees. & R. 73. § 4176.
Colburn v. Phillips, 13 Gray (Mass.), 64, 67. §§ 7592, 7593.
Colby v. Coates, 6 Cush. (Mass.) 558. §§ 6898, 7256.
Colchester v. Lowten, 1 Ves. & B. 226, 243, 244. § 5106.
Colchester v. Seaber, 3 Burr. 1866. §§ 256, 290, 6598.
Colchester Corp. v. Seaber, 1 Burr. 1866. § 256.
Cole v. Butler, 43 Me. 401, 405. §§ 3134, 3137, 3838, 3839.
Cole v. Cunningham, 133 U. S. 107. § 7346.
Cole v. Dalziel, 13 Ill. App. 23. § 2664.
Cole v. Dyer, 29 Ga. 434. §§ 787, 4497.
Cole v. East Greenwich Fire Engine Co., 12 R. I. 252. § 20, 67.
Cole v. Iowa State Mutual Ins. Co., 18 Iowa, 425. § 941.
Cole v. Joliet Opera House Co., 79 Ill. 98. § 1747.
Cole v. Knickerbocker Life Ins. Co., 23 Hun (N. Y.), 255. § 6642.
Cole v. Lienthal, 81 Cal. 378. § 337.
Cole v. Millerton Iron Co., 133 N. Y. 164. § 6535.
Cole v. Millerton Iron Co., 59 Hun (N. Y.), 217; 38 N. Y. St. Rep. 34; 13 N. Y. Supp. 851. § 4059.
Cole v. Northwestern Bank, L. R. 10 C. P. 354, 362. § 2636.
Cole v. Ryan, 52 Barb. (N. Y.) 168. §§ 1139, 1183, 3221, 3231.
Cole v. Skrainks, 37 Mo. App. 427. § 627.
Cole v. Tucker, 6 Tex. 266. § 6369.
Cole Silver Min. Co. v. Virginia & C. Water Co., 1 Sawy. (U. S.) 470. § 5955.
Coleman's Case, 1 De Gex & Sm. 495. §§ 1792, 1802, 1803.
Coleman v. Ballandi, 22 Minn. 144, 147. § 4170.
Coleman v. Coleman, 78 Ind. 344. § 2992, 4355.
Coleman v. Columbus Oil Co., 51 Fa. St. 74. §§ 2092, 2187.
Coleman v. First Nat. Bank, 53 N. Y. 393. § 5032.
Coleman v. Manhattan Beach Improvement Co., 94 N. Y. 229, 234. § 7010.
Coleman v. New York & C. R. Co., 106 Mass. 160. § 6306.
Coleman v. Parrott (Ky.), 13 S. W. Rep. 525; 11 Ky. L. Rep. 947. §§ 5441, 5837.
Coleman v. San Rafael & C. Turnp. Co., 49 Cal. 517. §§ 5804, 5808, 5811.
Coleman v. Second Ave. R. Co., 38 N. Y. 201; 48 Barb. (N. Y.) 371. §§ 4043, 4059, 4065, 4079.
Coleman v. Spencer, 5 Blackf. (Ind.) 197. §§ 3283, 3284.
Coleman v. White, 14 Wis. 700. §§ 3075, 3038, 3358, 3476, 3481, 3483, 3486, 3493, 3509, 3510, 3515.
Coles v. Bank of England, 10 Ad. & El. 437, 451. §§ 2557, 2558, 2559.
Coles v. Central R. & C. Co., 82 Ga. 149. § 7429.
Coles v. Iowa & C. Ins. Co., 18 Iowa, 425. § 5937.
Coles v. Kennedy, 81 Iowa, 360. § 3707.
Coles v. Trecothick, 9 Ves. 234, 251, 256. § 4852.
Coles v. Withers, 33 Gratt. (Va.) 186. § 7063.
Colfax Hotel Co. v. Lyon, 69 Iowa, 683. §§ 1147, 1920.
Colgate v. Compagnie Francaise, 23 Fed. Rep. 82. §§ 7409, 7626.
Colglazier v. Louisville & C. R. Co., 22 Fed. Rep. 568. § 7891.
Colgrove v. New York & C. R. Co., 20 N. Y. 492. § 1476.
Colket v. Ellis, 10 Phila. (Pa.) 375. § 2659.
Collamer v. Foster, 26 Vt. 754. § 3446.
Colman v. Eastern Counties R. Co., 10 Beav. 1. §§ 3983, 4518, 4519, 4565, 4566, 4567.
Colman v. Eastern Counties Railway Co., 4 Eng. Rail. Cas. 513. § 3999.
Colman v. Spencer, 5 Blackf. (Ind.) 197. § 2404.
Colman v. West Virginia Oil & C. Co., 25 W. Va. 148. § 4687.
Colonial & C. Mort. Co. v. Hutchinson Mort. Co., 44 Fed. Rep. 219. § 7409.
Colonial Bank v. Cady, 15 App. Cas. 267. §§ 2591, 2609, 2610.
Colonial Bank v. Hepworth, 36 Ch. Div. 36. §§ 2395, 2591.
Colorado & C. R. Co. v. Brown, 15 Colo. 193. § 5625.
Colorado Cent. Min. Co. v. Turck, 150 U. S. 138. § 7456.
Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499. §§ 7521, 7936, 7970, 8021, 8041.

- Colorado Loan & Co. v. Grand Valley Canal Co.** (Colo.) 32 Pac. Rep. 178. §§ 6016, 6019.
- Colorado Nat. Bank v. Scott, 19 Abb. N. Cas.** (N. Y.) 348. §§ 6893, 6982, 7139.
- Colquitt v. Howard, 11 Ga. 556.** §§ 2943, 4477, 4479, 4499, 4566, 4578.
- Colquitt v. Stultz, 65 Ga. 305.** § 2660.
- College of Physicians v. Harrison, 9 Barn. & C. 524.** § 3021.
- Collen v. Wright, 7 El. & Bl. 301; 26 L. J. (Q. B.) 147; 8 El. & Bl. 647; 27 L. J. Q. B. 215.** §§ 4135, 5028.
- Colles v. Trow City Directory Co., 11 Hun (N. Y.), 397.** § 4520.
- Collie's Claim, L. R. 12 Ex. 248.** § 3909.
- Collier v. Bedell, 39 Hun (N. Y.) 238.** § 4981.
- Collier v. Davis, 94 Ala. 456.** §§ 7935, 7982.
- Collier v. Morgan's R. Co., 41 La. An. 37.** §§ 7506, 7542, 7546.
- Collum, Ex parte, L. R. 9 Ex. 238.** § 1792.
- Collins v. Brush, 9 Wend. (N. Y.) 198.** § 2617.
- Collins v. Buckeye State Ins. Co., 17 Ohio St. 215.** §§ 5126, 5129, 5132, 5152.
- Collins v. Central Bank, 1 Ga. 435.** § 7068.
- Collins v. Chicago & C. R. Co., 14 Wis. 492.** § 406.
- Collins v. Collins, L. R. 12 Eq. 455.** § 1069.
- Collins v. Life Asso. of America, 3 Mo. App. 586.** § 5325.
- Collins v. Rogers, 63 Mo. 515.** § 526.
- Collins v. Sherman, 31 Miss. 679.** § 5399.
- Collins v. Yates, 27 L. J. Ex. 150.** § 4428.
- Colt v. Barnes, 64 Ala. 108.** §§ 6256, 6257.
- Colt v. Brown, 12 Gray (Mass.), 233.** §§ 6965, 6967, 6968, 7251, 7302, 7477.
- Colt v. Ives, 31 Conn. 25.** § 2419.
- Colt v. Nettterville, 2 P. Wms. 304.** § 1067.
- Colt v. Owens, 90 N. Y. 368.** §§ 2479, 2695, 2697, 2698.
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- Columbia Bank v. Jackson, 4 N. Y. Supp. 433.** §§ 7602, 7661.
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- Columbia Electric Co. v. Dixon, 46 Minn. 463.** § 3639.
- Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33.** §§ 7937, 7952, 7953.
- Columbia Ins. Co. v. Masonheimer, 76 Pa. St. 138.** § 4696.
- Columbia Turnpike v. Woodworth, 2 Caines (N. Y.), 97.** § 5933 a.
- Columbian Bank, Re, 147 Pa. St.** § 2062.
- Columbian Book Co. v. De Golyer, 115 Mass. 67, 69.** §§ 6898, 6927, 7256.
- Columbian Ins. Co. v. Stevens, 37 N. Y. 536.** § 7254.
- Columbus v. Goethius, 7 Ga. 139.** § 7756.
- Columbus & C. R. Co. v. Arnold, 31 Ind. 174.** § 3968.
- Columbus & C. R. Co. v. Powell, 40 Ind. 37.** §§ 405, 6347.
- Columbus & C. R. Co. v. Simpson, 5 Ohio St. 251.** § 5626.
- Columbus & C. R. Co. v. Skidmore, 69 Ill. 566.** §§ 398, 408.
- Columbus Buggy Co. v. Graves, 108 Ill. 459.** §§ 7913, 7983.
- Columbus Co. v. Hurford, 1 Neb. 146.** § 5176.
- Columbus Ins. Co. v. Eaton, 35 Me. 391.** § 8069.
- Columbus Ins. Co. v. Walsh, 18 Mo. 229.** § 7957.
- Colusa Co. v. Hudson, 85 Cal. 633.** § 5625.
- Comanche Mining Co. v. Rumley, 1 Mont. 201.** §§ 2403, 3676.
- Combes Case, 9 Coke, 76.** § 5074.
- Combination Trust Co. v. Weed, 2 Fed. Rep. 24.** §§ 2051, 4062.
- Combs v. Hannibal & Co., 43 Mo. 148.** §§ 4979, 5265.
- Combs v. Scott, 12 Allen (Mass.), 493.** § 5306.
- Combs v. Smith, 73 Mo. 32.** § 5626.
- Comeau v. Guild Farm Oil Co., 3 Daly (N. Y.) 220.** §§ 2339, 2391, 2412.
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- Comfort v. Leland, 3 Whart. (Pa.) 81.** §§ 1815, 1925.
- Comins v. Coe, 117 Mass. 45.** § 2431.
- Commanche County v. Lewis, 133 U. S. 198.** § 1846.
- Comparet v. Burr, 5 Blackf. (Ind.) 419.** § 2455.
- Compton v. Van Volkenburgh & Co. R. Co., 34 N. J. L. 134.** § 937.
- Commercial & Co. Bank v. Corbett, 5 Sawy. (U. S.) 172.** § 6882.
- Commercial & Co. Bank v. Jones, 18 Tex. 811.** § 5301.
- Commercial & Co. Bank v. Slocumb, 14 Pet. (U. S.) 60.** §§ 7447, 7628.
- Commercial Bank v. Bonner, 13 Smedes & M. (Miss.) 649.** §§ 4874, 7415.
- Commercial Bank v. Chambers, 8 Smedes & M. (Miss.) 9.** §§ 6718, 6733, 6750.
- Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270.** §§ 5208, 5209.
- Commercial Bank v. French, 21 Pick. (Mass.) 486.** §§ 4963, 5133, 7592, 7593, 7594, 7597, 7598.
- Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348.** §§ 2389, 2391, 2394, 2467, 2589, 2636, 4768, 5176.
- Commercial Bank v. Lockwood, 2 Har. (Del.) 8.** §§ 6718, 6733.
- Commercial Bank v. Newport Man. Co., 1 B. Mon. (Ky.) 13.** §§ 5045, 5046, 5049, 5126, 5149, 5730, 5731, 6734.
- Commercial Bank v. Nolan, 7 How. (Miss.) 508.** §§ 5969, 5977.
- Commercial Bank v. Norton, 1 Hill (N. Y.), 501, 503.** §§ 4729, 4815.
- Commercial Bank v. Pfeiffer, 103 N. Y. 242.** § 518.
- Commercial Bank v. Simmons, 6 Chic. Leg. N. 344.** § 7437.
- Commercial Bank v. State, 4 Smedes & M. (Miss.) 439, 497, 503.** § 5475.
- Commercial Bank v. State, 6 Smedes & M. (Miss.) 599.** §§ 1368, 1784, 5381, 6610, 6636.
- Commercial Bank v. St. Croix Man. Co., 23 Me. 280.** §§ 4933, 5231.
- Commercial Bank v. Ten Eyck, 48 N. Y. 305; 50 Barb. 9.** §§ 4733, 4815, 4828.
- Commercial Gazette Co. v. Grooms (Ohio Super. Ct.), 21 Week. L. Bull. 292.** §§ 6383, 6394.
- Commercial Ins. & Co. v. Turner, 8 S. C. 107.** § 7665.
- Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co., 19 How. (U. S.) 318.** §§ 4883, 5024, 5175.
- Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684.** §§ 7031, 7032.
- Commercial Nat. Bank v. Burch, 141 Ill. 519.** §§ 5016, 6481.
- Commercial Nat. Bank v. Farmers' & Co. Bank, 82 Iowa, 132.** § 2409.
- Commercial Nat. Bank v. Iola, 2 Dill. (U. S.) 553.** § 602.
- Commercial Union Tel. Co. v. New-England Telephone & Co., 61 Vt. 241.** § 5498.
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- Commissioners, Re, 39 N. J. L. 433.** § 5611.
- Commissioners v. Atlantic & C. R. Co., 77 N. C. 289.** §§ 5045, 6050.
- Commissioners v. Bolles, 94 U. S. 104.** § 522.
- Commissioners v. Bright, 18 Ind. 93.** §§ 529, 5275.
- Commissioners v. Clark, 94 U. S. 278.** § 6064.
- Commissioners v. Davis, 6 Mont. 306.** § 2884.
- Commissioners v. Elston, 32 Ind. 27.** § 2859.
- Commissioners v. Gas Co., 12 Pa. St. 318.** § 1021.
- Commissioners v. Holyoke Water Co., 104 Mass. 445.** §§ 5349, 5401, 5410, 5411, 5520, 5623.
- Commissioners v. Lemly, 85 N. C. 341.** §§ 4428, 4435.
- Commissioners v. Lucas, 93 U. S. 108.** § 5383.
- Commissioners v. Miller, 7 Kan. 479.** §§ 1113, 1119.
- Commissioners v. Northern Liberties Gas Co., 12 Pa. St. 318.** §§ 1022, 1024.
- Commissioners v. O'Sullivan, 17 Kan. 68.** § 5626.
- Commissioners v. Reynolds, 44 Ind. 609.** § 4034.
- Commissioners v. Seabrook, 8 Strobb. (S. C.) 560.** § 475.
- Commissioners v. Sellow, 99 U. S. 624.** § 7524.
- Commissioners v. Shields, 62 Mo. 247.** § 538.
- Commissioners v. Walker, 6 How. (Miss.) 143.** § 5835.
- Commissioners v. Wood, 10 Pa. St. 93.** § 6359.
- Com. Appeal of the (Pa.) 184 Atl. Rep. 133.** § 5571.
- Com. v. Alger, 7 Cush. (Mass.) 53.** §§ 5471, 5499.
- Com. v. Alleghany Bridge Co., 20 Pa. St. 185.** §§ 6598, 6612, 6776.
- Com. v. Allen, 70 Pa. St. 465.** § 6808.
- Com. v. American Bell Telephone Co., 129 Pa. St. 217.** § 8123.
- Com. v. Archbold, 17 Irish Eq. 187.** § 693.
- Com. v. Arrison, 15 Serg. & R. (Pa.) 127.** §§ 774, 6783, 6803.
- Com. v. Atlantic & C. R. Co., 53 Pa. St. 9.** §§ 327, 395, 407.

- Com. v. Bacon, 13 Bush (Ky.), 210. §§ 648, 5478.
 Com. v. Bakeman, 105 Mass. 53. § 7712.
 Com. v. Bank of Commerce, 9 Am. L. Reg. 379. § 6636.
 Com. v. Bank of Pennsylvania, 3 Watts & S. (Pa.) 173. § 731.
 Com. v. Bank of United States, 2 Ashm. (Pa.) 349. §§ 5389, 5477, 6805.
 Com. v. Bean, 14 Gray (Mass.), 52. § 1025.
 Com. v. Bennett, 103 Mass. 27. § 643.
 Com. v. Berkshire & Co. Ins. Co., 98 Mass. 25. § 5851.
 Com. v. Biddle, 139 Pa. St. 605. § 7939.
 Com. v. Bird, 12 Mass. 443. § 5571.
 Com. v. Blue Hill Tp. Co., 5 Mass. 420. §§ 2925, 5609.
 Com. v. Boston & C. R. Co., 3 Cush. (Mass.) 25. § 7756.
 Com. v. Boston & C. R. Corp., 11 Oush. (Mass.) 512. § 6427.
 Com. v. Boston & C. R. Co., 126 Mass. 61. § 6427.
 Com. v. Boston & C. R. Co., 129 Mass. 500. § 6427.
 Com. v. Boston & C. R. Co., 135 Mass. 550. § 6424.
 Com. v. Boston & C. R. Co., 143 Mass. 146. §§ 2069, 2168.
 Com. v. Breed, 4 Pick. (Mass.) 460. § 6641.
 Com. v. Brockton Street R. Co., 143 Mass. 501. § 6427.
 Com. v. Brockway, 150 Mass. 322. § 5483.
 Com. v. Brooks, 109 Mass. 355. § 1025.
 Com. v. Burrell, 7 Pa. St. 34. § 6395.
 Com. v. Cain, 14 Bush (Ky.), 525. §§ 5477, 6756.
 Com. v. Cain, 5 Serg. & R. (Pa.) 512. § 1021.
 Com. v. Christian, 9 Phila. (Pa.) 556. § 4846.
 Com. v. Central Bridge Corp., 12 Oush. (Mass.) 242. §§ 6429, 6430, 6437.
 Com. v. Central Passenger R. Co., 52 Pa. St. 506. §§ 258, 5354, 6623, 6805, 7148.
 Com. v. Central Transp. Co., 145 Pa. St. 89. § 2897.
 Com. v. Certain Intoxicating Liquors, 115 Mass. 153. § 70.
 Com. v. Clapp, 5 Gray (Mass.), 97. § 658.
 Com. v. Cleveland & Co. R. Co., 29 Pa. St. 370. §§ 2905, 8130.
 Com. v. Clucely, 56 Pa. St. 270. §§ 769, 783, 6776, 6783, 6811.
 Com. v. Cochituate Bank, 3 Allen (Mass.), 42. §§ 3032, 3033, 3035, 3036, 5963.
 Com. v. Commercial Bank, 28 Pa. St. 383. §§ 6608, 6623, 6629, 6770, 6792, 6795, 6803.
 Com. v. Commissioners, 32 Pa. St. 218. § 1118.
 Com. v. Conover, 10 Phila. (Pa.) 55. § 118.
 Com. v. Covington & Co. Bridge Co. (Ky.), 21 S. W. Rep. 1042. § 5405.
 Com. v. Crompton, 137 Pa. St. 138. § 2390.
 Com. v. Cullen, 13 Pa. St. 133. §§ 96, 97, 98, 766, 3996, 5266, 5381, 6618, 6655.
 Com. v. Dalzell, 152, Pa. St. 217. §§ 3870, 3872.
 Com. v. Davis, 140 Mass. 485. § 1025.
 Com. v. Dearborn, 15 Mass. 125. § 766.
 Com. v. Delaware & Co. Canal Co., 123 Pa. St. 594. §§ 2914, 2916.
 Com. v. Delaware & Co. Co., 43 Pa. St. 295. § 6807.
 Com. v. Detweiler, 131 Pa. St. 614. §§ 737, 740, 745, 3854, 3859, 3974.
 Com. v. Dickinson, 9 Phila. (Pa.) 561. § 617.
 Com. v. Dunham, Thach. Cr. Cas. (Mass.) 519. § 4241.
 Com. v. Eagle Fire Ins. Co., 14 Allen (Mass.), 344. §§ 4684, 4704.
 Com. v. East Boston Ferry Co., 13 Allen (Mass.), 583. § 6427.
 Com. v. Eastern R. Co., 103 Mass. 254. §§ 5502, 5623, 7826.
 Com. v. Emigrant Indust. & Co. Bank, 98 Mass. 12. § 6107.
 Com. v. Empire Pass. R. Co., 134 Pa. St. 237. §§ 4421, 4428.
 Com. v. Erie & Co. R. Co., 27 Pa. St. 339. §§ 5347, 5440, 5661, 5666.
 Com. v. Essex Co., 13 Gray (Mass.), 239, 253. §§ 5410, 5417, 5520.
 Com. v. Evans, 139 Mass. 11, 12. § 5483.
 Com. v. Fahey, 5 Oush. (Mass.) 408. § 1017.
 Com. v. Farmers' & Co. Bank, 21 Pick. (Mass.) 542. § 5475.
 Com. v. Farmers' Bank, 2 Grant Cas. (Pa.) 392. §§ 6598, 6775.
 Com. v. Farren, 9 Allen (Mass.), 489. § 5483.
 Com. v. Fayette Co. R. Co., 55 Pa. St. 452. §§ 67, 5408.
 Com. v. Fisher, 1 Penr. & W. (Pa.) 462, 467. §§ 6342, 6370.
 Com. v. Fitchburg R. Co., 12 Gray (Mass.), 180. §§ 6825, 7837.
 Com. v. Fitchburg R. Co., 10 Allen (Mass.), 12. § 6427.
 Com. v. Fitchburg R. Co., 120 Mass. 372. § 6427.
 Com. v. Fowler, 10 Mass. 290. §§ 766, 769, 770, 6778, 6780.
 Com. v. France, 3 Brews. (Pa.) 148. § 6742.
 Com. v. Frankfurt, 13 Bush (Ky.), 185. §§ 5717, 7571.
 Com. v. Franklin Ins. Co., 115 Mass. 278. §§ 6946, 6998.
 Com. v. German Society, 15 Pa. St. 251. §§ 810, 868, 881, 882, 898, 904, 906, 913, 914.
 Com. v. Gill, 3 Whart. (Pa.) 228. §§ 772, 3979.
 Com. v. Goodrich, 13 Allen (Mass.), 546. § 1017.
 Com. v. Graham, 54 Pa. St. 339. § 765.
 Com. v. Green, 4 Whart. (Pa.) 531, 598. § 20.
 Com. v. Green, 58 Pa. St. 226. § 610.
 Com. v. Guardians of the Poor, 6 Serg. & R. (Pa.) 469. §§ 113, 708, 806, 803, 847, 856, 863, 882, 888, 833.
 Com. Gentl v. Helms (Pa.), 26 Week. Not. Cas. 353. § 3851.
 Com. v. Hamilton Man. Co., 12 Allen (Mass.), 239, 300. §§ 5556, 5560, 8134.
 Com. v. Hamilton Man. Co., 120 Mass. 383, 384. § 5490.
 Com. v. Hancock Free Bridge Corp., 2 Gray (Mass.), 58. §§ 6429, 6430.
 Com. v. Harmer, 6 Phila. (Pa.) 90. § 6363.
 Com. v. Hemmingsway, 131 Pa. St. 614. §§ 743, 3857.
 Com. v. Hide & Leather Ins. Co., 119 Mass. 155. § 7256.
 Com. v. Hitchings, 5 Gray (Mass.), 485. § 658.
 Com. v. Hunt, 4 Met. (Mass.) 111. § 1030.
 Com. v. Huntingdon Bank, 2 Penr. & W. (Pa.) 438. § 6723.
 Com. v. Jackson, 5 Bush (Ky.), 680. § 634.
 Com. v. Jarrett, 7 Serg. & R. (Pa.) 460. § 4533.
 Com. v. Jeffries, 7 Allen (Mass.), 548. § 7738.
 Com. v. Jones, 12 Pa. St. 365. §§ 769, 6785.
 Com. v. Judge & Co., 8 Pa. St. 391. § 643.
 Com. v. Lancaster Sav. Bank, 123 Mass. 493. § 7002.
 Com. v. Lehigh Ave. R. Co., 6 Pa. County Ct. 557. § 5705.
 Com. v. Lehigh Valley R. Co., 104 Pa. St. 89, 106. § 2914.
 Com. v. Lehigh Val. R. Co., 126 Pa. St. 308; affirmed, 145 U. S. 192. §§ 8106, 8119.
 Com. v. Lexington & Co. R. Co., 6 B. Mon. (Ky.) 397. § 6775.
 Com. v. Locke, 72 Pa. St. 491; 6 Pa. St. 507. § 643.
 Com. v. Luscomb, 130 Mass. 42. § 5483.
 Com. v. Lykens Water Co., 110 Pa. St. 391. §§ 6582, 6586.
 Com. v. Marshall, 11 Pick. (Mass.) 350. § 6756.
 Com. v. Marshall, 69 Pa. St. 328. § 590.
 Com. v. Massachusetts Mut. Ins. Co., 119 Mass. 51. § 7226.
 Com. v. McCafferty, 145 Mass. 384. § 1025.
 Com. v. McCarter, 98 Pa. St. 607, 615. § 6783.
 Com. v. McKean County Bank, 32 Pa. St. 185. § 45.
 Com. v. McWilliams, 11 Pa. St. 62. §§ 1115, 1118.
 Com. v. Milton, 12 B. Mon. (Ky.) 212, 227. § 7447.
 Com. v. Moltz, 10 Pa. St. 527. § 5246.
 Com. v. Morris, 1 Phila. (Pa.) 411. § 6600.
 Com. v. Morrison, 2 A. K. Marsh. (Ky.) 75. § 7899.
 Com. v. National Mut. Co. Asso., 94 Pa. St. 481. § 7941.
 Com. v. New Bedford Bridge Co., 2 Gray (Mass.), 339. §§ 5390, 6419.
 Com. v. Newburyport Bridge, 9 Pick. (Mass.) 142. §§ 6429, 6437.
 Com. v. New York & Co. R. Co., 114 Pa. St. 340. § 7913.
 Com. v. New York & Co. R. Co., 129 Pa. St. 463. § 8098.
 Com. v. New York & Co. R. Co., 132 Pa. St. 591. §§ 5337, 7913.
 Com. v. New York & Co. R. Co., 135 Pa. St. 58. §§ 7826, 7830.
 Com. v. New York & Co. R. Co., 148 Pa. St. 38. § 2914.
 Com. v. Ohio & Co. R. Co., 1 Grant Cas. (Pa.) 320. §§ 4995, 5176.
 Com. v. Patch, 97 Mass. 221. § 1025.
 Com. v. Perry, 155 Mass. 117. § 5494.
 Com. v. Pennsylvania & Co. Institute, 2 Serg. & R. (Pa.) 141. §§ 817, 820, 881, 884, 898.
 Com. v. Pennsylvania Canal Co., 66 Pa. St. 41. §§ 5520, 5615.

- Com. v. Pennsylvania R. Co., 2 Pa. County Ct. 391. § 5886.
- Com. v. People's Five Cent Savings Bank, 5 Allen (Mass.), 428. §§ 5556, 5557, 5560, 8134.
- Com. v. Perkins, 43 Pa. St. 400. § 1118.
- Com. v. Philadelphia & C. R. Co., 20 Pa. St. 518. § 6776.
- Com. v. Philadelphia & C. R. Co., 137 Pa. St. 481. § 6101.
- Com. v. Philanthropic Society, 5 Binn. (Pa.) 486. §§ 857, 861.
- Com. v. Phoenix Bank, 11 Met. (Mass.) 129. § 7070.
- Com. v. Phoenix Iron Co., 105 Pa. St. 111. §§ 4406, 4418, 4419, 4420, 4427.
- Com. v. Pike Beneficial Society, 8 Watts & S. (Pa.) 250. §§ 846, 904, 913, 914.
- Com. v. Pittsburgh, 41 Pa. St. 278. §§ 289, 1118, 5045, 5130, 5733.
- Com. v. Pittsburgh & C. R. Co., 58 Pa. St. 26. §§ 5421, 5624, 6613, 6614.
- Com. v. Pittsburgh & C. R. Co., 74 Pa. St. 83. §§ 2167, 2933, 2906.
- Com. v. Pomeroy, 5 Gray (Mass.), 486. § 658.
- Com. v. Power, 7 Met. (Mass.) 596. § 1052.
- Com. v. President of Anderson Ferry, 7 Serg. & R. (Pa.) 6. § 7829.
- Com. v. Proprietors, 9 Pick. (Mass.) 142. § 6428.
- Com. v. Proprietors, 2 Gray (Mass.), 339. § 6423.
- Com. v. Provident Institution, 12 Allen (Mass.), 312; affirmed, 9 Wall. 611. §§ 5556, 5557.
- Com. v. Pulaski County Agric. & C. Asso., 92 Ky. 197. § 6419.
- Com. v. Reading Savings Bank, 137 Mass. 431. § 5256.
- Com. v. Reading Sav. Bank, 133 Mass. 16. § 4718.
- Com. v. Reed, 1 Gray (Mass.), 472. § 7756.
- Com. v. Rice, 9 Met. (Mass.) 253. § 1028.
- Com. v. Robertson, 5 Cush. (Mass.) 438. §§ 1021, 1025.
- Com. v. Ruggles, 6 Allen (Mass.), 588. § 4973.
- Com. v. Runk, 26 Pa. St. 235. § 7003.
- Com. v. Ryan, 5 Mass. 90. § 2756.
- Com. v. Schall, 12 Pa. Ct. 554. § 4301.
- Com. v. Small, 26 Pa. St. 31. § 783.
- Com. v. Smead, 11 Mass. 74. § 6790.
- Com. v. Smith, 10 Allen (Mass.), 448. §§ 257, 5353, 5355, 5356, 5880, 5970, 6050, 6137, 6140, 6165, 6542.
- Com. v. Smith, 32 Ky. 38. § 5109.
- Com. v. Smith, 45 Pa. St. 52. §§ 697, 785.
- Com. v. Sparks, 6 Whart. (Pa.) 416. § 773.
- Com. v. Sprenger, 5 Binn. (Pa.) 353. § 6790.
- Com. v. Steffee, 7 Bush (Ky.), 161. §§ 1021, 1025.
- Com. v. St. Mary's Church, 6 Serg. & R. (Pa.) 508. §§ 3967, 3975, 5107, 5222.
- Com. v. Stodder, 2 Cush. (Mass.) 562. § 1025.
- Com. v. St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441. §§ 113, 799, 806, 846, 849, 856, 858, 868, 904, 1021, 4393.
- Com. v. Susquehanna & C. R. Co., 122 Pa. St. 306, 321. § 6124.
- Com. v. Texas & C. R. Co. (1881), 98 Pa. St. 90. §§ 675, 7899.
- Com. v. Trenton Delaware Bridge Co., 9 Am. Law Reg. (o. s.) 238. § 8130.
- Com. v. Turner, 1 Cush. (Mass.) 493, 496. § 935.
- Com. v. Union Ins. Co. Newburyport, 5 Mass. 230. §§ 769, 4539, 5598, 6603, 6772, 6774, 6775, 6779.
- Com. v. Union League, 135 Pa. St. 301. §§ 4396, 4400.
- Com. v. United States Bank, 2 Arhm. (Penn.) 349. § 6609.
- Com. v. Vermont & C. R. Co., 108 Mass. 7. § 6427.
- Com. v. Vrooman, 164 Pa. St. 306. § 5492.
- Com. v. Waite, 11 Allen (Mass.), 264. § 5483.
- Com. v. Walter, 83 Pa. St. 105. § 6783.
- Com. v. Walton, 17 Pick. (Mass.) 403. § 5338.
- Com. v. Watmough, 6 Whart. (Pa.) 117. § 2390.
- Com. v. Welch, 2 Dana (Ky.), 330. §§ 4168, 6756.
- Com. v. West Chester Co., 3 Grant Cas. (Pa.) 200. §§ 39, 6624.
- Com. v. Westinghouse Air Brake Co., 151 Pa. St. 276. § 2919.
- Com. v. Whipples, 80 Ky. 269. § 648.
- Com. v. Swank, 79 Pa. St. 154, 157. § 6783.
- Com. v. Swift & Co. Turnp. Co., 2 Va. Cas. 362. §§ 6418, 6425.
- Com. v. Wilkins, 121 Mass. 356. § 1024.
- Com. v. Wilkinson, 16 Pick. (Mass.) 175. § 6442.
- Com. v. Williams, 2 Cush. (Mass.) 582. § 6444.
- Com. v. Woelper, 3 Serg. & R. (Pa.) 29. §§ 779, 1050, 3927, 7730, 7740.
- Com. v. Worcester Turnpike Co., 3 Pick. (Mass.) 327. §§ 59, 1021, 1022, 1025, 5267, 6358, 6600, 7756.
- Com. v. Wyman, 8 Met. (Mass.) 247. §§ 5003, 5004.
- Com. Bank v. Fryor, 11 Abb. Pr. (N. Y.) 227. § 7671.
- Com. Man. & C. Bank 2 Pearson's Dec. 386; 2 Nat. Bk. Cas. 459. § 2861.
- Comstock, Re, 3 Sawyer. (U. S.) 218. §§ 7887, 7898, 7950.
- Comstock v. Frederickson, 51 Minn. 350. §§ 7339, 7340.
- Comstock v. Grand Rapids, 40 Mich. 397. § 4703.
- Comstock v. Smith, 23 Me. 202. § 3842.
- Conant v. Bellows Falls Canal Co., 29 Vt. 263. §§ 5024, 5062.
- Conant v. Millandon, 5 La. An. 542. §§ 780, 781.
- Conant v. National Ice Co., 40 N. Y. Super. 83. § 264.
- Conant v. Reed, 1 Ohio St. 198. §§ 3248, 4285.
- Conant v. Van Schaick, 24 Barb. (N. Y.) 87. §§ 3040, 3074, 3146, 3396, 3402, 3405, 4168, 4331.
- Conard v. Atlantic Ins. Co., 1 Pet. (U. S.) 386. §§ 2619, 7070, 7613, 7665.
- Concord v. Concord Bank, 16 N. H. 26. § 4826.
- Concord v. McIntire, 6 N. H. 527. § 7665.
- Concord & C. R. Co. v. Forsaith, 59 N. H. 122. § 5459.
- Concord Railroad v. Clough, 49 N. H. 257. §§ 4983, 4986.
- Concord Railroad v. Greely, 17 N. H. 47. §§ 5589, 5591, 5592, 5600.
- Concordia Savings & C. Asso. v. Read, 93 N. Y. 474. § 7667, 7672.
- Cone v. Paute, 10 Heisk. (Tenn.) 506. § 6823.
- Cone v. Russell, 48 N. J. Eq. 208. §§ 3376, 6404.
- Congar v. Chicago & C. R. Co., 24 Wis. 157. §§ 5194, 5198.
- Congar v. Galena & C. R. Co., 17 Wis. 477. § 7503.
- Congdon v. Winsor, 17 R. I. 236. §§ 3090, 7732.
- Congregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Pr. (N. s.) (N. Y.) 484. §§ 5047, 5049.
- Congregational Church, Re, 131 N. Y. 1. § 7642.
- Congregational Society v. Curtis, 22 Pick. (Mass.) 320. § 101.
- Congregational Soc. v. Perry, 6 N. H. 164. §§ 518, 529, 1205, 5275.
- Congregational Soc. v. Sperry, 10 Conn. 200. § 792.
- Congreve v. Everett, 10 Ex. 298. § 6141.
- Congreve v. Morgan, 18 N. 84. § 1426.
- Coline v. Junction & C. R. Co., 3 Houst. (Del.) 238. § 5121.
- Conklin v. Elting, 2 Johns. (N. Y.) 410. § 5929.
- Conklin v. Furman, 57 Barb. (N. Y.) 484. §§ 2010, 3075, 3078, 3360, 3392.
- Conklin v. Furman, 48 N. Y. 527; 8 Abb. Pr. (N. s.) 161; 57 Barb. 484. §§ 2010, 3082, 3509, 3780.
- Conklin v. Keokuk, 73 Iowa, 343. § 7756.
- Conklin v. Second National Bank, 45 N. Y. 655. § 1032.
- Conkling v. Washington University, 2 Md. Chan. 497. § 1084.
- Conley v. Chilcote, 25 Ohio St. 320. § 8076.
- Connah v. Sedgwick, 1 Barb. (N. Y.) 210. § 6835.
- Connecticut & C. Ins. Co. v. Cross, 18 Wis. 109. §§ 7882, 7977.
- Connecticut & C. Ins. Co. v. Railroad Co., 41 Barb. (N. Y.) 9. § 1102.
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- Connecticut & C. R. Co. v. Baxter, 32 Vt. 805. § 1350.
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- Connecticut Bank v. Smith, 17 How. Pr. (N. Y.) 487. §§ 518, 7659.
- Connecticut Mut. Life Ins. Co. v. Albert, 39 Mo. 181. § 7942.
- Connecticut Mut. Life Ins. Co. v. Cleveland & C. R. Co., 41 Barb. (N. Y.) 9. §§ 5730, 6064.
- Connecticut Mut. Life Ins. Co. v. Com., 133 Mass. 161, 163. §§ 8120, 8134.
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- Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622. § 7957.
- Connecticut Mut. Fire Ins. Co. v. Whipple, 61 N. H. 61. § 7957.

Connecticut—Copp TABLE OF CASES CITED.

- Connecticut River R. Co. v. Williston, 16 Gray (Mass.), 64. § 4846.
- Connecticut River Sav. Bank v. Fiske, 60 N. H. 363. §§ 3381, 3436, 6016, 6018.
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- Connell v. Connell, 6 Ohio. 358. § 590.
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- Conner v. Todd, 48 N. J. L. 361. § 7869.
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- Connor, Ex parte, 51 Ga. 571. § 617.
- Connor v. Fifth Nat. Bank (Pa.), 14 Pitts. L. J. (N. S.) 370. § 6064.
- Connor v. Hill, 11 Rich. L. (S. C.) 193, 195. § 2476.
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- Connor v. Vicksburg & Co. R. Co., 36 Fed. Rep. 273. § 7485.
- Conover v. Mutual Ins. Co., 1 N. Y. 290. §§ 4698, 4833.
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- Couro v. Gray, 4 How. Fr. (N. Y.) 166. § 6819.
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- Conroy v. Gale, 5 Lans. (N. Y.) 344; affirmed, 47 N. Y. 665. § 6363.
- Conroy v. Sullivan, 44 Ill. 451. §§ 3112, 4182.
- Conscocague Bank v. Ragan, 7 Gill & J. (Md.) 341. § 2146.
- Conser v. Snowden, 54 Md. 175. § 2436.
- Consett v. Bell, 1 Young & C. 569. § 4035.
- Consolidated & Co. v. Central Pac. R. Co., 51 Cal. 269. § 5955.
- Consolidated Association v. Avegno, 28 La. An. 552. § 6064.
- Consolidated Association v. Claiborne, 7 La. An. 318. §§ 4443, 7720.
- Consolidated Bank v. State, 5 La. An. 44. § 1133.
- Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269. §§ 5591, 5608, 5964.
- Consolidated Gregory Co. v. Baber, 1 Colo. 511. § 4838.
- Consolidated Tank-Line Co. v. Kansas City Varnish Co., 43 Fed. Rep. 204. § 7783.
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- Constant v. St. Alban's Church, 4 Daly (N. Y.) 305. §§ 3905, 5310.
- Continental Bank v. National Bank, 50 N. Y. 575, 581. § 4616.
- Continental Improvement Co. v. Phelps, 47 Mich. 299. §§ 622, 627.
- Continental Ins. Co. v. Board of Underwriters, 67 Fed. Rep. 310. § 7782.
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- Continental National Bank v. Elliott Nat. Bank, 7 Fed. Rep. 369. §§ 2396, 2417.
- Continental Nat. Bank v. Weems, 69 Tex. 489. §§ 7028, 7107, 7108.
- Contocook Valley R. Co. v. Barker, 32 N. H. 363. §§ 1035, 1724, 1732.
- Contract Corp., Ex parte, L. R. 3 Ch. 105. §§ 1102, 1108, 1706.
- Converse v. Dimock, 22 Fed. Rep. 573. § 4500.
- Converse v. Hood, 149 Mass. 471. §§ 297, 741, 1337, 4449, 4485, 4488, 4489, 4533.
- Converse v. Norwich & Co. Trans. Co., 33 Conn. 179. § 5645.
- Convith v. Culver, 69 Ill. 502. § 1897.
- Conway, Ex parte, 4 Ark. 302. §§ 3945, 6466, 6467, 6474, 6484, 6485, 6494, 6534, 7068, 7069.
- Conway v. Halsey, 44 N. J. L. 462. § 4472.
- Conway v. John, 14 Colo. 30. § 2409.
- Conway v. State Bank, 13 Ark. 48, 51. § 7669.
- Conwell v. Connorsville, 15 Ind. 150. §§ 2810, 2847.
- Conwell v. Pattison, 28 Ind. 509. § 6907.
- Coryngbam's Appeal, 57 Pa. St. 474. §§ 2622, 2656, 2667, 2668, 4063.
- Cook v. Goodman, 2 Ad. & El. (N. S.) 580. § 5089.
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- Cook v. Baldwin, 120 Mass. 317. § 5154.
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- Cook v. Burlington, 59 Iowa. 251. §§ 2812, 2847.
- Cook v. Chittenden, 25 Fed. Rep. 515. §§ 1525, 1534.
- Cook v. Detroit & Co. R. Co., 43 Mich. 349. §§ 263, 6237, 6239.
- Cook v. Dillon, 9 Iowa. 407. § 7060.
- Cook v. Doggett, 2 Allen (Mass.) 439. § 2706.
- Cook v. Ellis, 6 Hill (N. Y.) 466. § 6379.
- Cook v. Hannibal & Co. R. Co., 63 Mo. 397. § 6350.
- Cook v. Kuhn, 1 Neb. 472. § 5016.
- Cook v. Loomis, 26 Conn. 483. § 2454.
- Cook v. Loveland, 2 Bos. & P. 31. § 3914.
- Cook v. Manufacturing Co., 1 Sneed (Tenn.), 698. § 602.
- Cook v. McNaughton, 128 Ind. 410. § 1206.
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- Cook v. Oxley, 3 T. R. 653. § 1179.
- Cook v. Sherman, 20 Fed. Rep. 167. § 4011.
- Cook v. Toombs, 2 Anstr. 420. § 1048.
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- Cook v. Van Horn, 81 Wis. 291. § 7336.
- Cook v. Ward, 2 C. P. Div. 255. § 1706.
- Cook v. Wheeler, Harr. (Mich.) 443. § 3116.
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- Cook County v. Chicago & Co. R. Co., 35 Ill. 460. § 8097.
- Cook County Nat. Bank v. United States, 107 U. S. 445; reversing 9 Biss. (U. S.) 65. § 7312.
- Cooke v. Abna Ins. Co., 7 Daly (N. Y.) 555. § 4858.
- Cooke v. Colehan, 2 Straus, 1217. § 1629.
- Cooke v. Illinois & Co. R. Co., 30 Iowa. 205. § 6298.
- Cooke v. Orange, 48 Conn. 401. §§ 7342, 7348.
- Cooke v. Pearce, 23 S. C. 239. §§ 4234, 4372.
- Cooke v. State Nat. Bank, 52 N. Y. 96. §§ 673, 4616, 4756, 4815, 4816, 7462, 7464.
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- Cooley v. Essex, 27 N. J. L. 415. § 28.
- Cooley v. Norton, 4 Cush. (Mass.) 93. § 4785.
- Cooley v. Wardens, 12 How. (U. S.) 299. § 5460.
- Cooley v. Warren, 53 Mo. 166. § 519.
- Coolidge v. Payson, 2 Wheat. (U. S.) 66. § 5154.
- Coolidge v. Wiggins, 62 Me. 568. § 4378.
- Coolidge v. Williams, 4 Mass. 140. § 5663.
- Coombe v. Sampson, 1 Dowd & R. 201. § 2477.
- Coombs v. Carr, 55 Ind. 303. § 3248.
- Coombs v. Jordan, 3 Bland Ch. (Md.) 284. § 7060.
- Coomes v. Houghton, 102 Mass. 211. § 6287.
- Coope v. Bolles, 42 Barb. (N. Y.) 87. § 3562.
- Cooper v. Central R. Co., 44 Iowa, 131. § 6350.
- Cooper v. Curtis, 30 Me. 488. §§ 3994, 3998, 4789, 4790, 4792, 5133, 5158, 5755.
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- Cooper v. Rankin, 5 Binn. (Pa.) 613. § 5295.
- Cooper v. Richmond R. Co., 42 Fed. Rep. 697. § 7471.
- Cooper v. Shropshire Union R. & Co. Co., 13 Jur. 443; 6 Railw. Cas. (Eng.) 136. § 355.
- Cooper v. Smith, 9 Serg. & R. (Pa.) 26. § 7507.
- Cooper v. Telfair, 4 Dall. (U. S.) 14. § 6580.
- Cooper v. Thompson, 13 Blatchf. (U. S.) 434, 437. § 6107.
- Cooper Man. Co. v. Ferguson, 113 U. S. 727. §§ 7936, 7980.
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- Ope v. Thames & Co. R. Co., 3 Ex. 841. §§ 5058, 5297.
- Copeland v. Citizens' Gas Co., 61 Barb. (N. Y.) 60. §§ 4010, 4520, 4532.
- Copeland v. Copeland, 7 Bush (Ky.), 349. § 1066.
- Copeland v. Johnson Man. Co., 47 Hun (N. Y.), 235. § 4331.
- Copeland v. Memphis & Co. R. Co., 3 Woods (U. S.) 651, 658. § 47.
- Copeman v. Gallant, 1 P. Wms. 320. § 7084.
- Copes v. Charleston, 10 Rich. L. (S. C.) 491. §§ 590, 1118.
- Copley v. Grover & Baker Sewing Machine Co., 2 Woods (U. S.), 494. § 3612.
- Copp v. Lamb, 12 Ma. 312. §§ 56, 696, 7693.

- Coppage v. Hutton**, 124 Ind. 410. § 1157.
Copper Miners' Co. v. Fox, 16 Ad. & El. (N. S.) 229, 236. §§ 5059, 5297.
Coppennoll v. Ketcham, 56 Barb. (N. Y.) 113. § 7552.
Coppin v. Greenlees, 38 Ohio St. 275. §§ 1102, 1107, 1514, 2054, 2068.
Couard v. Prendergast, 35 Mo. App. 237. §§ 3608, 3614, 3660, 3737, 3799, 3811.
Corbett, Re, 5 Sawy. (U. S.) 206. § 1084.
Corbett v. Woodward, 5 Sawy. (U. S.) 403. §§ 697, 4009, 4016, 4060, 4104, 4108.
Corby v. Tracy, 62 Mo. 511, 515. § 3615.
Corcoran v. Chesapeake & C. Canal Co., 94 U. S. 741, 745. § 6876.
Corcoran v. Holbrook, 59 N. Y. 617. § 6349.
Corcoran v. Snow Cattle Co., 151 Mass. 74. § 4720.
Cordes v. Strasser, 8 Mo. App. 61. § 1048.
Corey v. Long, 43 How. Pr. (N. Y.) 504. § 7199.
Corey v. Morrill, 61 Vt. 598. §§ 1861, 4355.
Corfield v. Coryell, 4 Wash. (U. S.) 380. § 2899.
Cork & C. R. Co., Re, L. R. 4 Ch. 748. §§ 5968, 5979.
Cork & C. R. Co., Re, L. R. 4 Ch. 789. § 5702.
Cork & C. R. Co. v. Cazenove, 10 Ad. & El. (N. S.) 935. § 1095.
Cork & C. R. Co. v. Goode, 13 O. B. 826. § 1938.
Cork & C. R. Co. v. Patterson, 37 Eng. L. & Eq. 398; 18 C. B. 414. §§ 345, 356.
Cornac v. Western White Bronze Co., 77 Iowa, 32. §§ 1658, 3301, 3691, 4873.
Corn Exchange Bank v. Blye, 37 Hun (N. Y.) 473. § 6899.
Corn Exchange Bank v. Blye, 101 N. Y. 303; affirming 37 Hun (N. Y.) 473. § 7327.
Corn Exchange Bank v. Cumberland Coal Co., 1 Bosw. (N. Y.) 438. §§ 3960, 4887, 5328.
Cornfoot v. Fowke, 6 Mees. & W. 358. §§ 4783, 4929.
Cornell's Appeal, 114 Pa. St. 153. §§ 1233, 3486, 3494, 3806.
Cornell v. Clark, 104 N. Y. 451. § 4070.
Cornell v. Hay, L. R. 8 O. P. 328. § 476.
Cornell v. Hichens, 11 Wis. 353. § 5781.
Cornell v. New Hope Land & C. Co., 9 N. J. Eq. 457. § 5107.
Cornell v. Roach, 101 N. Y. 373. § 4366.
Cornell v. Roach, 9 Abb. N. Cas. (N. Y.) 275. § 4233.
Cornell University v. Fiske, 236 U. S. 152. §§ 5787, 5809.
Cornick v. Richards, 3 Lea (Tenn.), 1. §§ 2412, 2593, 2765.
Corning v. Green, 23 Barb. (N. Y.) 33. §§ 582, 5441.
Corning v. McCullough, 1 N. Y. 47, 53. §§ 1986, 1989, 1992, 3040, 3074, 3077, 3358, 3476, 3767.
Cornwall v. Eastham, 2 Bush (Ky.), 561. §§ 3495, 4266, 4315.
Corporation of Banbury, Case of, 10 Mod. 346. § 6658.
Corporation of Colchester v. Seaber, 3 Burr. 1866, 1870. § 6655.
Corporation of Ludlow v. Tyler, 7 Car. & P. 537. § 289.
Corporation Officers, Re, 3 Pa. County Ct. 188. § 4714.
Correll v. Burlington & C. R. Co., 38 Iowa 120. § 6362.
Corrigan v. Gage, 68 Mo. 541. § 1024.
Corrigan v. Trenton Delaware Falls Co., 7 N. J. Eq. 499. §§ 512, 5069, 5070, 7046.
Corry v. Londonderry & C. R. Co., 29 Beav. 272. § 2157.
Corse v. Sanford, 14 Iowa, 235. §§ 3392, 3399.
Corser v. Paul, 41 N. H. 24. §§ 4793, 4802.
Corser v. Russell, 44 Hun (N. Y.), 630; 20 Abb. N. Cas. (N. Y.) 316; 9 N. Y. St. Rep. 56. § 7163.
Cortelyou v. Lansing, 2 Caines Cas. (N. Y.) 200. §§ 2619, 2656.
Cortelyou v. Vanbrundt, 1 Johns. (N. Y.) 313. § 5338.
Cortis v. Kent Water Works, 7 Barn. & C. 314. § 3914.
Corwin v. Walton, 18 Mo. 71. § 6379.
Corwith v. Culver, 63 Ill. 502. § 3460.
Corson v. Maryland, 120 U. S. 502. § 5460.
Cory v. Lee, 93 Ala. 468. § 2392.
Cory v. State, 55 Ga. 236. § 5004.
Corydon Steam Mill v. Pell, 4 Blackf. (Ind.) 472. § 1930.
Coryell v. New Hope & C. Co., 9 N. J. Eq. 457. §§ 3915, 6176, 8494.
Cosgrove v. Tebo, & C. R. Co., 64 Mo. 495. §§ 7503, 7540.
Costa Rica v. Erlanger, 1 Ch. Div. 171. § 7409.
Costar v. Brush, 25 Wend. (N. Y.) 628. § 5398.
Costello's Case, 2 De Gex, F. & J. 302. §§ 3255, 3256.
Costello v. Cave, 2 Hill (N. Y.), 528. § 1220.
Coster v. Mayor & C. of Albany, 43 N. Y. 411. § 381.
Coster v. Tide Water Co., 18 N. J. Eq. 64. §§ 5591, 5594, 5596, 5611, 5626.
Cottheal v. Brouwer, 5 N. Y. 562. §§ 4421, 4427.
Cotter v. Doty, 5 Ohio, 993. § 5843.
Cotting v. New York & C. R. Co., 54 Conn. 156. § 2272.
Cottle, Ex parte, 2 Mac. & G. 185. §§ 421, 428, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209, 3210, 3211, 3212, 3213, 3214, 3215, 3216, 3217, 3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 34

Cowles v. Cromwell, 25 Barb. 413. §§ 3221, 3222.
 Cowles v. Mercer Co., 7 Wall. (U. S.) 118, 121. § 7457.
 Cowles v. Whitman, 10 Conn. 121. §§ 2435, 2728.
 Cowley v. Grand Rapids & C. Co., 13 Ind. 61. § 1964.
 Cowley v. Smyth, 46 N. J. L. 380. § 4147.
 Cox's Case, 4 De Gex. J. & S. 53. §§ 3200, 3204.
 Cox's Case, 33 L. J. (Ch.) 145. § 3255.
 Cox v. Bearden, 84 Ga. 304. § 6931.
 Cox v. Bodfish, 35 Me. 302. § 4445.
 Cox v. Crumley, 5 Lea (Tenn.), 529. § 6377.
 Cox v. Gould, 4 Blatchf. (U. S.) 341. §§ 2028, 3124, 3734.
 Cox v. Midland Counties R. Co., 3 Ex. 268. § 4394.
 Cox v. Mitchell, 7 C. B. (N. S.) 55. § 6211.
 Cox v. O'Riley, 4 Ind. 368. § 2588.
 Cox v. Hart, 53 Mich. 557. § 7578.
 Coy v. Jones, 30 Neb. 793. § 3767.
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 Coyote Gold & Co. v. Ruble, 8 Or. 244. §§ 1146, 1160, 1317.
 Cozart v. Georgia R. & C. Co., 54 Ga. 379. § 6183.
 Craddock v. American & C. Ins. Co., 88 Ala. 281. § 7935.
 Craford v. Warwick Co., 87 Va. 110. § 7366.
 Craft v. South Boston R. Co., 150 Mass. 207. §§ 4716, 4726.
 Cragg v. Taylor, L. R. 1 Exch. 148. §§ 2778, 2797.
 Cragie v. Hadley, 99 N. Y. 131. §§ 7087, 7095.
 Craig's Appeal, 92 Pa. St. 396. § 3126.
 Craig v. Andes, 93 N. Y. 405. § 1132.
 Craig v. Fenn, 1 Car. & Marsh. 43. § 7756.
 Craig v. First Presbyterian Church, 88 Pa. St. 42. § 725.
 Craig v. Fox, 16 Ohio, 567. § 1752.
 Craig v. Gregg, 83 Pa. St. 19. §§ 4119, 4472.
 Craig v. Hyde, 24 How. Pr. (N. Y.) 313. § 1695.
 Craig v. Missouri, 4 Pet. (U. S.) 410, 432. § 5761.
 Craig v. People, 47 Ill. 487. §§ 5910, 5938, 5939.
 Craig v. Phillips, 3 Ch. Div. 722. §§ 452, 476, 1389.
 Craig v. Vicksburg, 31 Miss. 216. § 6064.
 Craig v. Ward, 9 Johns. (N. Y.) 197. § 2617.
 Craigie v. Smith, 14 Abb. N. Cas. (N. Y.) 409. § 7272.
 Craig Medicine Co. v. Merchants' Bank, 59 Hun (N. Y.), 561. §§ 3909, 4851.
 Craiker v. Chicago & C. R. Co., 36 Wis. 657. §§ 4993, 6286, 6307, 6387, 6391.
 Cram v. Bangor, 122 Me. 354. §§ 3911, 3913, 3914, 5046, 5074, 5175.
 Cramer v. Burlington, 42 Iowa. 315. § 7756.
 Cramer v. Tittel, 72 Cal. 12. § 599.
 Crampton v. Zabriske, 101 U. S. 601. §§ 5262, 5705, 7318.
 Crandall v. Clark, 7 Barb. (N. Y.) 169. § 5094.
 Crandall v. Lincoln, 52 Conn. 73. §§ 2054, 2059, 2063, 2068, 2951, 3276.
 Crandall v. State, 6 Wall. (U. S.) 35. § 7878.
 Crandall v. State, 10 Conn. 339. § 2399.
 Crane v. Baudouine, 55 N. Y. 256. § 4855.
 Crane v. Bedwell, 25 Miss. 507. § 5239.
 Crane Bros. Man. Co. v. Adams, 142 Ill. 125. § 2163.
 Crane Bros. Man. Co. v. Morse, 49 Wis. 368. § 7672.
 Crane Bros. Man. Co. v. Reed, 3 Utah, 506. § 7656.
 Cranson v. Smith, 47 Mich. 139. § 2775.
 Cranwell v. Ship Roadick, 15 La. An. 436. § 2588.
 Crapo v. Kelly, 16 Wall. (U. S.) 610. §§ 7341, 7342.
 Crater v. Binioger, 45 N. Y. 548. § 1255.
 Cravens v. Eagle Cotton Mills Co., 120 Ind. 6. §§ 518, 1354.
 Cravens v. Jameson, 59 Mo. 68. § 1924.
 Cravens v. Logan, 7 Ark. 103. § 7593.
 Crawl v. Easterly, 4 Lans. (N. Y.) 513. §§ 3901, 4164, 4372.
 Crawford v. Branch Bank, 7 How. (U. S.) 279. § 5437.
 Crawford v. Branch Bank, 7 Ala. 205. § 4612.
 Crawford v. Branch Bank, 8 Ala. 79. §§ 7733, 7737.
 Crawford v. Burrell Township, 53 Pa. St. 219. § 5571.
 Crawford v. Dean, 6 Blackf. (Ind.) 181. § 7595.
 Crawford v. Delaware, 7 Ohio St. 460. §§ 6275, 7772.
 Crawford v. Longstreet, 43 N. J. L. 325. §§ 5044, 5048, 5050, 5941.
 Crawford v. Northeastern R. Co., 3 Jur. (N. S.), pt. 1, p. 1093. § 2264.
 Crawford v. Planters' & C. Bank, 4 Ala. 313. § 7760.
 Crawford v. Planters' & C. Bank, 6 Ala. 289. § 7760.
 Crawford v. Powell, 2 Ld. Raym. 1013; 1 W. Black. 229. §§ 3887, 3896.

Crawford v. Rohrer, 59 Md. 599. §§ 1580, 1582, 3537.
 Crawford v. State Bank 5 Ala. 679. § 4661.
 Crawford County v. Pittsburgh & C. R. Co., 32 Pa. St. 141. § 1545.
 Crawfordville & C. Turnp. Co. v. Smith, 89 Ind. 290. § 5348.
 Crawfordville & C. R. Co. v. Wright, 5 Ind. 252. §§ 6305, 7394.
 Crawshaw v. Collins, 15 Ves. 218, 229. §§ 1084, 4548.
 Crawshaw v. Maule, 1 Swanst. 528. § 6834.
 Crear v. Crossly, 40 Ill. 175. § 5596.
 Crease v. Babcock, 23 Pick. (Mass.) 334. §§ 5419, 5421, 6579, 6738, 6744.
 Crease v. Babcock, 10 Met. (Mass.) 525. §§ 1927, 2937, 3038, 3092, 3093, 3134, 3192, 3213, 3283, 3466, 3483, 3488, 3500, 3538, 3695, 4311.
 Credit Co. v. Arkansas & C. R. Co., 15 Fed. Rep. 46, 50. §§ 7177, 6226.
 Credit Co. v. Howe Machine Co., 54 Conn. 357. §§ 2608, 4720, 4724, 4889, 4890.
 Credit Foncier & Mobilier of England, Ex parte, L. R. 7 Ch. 161. §§ 2034, 2914, 5214.
 Cree v. Somervail (H. L.), 4 App. Cas. 643. §§ 3194, 3196.
 Creed v. Lancaster Bank, 1 Ohio, 1. §§ 1455, 1891, 3271.
 Cremer v. Higginson, 1 Mason (U. S.), 338. § 3158.
 Crenshaw v. Slate River Co., 6 Rand. (Va.) 425. § 5607.
 Crenshaw v. Ullman, 113 Mo. 633. § 7698.
 Crescent City Bank v. Carpenter, 26 Ind. 108, 113. §§ 5046, 5168.
 Crescent City Brew. Co. v. Flanner, 44 La. An. 22. §§ 4070, 4072, 6509, 6530.
 Crescent City Seltz & C. Water Man. Co. v. Deblieux, 40 La. An. 155. § 2621.
 Crescent City Wharf & C. R. Co. v. Simpson, 77 Cal. 286. § 5105.
 Cresswell v. Oberly, 17 Bradw. (Ill.) 281. § 239.
 Cresswell v. Lanahan, 101 U. S. 347. § 4703.
 Cresswell & Mining Co. v. Williams, 14 Week. Rep. 1003. § 5721.
 Creyke's Case, L. R. 5 Ch. 63. §§ 1550, 1796.
 Cribb v. Waycross Lumber Co., 82 Ga. 597. § 7658.
 Crips v. Mayor of Maldstone, 1 Keb. 812. § 829.
 Crielwell's Appeal, 100 Pa. St. 488. § 7042.
 Crittenden v. Wilson, 5 Cow. (N. Y.) 165. §§ 6342, 6371.
 Crocker v. Crane, 21 Wend. (N. Y.) 211. §§ 1218, 1221, 1222, 1227, 1245, 1247, 1322.
 Crocker v. Gulliver, 44 Me. 491. § 2454.
 Crocker v. Man, 3 Mo. 472. § 7507.
 Crocker v. New London & C. R. Co., 24 Conn. 249. § 6305.
 Crocket v. Young, 1 Smedes & M. (Miss.) 241. §§ 4789, 4790, 4794.
 Croft v. Alison, 4 Barn. & Ald. 590. §§ 6298, 6299.
 Croft v. Pyke, 3 P. Wms. 180. § 1084.
 Crofut v. Brooklyn Ferry Co., 36 Barb. (N. Y.) 201. § 7423.
 Cromford & C. R. Co. v. Lacey, 3 You. & J. 80. §§ 1377, 1899.
 Cromie v. Louisville Orphans' Home Soc., 3 Bush (Ky.), 355. § 5787.
 Crompton v. Varna Ry. Co., L. R. 7 Ch. 562. § 5297.
 Cromwell v. Charleston Ins. & C. Co., 2 Rich. L. (S. C.) 512. §§ 7424, 7425, 7999.
 Cromwell v. Royal Canadian Ins. Co., 49 Md. 366. §§ 7629, 7970, 8007, 8073.
 Cromwell v. Sac Co., 96 U. S. 51. §§ 6065, 6077.
 Cronin v. Potters Co-Op. Co. (Ohio C. F.), 29 Ohio L. J. 52. §§ 6896, 6703.
 Crook v. Jewett, 12 How. Pr. (N. Y.) 19. §§ 4473, 4474.
 Crook v. Seaford, L. R. 10 Eq. 678; L. R. 6 Ch. 551. § 5297.
 Crooker v. Appleton, 25 Me. 131. § 5301.
 Crosby v. Day, 81 N. Y. 242, 244. § 6989.
 Crosby v. Day, 16 Hun (N. Y.), 291. § 6989.
 Crosby v. Hanover, 36 N. H. 404. §§ 5595, 5615, 5616, 5617.
 Crosby v. Lumbermen's Bank, 1 Clark (N. Y.), 234. § 8081.
 Cross v. Armstrong, 44 Ohio St. 613. § 7901.
 Cross v. De Valle, 1 Wall. (U. S.) 5. § 7964.
 Cross v. Eureka & C. Co., 73 Cal. 302. §§ 2181, 2619, 2658.
 Cross v. Jackson, 5 Hill (N. Y.), 478, 480. § 7595.
 Cross v. Peach Bottom R. Co., 90 Pa. St. 392. §§ 73, 77, 1278.

- Cross v. Pinckneyville Mill Co.**, 17 Ill. 54. §§ 207, 239, 240, 1158, 1170.
- Cross v. Sackett**, 2 Bosw. (N. Y.) 617. §§ 1387, 1482, 1472, 1500.
- Cross v. Sackett**, 16 How. Pr. (N. Y.) 62. § 4119.
- Cross v. West Virginia &c. R. Co.**, 37 W. Va. 342. § 3357.
- Cross v. Williams**, 7 Hurlst. & N. 675. § 5167.
- Crosse v. Smith**, 1 Maule & S. 545. § 5213.
- Crosley v. Louisiana Savings Bank &c. Commr's**, 38 La. An. 74. § 1596.
- Crosley v. O'Brien**, 24 Ind. 325, 329. § 5615.
- Crossman v. Hilltown Turp. Co.**, 3 Grant Cas. (Pa.) 225. §§ 5070, 5104.
- Crossman v. Penrose &c. Co.**, 26 Pa. St. 69. § 1394.
- Croton Ins. Co., Matter of**, 3 Barb. Ch. (N. Y.) 642. §§ 7069, 7294, 7230, 7254.
- Croton Turp. Road v. Ryder**, 1 Johns. Ch. (N. Y.) 611. §§ 5404, 5919, 7776, 7777.
- Crouch v. Gridley**, 6 Hill (N. Y.) 250. § 3112.
- Crow v. Beardsley**, 68 Mo. 435. § 6534.
- Crowder v. Moore**, 52 Ala. 220. §§ 6880, 6883.
- Crow Dog, Ex parte**, 109 U. S. 555. § 687.
- Crowell v. Jackson**, 53 N. J. L. 656. § 2721.
- Crowley v. Copley**, 2 La. An. 329. § 5575.
- Crowley v. Genesee Mining Co.**, 55 Cal. 273. § 5045.
- Crowley v. Panama R. Co.**, 30 Barb. (N. Y.) 99. § 7891.
- Crowley v. Royal Exchange Shipping Co.**, 2 Civ. Proc. Rep. (N. Y.) 174. § 8009.
- Crowley v. Wallace**, 12 Mo. 143. § 5092.
- Crown v. Brainerd**, 57 Vt. 625. § 4314.
- Crown Bank, Re**, 44 Ch. Div. 634. § 6698.
- Crown Point Iron Co. v. Fitzgerald**, 14 N. Y. St. Rep. 427. § 7560.
- Croxall v. Shererd**, 5 Wall. (U. S.) 268. § 590.
- Croxton's Case**, 1 De Gex, M. & G. 600. § 3221.
- Croydon Hospital v. Farley**, 6 Taunt. 497. § 7609.
- Crozer v. Leland**, 4 Whart. (Pa.) 12. §§ 1754, 1952.
- Crum v. Bliss**, 47 Conn. 592. § 5784.
- Crumlish v. Shenandoah Valley R. Co.**, 28 W. Va. 623. § 4505.
- Crump v. U. S. Mining Co.**, 7 Gratt. (Va.) 352. §§ 1364, 1367, 1383, 1388, 1424, 4634, 4916, 6323, 6335, 6598, 6600, 7702.
- Crusader, The**, 1 Ware (U. S.) 441. §§ 1377, 1909.
- Cruse v. Barley**, 3 P. Wms. 20, 22. § 5790.
- Crutcher v. Com.**, 89 Ky. 6. § 8108.
- Crutcher v. Kentucky**, 141 U. S. 47. § 8108.
- Crutcher v. Nashville Bridge Co.**, 8 Humph. (Tenn.) 403. § 5730.
- Crutchfield v. Mutual Gaslight Co. (Tenn.)**, 2 S. W. Rep. 653. § 6699.
- Crutinger v. Missouri Pac. R. Co.**, 82 Mo. 64. §§ 7425, 7524, 7993.
- Cuacullu v. Union Ins. Co.**, 2 Rob. (La.) 571 (1842). § 3585.
- Cud v. Rutter**, 1 P. Wms. 570. §§ 4464, 4474.
- Cuddon v. Eastwick**, Salk. 192. § 6302.
- Culbertson v. Kinevan**, 73 Cal. 68. § 4988.
- Culbertson v. Wabash Nav. Co.**, 4 McLean (U. S.), 544. §§ 1076, 4075, 7484.
- Culbreath v. Culbreath**, 7 Ga. 64. § 1717.
- Cullen v. Duke of Queensbury**, 1 Bro. Ch. 101; 1 Bro. Parl. Cas. 396. § 5167.
- Cullen v. Duke of Queensberry**, 6 Ves. 777. § 924.
- Cullen v. O'Hara**, 4 Mich. 132. § 2752.
- Cullen v. Thompson**, 4 Maq. H. L. (Sc.) 424. § 1487.
- Cullinan v. New Orleans**, 28 La. An. 102. § 1013.
- Culver v. Leovy**, 19 La. An. 202. § 4851.
- Culver v. Reno Real Estate Co.**, 91 Pa. St. 367. §§ 2282, 5721.
- Culver v. Third Nat. Bank**, 61 Ill. 528. §§ 3095, 3170, 3414, 3415, 3460, 3502, 3652.
- Cumberland &c. Canal Corp. v. Portland**, 56 Me. 77. § 6285.
- Cumberland &c. Co. v. Hoffman &c. Co.**, 30 Barb. (N. Y.) 159. § 7999.
- Cumberland &c. Co. v. Sherman**, 20 Md. 117. § 5306.
- Cumberland &c. Co. v. United Electric R. Co.**, 42 Fed. Rep. 273. § 5606.
- Cumberland &c. R. Co. v. Hogan**, 45 Md. 229. § 6360.
- Cumberland &c. R. Co. v. Moran**, 44 Md. 283. § 6350.
- Cumberland Coal &c. Co. v. Hoffman Steam Coal Co.**, 30 Barb. (N. Y.) 149. § 8002.
- Cumberland Coal &c. Co. v. Parish**, 42 Md. 598. §§ 4009, 4016.
- Cumberland Coal &c. Co. v. Sherman**, 30 Barb. (N. Y.) 553. §§ 457, 4022, 4024, 4043, 4047, 4080, 4071, 5191, 622.
- Cumberland College v. Ish**, 22 Cal. 641. § 7599.
- Cumberland Teleph. &c. Co. v. Turner**, 88 Tenn. 265. § 8049.
- Cumberland Valley R. Co. v. Baab**, 9 Watts (Pa.), 458. § 1306.
- Cumberland Valley R. Co. v. Hughes**, 11 Pa. St. 141. § 6358.
- Cuming v. Boswell**, 2 Jur. (N. s.) 1005. §§ 2199, 2212.
- Cumming v. Prescott**, 2 Young & C. E. 488. § 3839.
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- Curd v. Wunder**, 5 Ohio St. 93. § 7854.
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 Curtis v. Harlow, 12 Met. (Mass.) 3. §§ 3023, 3180, 3183.
 Curtis v. Leavitt, 17 Barb. (N. Y.) 309. §§ 632, 5016.
 Curtis v. Leavitt, 15 N. Y. 9; modifying 17 Barb. 309. §§ 2246, 3562, 4121, 4168, 4748, 4760, 4933, 5045, 5069, 5070, 5071, 5697, 5698, 5730, 5952, 6189, 6477, 6515, 6948.
 Curtis v. McCullough, 3 Nev. 202. §§ 792, 3973.
 Curtis v. Piedmont Lumber & Co. Co., 103 N. C. 401. §§ 5018, 5288.
 Curtis v. Portland, 59 Me. 493. § 3918.
 Curtis v. Swartwout, 1 N. Y. Leg. Obs. 406. § 4633.
 Curtis v. Whipple, 24 Wis. 320. § 1117.
 Curtiss v. Murry, 26 Cal. 863. § 3115.
 Cushee v. Leavitt, 5 Cal. 169. § 1430.
 Cushing v. Rice, 45 Me. 305. § 7591.
 Cushman v. Bonfield, 35 Ill. App. 436. § 6246.
 Cushman v. Shepard, 4 Barb. (N. Y.) 113. § 3173.
 Cushman v. Thayer Man. Co., 76 N. Y. 865. §§ 2425, 2430, 2435, 2436, 2445, 2501, 2728.
 Cushman v. Thayer Man. Co., 7 Daly (N. Y.), 330. § 2441.
 Custar v. Titusville Gas & Co., 63 Pa. St. 381. §§ 446, 1361, 1367, 1400, 1434, 1796, 4916, 6334.
 Custer v. Tompkins County Bank, 9 Pa. St. 27. §§ 5208, 5221, 5234.
 Cutler v. American Exch. Bank, 113 N. Y. 593. § 7099.
 Cutler v. Middlesex Factory, 14 Pick. (Mass.) 483.
 Outliff v. Albany, 60 Ga. 597. § 8091.
 Cutting v. Damerel, 23 Hun (N. Y.), 339. § 7282.
 Cutting v. Damerel, 68 N. Y. 410; reversing 23 Hun (N. Y.) §§ 1550, 1794, 3319.
 339. §§ 3289, 3565, 6943, 7382.
 Cuykendall v. Corning, 88 N. Y. 129. §§ 3351, 3493, 5506.
 Cuykendall v. Douglas, 19 Hun (N. Y.), 577. §§ 2108, 6561.
 Dabney v. Bank, 3 S. C. 124. § 7042.
 Dabney v. Stevens, 10 Abb. Pr. (N. s.) (N. Y.) 39; 40 How. Pr. 341; 46 N. Y. 681. §§ 4164, 4331, 4887, 4890, 4965.
 Dade Coal Co. v. Haaslett, 83 Ga. 549. § 7426.
 Daggett v. Davis, 53 Mich. 35. §§ 2450, 2451, 2455, 2460, 2477.
 Dahl v. Falache, 68 Cal. 948. § 3362.
 Deland v. Williams, 101 Mass. 571. §§ 2208, 2210, 2216.
 Dale, Ex parte, 11 Ch. Div. 772. § 7104.
 Dale v. Donaldson Lumber Co., 48 Ark. 188. § 4700.
 Dale v. Martin, 11 L. R. Ir. 371; 9 L. R. Ir. 498. § 1716.
 Dale v. Medcalf, 9 Pa. St. 108, 110. § 5448.
 Dallas Cotton & Co. Mills v. Clancey (Tex. App.), 15 S. W. Rep. 194. §§ 1982, 1975.
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 Daly v. Nat. Life Ins. Co. (1878), 64 Ind. 1. §§ 652, 7899, 7955, 7956.
 Daly v. Onondago County Mut. Ins. Co., 6 Hill (N. Y.), 476. § 7590.
 Damarin v. Huron Iron Co., 47 Ohio St. 581. § 6509.
 Damhorst v. Missouri & C. R. Co., 32 Mo. App. 350. § 7514.
 Damon v. Granby, 2 Pick. (Mass.) 352. §§ 20, 3914, 3918, 3953, 3959, 4959, 5074.
 Dana v. Bank of St. Paul, 4 Minn. 385. §§ 5019, 5644, 5967.
 Dana v. Bank of United States, 5 Watts & S. (Pa.) 217. §§ 13, 3945, 3968, 3974, 5222, 5641, 6050, 6467, 6473, 6493, 6494.
 Dana v. Binney, 7 Vt. 493, 501. § 6231.
 Dana v. Brown, 1 J. J. Marsh. (Ky.) 304. § 2317.
 Danbury & Co. R. Co. v. Wilson, 22 Conn. 435. §§ 80, 513, 1185, 1316, 1866.
 Dane v. Dane Man. Co., 14 Gray (Mass.), 488. §§ 3013, 3026, 3319, 4314, 4345.
 Dane v. Young, 61 Me. 160. §§ 2369, 3092, 3283, 3345, 3421, 3454, 6671.
 Danforth v. Penny, 3 Met. (Mass.) 564. §§ 7998, 8069.
 Danforth v. Schoharie & Co. Turnp. Co., 12 Johns. (N. Y.) 227. §§ 5045, 5046, 7392.
 Daniel v. Sorrells, 9 Ala. 436. § 2421.
 Daniel Ball, The, 10 Wall. (U. S.) 557. §§ 5539, 8114.
 Daniell's Case, 22 Beav. 43; 1 De Gex. & J. 372; 23 Beav. 558. §§ 1523, 1578, 1579, 2054, 2055, 5196, 3255, 4154.
 Daniell v. Royal British Bank, 1 H. & N. 631. §§ 1442, 3233.
 Danielly v. Cabaniss, 52 Ga. 211. §§ 590, 634.
 Daniels v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416, 422. § 7970.
 Daniels v. Meinhard, 52 Ga. 359. § 7811.
 Daniels v. Noxon, 17 Ont. App. 206. § 2863.
 Daniels v. St. Louis & C. R. Co., 62 Mo. 43. §§ 262, 365.
 Danley v. Rector, 10 Ark. 211. § 5246.
 Dann v. Spurrier, 7 Ves. 231. § 5246.
 Dannebrogge & Co. Min. Co. v. Allment, 26 Cal. 286. §§ 7695, 7708.
 Dannemyer v. Coleman, 8 Sawy. (U. S.) 51. § 4500.
 Danville & Plank Road Co. v. Hull, 27 Barb. (N. Y.) 609. § 5919.
 Danville, Town of, v. Pace, 25 Gratt. (Va.) 1. § 506.
 Danville & Co. v. Parks, 88 Ill. 170. §§ 2812, 2815, 2849.
 Danville & Co. v. State, 16 Ind. 456. § 6795.
 Danville & Co. R. Co. v. Com., 73 Pa. St. 29. §§ 6429, 6433.
 Danville Bridge Co. v. Pomroy, 15 Pa. St. 151. §§ 5191, 5232.
 Danville Seminary v. Mott, 136 Ill. 289. § 5051.
 Darby v. Boucher, 1 Salk. 279. § 5979.
 Darby v. Darby, 3 Drew. 495, 503. § 1084.
 D'Arcy v. Tamar R. Co., L. R. 2 Exch. 156; 2 Hurl. & C. 463. §§ 1706, 3908, 3936, 5103.
 Dargan v. Richardson, Dudley (S. C.) 62. § 2771.
 Darge v. Horicon Iron Man. Co., 22 Wis. 417. § 5257.
 Darley v. Queen, 12 Clark & Fin. 520. § 6783.
 Darlington v. New York, 31 N. Y. 164, 198. § 28.
 Darnell v. Dickens, 4 Yerg. (Tenn.) 7. §§ 5104, 5106.
 Darnell v. State, 48 Ark. 321. § 6758.
 Darrington v. Branch Bank, 13 How. (U. S.) 12. § 5761.
 Darrow v. People, 8 Colo. 426. § 588.
 Darst v. Bates, 95 Ill. 493, 509. § 2656.
 Darst v. Gale, 83 Ill. 136. §§ 6016, 6020.
 Dart v. Farmers' & Co. Bank, 27 Barb. (N. Y.) 337. § 7623.
 Dart v. Houston, 22 Ga. 506. §§ 764, 784.
 Dartmouth College v. Woodward, 4 Wheat. (U. S.) 535. §§ 2, 26, 40, 52, 65, 3031, 4030, 5184, 5331, 5384, 5385, 5408, 5489, 5638, 6577, 6579, 6609.
 Dash v. Van Kleef, 7 Johns. (N. Y.) 477. § 6700.
 Dasher v. Dasher, 47 Ga. 320. § 3363.
 Dashiell v. Attorney-General, 5 Har. & J. (Md.) 392; 6 Har. & J. (Md.) 1. § 5829.
 Dauchy v. Brown, 24 Vt. 197. §§ 3020, 3255, 3351, 3353, 3361.
 Davenport v. City Bank, 9 Paige (N. Y.), 12. §§ 6666, 6893.
 Davenport v. Dows, 18 Wall. (U. S.) 626. §§ 4578, 7570.
 Davenport v. Kelly, 7 Iowa, 102. § 1028.
 Davenport v. Mississippi & Co. R. Co., 16 Iowa, 349. § 8097.
 Davenport v. Peoria & Co. Ins. Co., 17 Iowa, 276. §§ 5024, 5046.
 Davenport v. Receivers, 2 Woods (U. S.), 519. § 7050.
 Davenport v. Swan, 9 Humph. (Tenn.) 186. § 8076.
 Davenport & Co. R. Co. v. O'Connor, 40 Iowa, 477. §§ 1352, 1355.
 Davenport & Co. R. Co. v. Rogers, 39 Iowa, 298. §§ 1340, 1352.
 Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83; 64 Iowa, 140. §§ 2857, 2884.
 Davenport Bank v. Gifford, 47 Iowa, 576. § 2377.
 Davenport Central R. Co. v. Davenport Gaslight Co., 43 Iowa, 301. § 5279.
 Davenport Gas Co. v. Davenport, 13 Iowa, 229. § 7766.
 Dayer v. Pemberton, 11 C. B. (N. s.) 628. § 4435.
 David v. Portland Water Committee, 14 Or. 98. § 611.
 Davidson's Case, 3 De Gex. & S. 21. §§ 1313, 1314, 3194, 3196, 3205.
 Davidson v. Alexander, 84 N. C. 621. § 7601.
 Davidson v. Donovan & Co. Canal Co., 4 Cranch C. C. (U. S.) 578. § 7806.
 Davidson v. New Orleans, 96 U. S. 97, 104. § 5449.
 Davidson v. Old People's & Co. Soc., 39 Minn. 303. § 5987.

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 Davidson v. State, 20 Fla. 784. § 6805.
 Davidson v. State, 4 Tex. App. 545. §§ 5503.
 Davidson v. Tulloch, 3 Macq. H. L. (Sc.) 783. §§ 1462, 1472, 1500.
 Davies v. Lathrop, 12 Fed. Rep. 353, 834. § 6985.
 Davies v. Marine Nat. Bank, 24 Fed. Rep. 194. § 7134.
 Davies v. New York Concert Co., 36 N. Y. St. Rep. 816; 13 N. Y. Supp. 739. § 4849.
 Daviess County v. Dickinson, 117 U. S. 637. §§ 5262, 5705, 7318.
 Daviess County Sav. Asso. v. Sailor, 63 Mo. 24. §§ 4750, 4751.
 Davis Case, L. R. 12 Eq. 514. § 5699.
 Davis, Estate of, 5 Whart. (Pa.) 530. § 1220.
 Davis, Ex parte, 3 Ch. Div. 463. §§ 3206, 3722.
 Davis, The, 10 Wall. (U. S.) 15. § 7321.
 Davis v. Anita, 73 Iowa, 325. § 1021.
 Davis v. Bank of England, 2 Bing. 393. §§ 2501, 2557, 2559, 2560, 2573, 4701.
 Davis v. Bank of Fulton, 31 Ga. 69. §§ 612, 7691.
 Davis v. Bank of River Raisin, 4 McLean (U. S.), 337. § 8743.
 Davis v. Branch Bank, 12 Ala. 463. § 4758.
 Davis v. Bruns, 23 Hun (N. Y.), 649. § 3060.
 Davis v. Buffum, 51 Me. 160. § 2460.
 Davis v. Central Railroad & Co., 17 Ga. 323. §§ 7424, 7426, 7429, 7431.
 Davis v. Clark, 106 Pa. St. 377. § 593.
 Davis v. Cook, 9 Nev. 134. § 7438.
 Davis v. Curting, 8 Q. B. 236; 10 Jur. 69; 15 L. J. (Q. B.) 56; 12 Week. Rep. 1079. § 6363.
 Davis v. Dumont, 37 Iowa, 47. §§ 1424, 6335.
 Davis v. Duncan, 19 Fed. Rep. 477. §§ 7148, 7160.
 Davis v. Flagg, 35 N. J. Eq. 491. § 4412.
 Davis v. Flagstaff Silver Mining Co., 2 Utah, 74. § 3999.
 Davis v. Foreman (1894), 3 Ch. 654. § 7782.
 Davis v. French, 20 Me. 21. § 7595.
 Davis v. Garr, 6 N. Y. 124. § 7593.
 Davis v. Gemmell, 70 Md. 356. §§ 4017, 4050, 4495, 4504, 4521, 4984.
 Davis v. Gemmell, 73 Md. 530. § 7055.
 Davis v. Georgetown Bridge Co., 1 Cranch O. O. (U. S.) 147. § 7392.
 Davis v. Gray, 16 Wall. (U. S.) 203. §§ 6586, 6592, 7760.
 Davis v. Hanly, 12 Ark. 645. § 2589.
 Davis v. Hooper, 4 Stew. & Port. (Ala.) 231. § 1430.
 Davis v. Jackson, 152 Mass. 58. §§ 2168, 2218.
 Davis v. Lamoille County Plank Road Co., 27 Vt. 602. §§ 6349, 6353, 6360.
 Davis v. Lane, 10 N. H. 156. §§ 3893, 3895.
 Davis v. Macon, 64 Ga. 128. § 8091.
 Davis v. Memphis & C. R. Co., 87 Ala. 633. §§ 6746, 6747.
 Davis v. Memphis City R. Co., 22 Fed. Rep. 883. § 4671.
 Davis v. Michelbacher, 31 N. W. Rep. 160. § 7162.
 Davis v. Montgomery Furnace & Co. (Ala.), 8 S. Rep. 426. §§ 1535, 3579, 3711, 3716, 5321.
 Davis v. Morton, 4 Bush (Ky.), 442, 444. § 6211.
 Davis v. Newkirk, 5 Denio (N. Y.), 94. § 2513.
 Davis v. New York, 14 N. Y. 506. § 6591.
 Davis v. New York, 1 Duer (N. Y.), 451, 484. § 6448.
 Davis v. New York, 2 Duer (N. Y.), 665. § 7774.
 Davis v. Old Colony Co., 131 Mass. 258. §§ 5721, 5722, 5792, 5880, 5968, 5973, 6004.
 Davis v. Railroad Co., 1 Woods (U. S.), 621. § 3997.
 Davis v. Randall, 115 Mass. 547. § 4750.
 Davis v. Rock Creek & Co., 55 Cal. 359. § 4044.
 Davis v. Rockingham Investment Co., 89 Va. 290. § 4851.
 Davis v. Smith, 75 Mo. 225. § 1097.
 Davis v. Smith American Organ Co., 117 Mass. 456. § 1817.
 Davis v. State, 7 Md. 157. § 611.
 Davis v. State, 3 Lea (Tenn.), 379. § 592.
 Davis v. Stevens, 17 Blatchf. (U. S.), 269. § 3255.
 Davis v. Stover, 16 Abb. Fr. (n. s.) (N. Y.) 225. § 7028.
 Davis v. United States Electric & Co., 77 Md. 35. §§ 3873, 6528.
 Davis v. Wood, 7 Mo. 162. § 7552.
 Davis v. Woolnough, 9 Iowa, 104. § 583.
 Davis v. Yuba County, 75 Cal. 452. § 5942.
 Davis & Co. Wheel Co. v. Davis & Co. Wagon Co., 20 Fed. Rep. 699. § 7770.
 Davis Mill Co. v. Bennett, 39 Mo. App. 460. §§ 3928, 3929, 4381, 4947, 7747.
 Davis Sewing Machine Co. v. Best, 105 N. Y. 59. §§ 4721, 4724.
 Davis Sewing Machine Co. v. Best, 30 Hun (N. Y.), 638. § 5714.
 Dawes Case, L. R. 6 Eq. 232. §§ 1550, 1552, 1554, 1792, 1795.
 Dawes v. North River Ins. Co., 7 Cow. (N. Y.) 462. §§ 4614, 4617, 4619, 4622, 5060, 7225.
 Dawkins v. Antrobush, 17 Ch. Div. 615. §§ 862, 910, 913, 914, 918, 919, 1047, 1763.
 Dawson v. Campbell, 2 Miles (Pa.), 170. § 8030.
 Dawson v. Holcomb, 1 Ohio, 275. §§ 6898, 6931.
 Dawson v. Paver, 5 Hare, 415. § 7768.
 Day v. Brooklyn & C. R. Co., 12 Hun (N. Y.), 435; affirmed, 76 N. Y. 593. § 6347.
 Day v. Crossman, 4 Thomp. & C. (N. Y.) 122. § 6363.
 Day v. Essex County Bank, 13 Vt. 97. §§ 4588, 7977.
 Day v. Holmes, 103 Mass. 306. §§ 2677, 2686.
 Day v. Insurance Co., 75 Iowa, 694. § 256.
 Day v. McAllister, 15 Gray (Mass.), 433. § 7958.
 Day v. Mill Owners' Mut. Fire Ins. Co., 75 Iowa, 694. § 238.
 Day v. Newark India Rubber Co., 1 Blatchf. (U. S.) 628. §§ 7450, 7881, 8022.
 Day v. Ogdensburg & C. R. Co., 107 N. Y. 129. §§ 5687, 6148, 6188, 6386, 6593, 6598, 6602.
 Day v. Postal Telegraph Co., 63 Md. 354. § 7334.
 Day v. Sawadge, Hob. 85. § 7756.
 Day v. Spiral Spring Buggy Co., 57 Mich. 146. §§ 5970, 5985, 6007, 6015, 6023, 6024.
 Day v. Stetson, 8 Me. 365. §§ 8, 501, 5595, 6598.
 Day v. Swift, 48 Me. 368. § 2619.
 Day v. Woodworth, 13 How. (U. S.) 363, 371. § 6385.
 Day v. Worcester & C. R. Co., 151 Mass. 302. §§ 365, 384.
 Day Land & Co. v. State, 68 Tex. 526. §§ 635, 636.
 Dayton v. Borst, 31 N. Y. 435. §§ 1138, 1142, 1185, 1577, 3559, 3567.
 Dayton v. Borst, 7 Bosw. (N. Y.) 115, 121. §§ 1972, 6880, 6881, 6889.
 Dayton v. Quigley, 29 N. J. Eq. 77. §§ 1021, 1022, 1024.
 Dayton & Co. Mining Co. v. Seawell, 11 Nev. 394. §§ 5592, 5593.
 Dayton & Co. R. Co. v. Hatch, 1 Disney (Ohio), 84. §§ 13, 73, 1332, 1337, 1577, 1905, 3968, 3974, 3980, 5222, 7577.
 Dayton & Co. R. Co. v. Shoemaker, 3 Ohio C. C. 473. § 6188.
 Dayton & Co. Turnp. Co. v. Coy, 13 Ohio St. 84. § 444.
 Dayton Bank v. Merchants' Bank, 37 Ohio St. 203. § 2482.
 Dayton Gold & Co. Mining Co. v. Seawell, 11 Nev. 394. § 5608.
 Dayton Ins. Co. v. Kelly, 24 Ohio St. 345. § 5860.
 Deaderick v. Wilson, 8 Baxt. (Tenn.) 108. §§ 354, 3906, 4034, 4479, 4578, 4499.
 Deadwood First Nat. Bank v. Gustin-Minerva & Co., 42 Minn. 327. §§ 1579, 1630, 1675, 3061.
 Dean's Appeal, 98 Pa. St. 101. § 7074.
 Dean v. Aetna Life Ins. Co., 2 Hun (N. Y.), 359; 4 Thomp. & C. (N. Y.) 497. §§ 4885, 5265.
 Dean v. Biggs, 25 Hun (N. Y.), 122. §§ 3519, 6197, 6923.
 Dean v. Davis, 51 Cal. 406. §§ 29, 39.
 Dean v. De Wolf, 16 Hun (N. Y.), 186. § 3147.
 Dean v. Hewit, 5 Wend. (N. Y.) 257. § 7593.
 Dean v. King, 22 Ohio St. 118. §§ 6331, 6332.
 Dean v. La Motte Lead Co., 59 Mo. 523. §§ 289, 5029, 7610, 7663.
 Dean v. Mace, 19 Hun (N. Y.), 391. §§ 3163, 6562.
 Dean v. Nelson, 10 Wall. (U. S.) 158. § 2733.
 Dean v. Tucker, 2 Cranch (U. S.), 26. § 5988.
 Dean v. Whiton, 16 Hun (N. Y.), 203. § 3164.
 Dean & Co. of Windsor v. Webb, Godb. 211. §§ 6718, 6745.
 Deane v. Hodge, 35 Minn. 146. §§ 4067, 5180, 5181, 5183.
 Deansville Cemetery Asso., Re, 66 N. Y. 569; reversing, 5 Hun (N. Y.), 489. §§ 5591, 5592, 5599.
 Dearborn v. Boston & Railroad, 24 N. H. 179. § 6343.
 Dearborn Foundry Co. v. Augustine, 5 Wash. 67. § 7957.
 Dearlort v. Foreman, 24 Ind. 485. § 1253.
 Dearing v. Bank of Charleston, 5 Ga. 437. § 8050.
 Deaum v. Lawson Co., 37 Pa. St. 533. § 2601.
 De Barante v. Gott, 6 Barb. (N. Y.) 492, 498. § 6187.

- De Bemer v. Drew, 39 How. Pr. (N. Y.) 466; 57 Barb. (N. Y.) 438. § 6862.
- De Bernardy v. Harding, 8 Ex. 822 § 5183.
- Deberry v. Holly Springs, 35 Miss. 385. § 5080.
- De Betz, Ex parte, 9 Abb. N. Cas. (N. Y.) 246. § 6248.
- De Beville's Case, L. R. 7 Eq. 11. §§ 1614, 1643.
- Debolt v. Ohio & C. Trust Co., 1 Ohio St. 563. § 5569.
- De Bost v. Albert Palmer Co., 35 Hun (N. Y.), 386. § 5974.
- De Bow v. People, 1 Denio (N. Y.), 9. §§ 632, 654.
- Debs, Re, 158 U. S. 564. § 7782.
- De Camp v. Alward, 52 Ind. 463. §§ 6473, 6534, 6660, 6694.
- De Camp v. Dobbins, 29 N. J. Eq. 36. §§ 5787, 5795, 5829.
- De Camp v. Eveland, 19 Barb. (N. Y.) 81. § 5419.
- De Camp v. Mississippi & C. R. Co., 12 Iowa, 348. § 6298.
- Deck v. Feld, 38 Mo. App. 674. §§ 2722, 2724.
- Decker v. Freeman, 3 Me. 338. §§ 5080, 5082, 5039, 5090, 5107.
- Denoster v. Livermore, 4 Mass. 101. § 6898.
- Denham Bank v. Chickering, 3 Pick. (Mass.) 335. §§ 4739, 4905, 5175, 5176.
- Denham Inst. for Savings v. Slack, 6 Cush. (Mass.) 408. §§ 4717, 4947.
- Deeks v. Stanhope, 14 Sim. 57. § 4565.
- Deerfield v. Nims, 110 Mass. 115. §§ 4156, 7570, 7578.
- Deering v. Flanders, 49 N. H. 225. § 1913.
- Deering v. Winchelsea, 2 Bos. & P. 270. § 3065.
- Deeze, Ex parte, 1 Atk. 228. § 6967.
- Deffell v. White, L. R. 2 C. P. 144. § 6132.
- DeForest v. Holm, 38 Wis. 516. § 5174.
- De Fries v. Creed, 34 Law Jour. (Ch.) 607. § 6932.
- De Gendre v. Kent, L. R. 4 Eq. 283. §§ 2175, 2206.
- De Graff v. American & C. Co., 21 N. Y. 124. § 5967.
- De Graff v. St. Paul & C. R. Co., 23 Minn. 144. § 5440.
- De Graffenried v. Brunswick & C. R. Co., 57 Ga. 22. § 7128.
- De Groot v. Jay, 30 Barb. (N. Y.) 483; 9 Abb. Pr. (N. Y.) 364. § 7128.
- De Groot v. United States, 5 Wall. (U. S.) 419. § 7321.
- De Groot v. Van Duzer, 20 Wend. (N. Y.) 390; reversing 17 Wend. (N. Y.) 170. § 7942.
- DeKay v. Voorhis, 36 N. Y. Eq. 37. § 6159.
- De la Cuesta v. Insurance Co., 136 Pa. St. 62, 658. § 2099.
- Delacy v. Neuse Navigation Co., 1 Hawks (N. C.), 274. §§ 820, 881, 904.
- Delafair v. Kinney, 24 Wend. (N. Y.) 345. §§ 4629, 7589.
- Delafair v. State, 2 Hill (N. Y.), 159; 26 Wend. (N. Y.) 192. § 5302.
- De Lancey v. Insurance Co., 52 N. H. 581. § 5670.
- Delano v. Butler, 118 U. S. 634. §§ 2103, 3104, 4466, 7284.
- Delano v. Case, 121 Ill. 247; 17 Ill. App. 531. §§ 4104, 4108, 4113, 4145.
- Delano v. Smith Charities, 138 Mass. 63. §§ 3927, 4706.
- Delany v. Mansfield, 1 Hogan, 234. § 6945.
- Delashman v. Berry, 21 Mich. 516. § 7622.
- Delauney v. Strickland, 2 Stark. 417. § 6157.
- Delaware & C. Canal Co. v. Com., 50 Pa. St. 399. §§ 39, 2825.
- Delaware & C. Canal Co. v. Com., 60 Pa. St. 367. §§ 6425, 6443.
- Delaware & C. Canal Co. v. Com. (Pa.), 17 Atl. Rep. 175. §§ 8105, 8110, 8112, 8118, 8119.
- Delaware & C. Canal Co. v. Lee, 22 N. J. L. 243, 247. §§ 6342, 6343, 6344, 6371, 7625.
- Delaware & C. Canal Co. v. Pennsylvania Coal Co., 21 Pa. St. 131. §§ 788, 3995.
- Delaware & C. Canal Co. v. Sansom, 1 Binn. (Pa.) 70. §§ 1138, 3222, 3262.
- Delaware & C. Co. v. Camden & C. R. Co., 15 N. J. Eq. 13. § 5402.
- Delaware & C. R. Co. v. Camden & C. R. Co., 16 N. J. Eq. 321. § 5402.
- Delaware & C. R. Co. v. Central Stock Yard, 45 N. J. Eq. 50. § 5530.
- Delaware & C. R. Co. v. Com., 68 Pa. St. 64, 69. § 2914.
- Delaware & C. R. Co. v. East Orange, 41 N. J. L. 127. § 1025.
- Delaware & C. R. Co. v. Irick, 23 N. J. L. 321. §§ 1284, 1815.
- Delaware & C. R. Co. v. Rowland (Pa.), 9 Atl. Rep. 929; 8 Cent. Rep. 814. §§ 1976, 1977.
- Delaware Bay & C. R. Co., Re, 11 Atl. Rep. 261; 9 Cent. Rep. 489. § 7202.
- Delaware Bay & C. R. Co. v. Markley, 45 N. J. Eq. 139. §§ 599, 7202.
- Delaware R. Co. v. Tharp, 5 Harr. (Del.) 454. §§ 67, 5408, 5413.
- Delaware R. Co. v. Tharp, 1 Houst. (Del.) 149, 174. §§ 73, 77.
- Delaware Railroad Tax, 18 Wall. (U. S.) 206. §§ 322, 363, 2211, 2810, 2817, 2883, 5571, 8094, 8130, 8131.
- Delawter v. Sand Creek Ditching Co., 26 Ind. 407. § 7691.
- Delinger v. Higgins, 26 Mo. 180. § 7507.
- Delius v. Cawthorn, 2 Dev. (N. C.) 90. § 5028.
- Dellinger v. Tweed, 66 N. C. 206. §§ 3112, 4182.
- Delta Lumber Co. v. Williams, 73 Mich. 86. § 4697, 4987.
- Delzell v. Indianapolis & C. R. Co., 32 Ind. 45. § 6373.
- Demarest v. Flack, 128 N. Y. 205; affirming 32 N. Y. St. Rep. 675; 11 N. Y. Supp. 83. §§ 3053, 6518, 7642, 7885, 7895.
- Demarest v. New York, 74 N. Y. 161. § 575.
- Deming v. Bull, 10 Conn. 409, 415. §§ 3074, 3170, 3183, 3415.
- Deming v. Grand Trunk R. Co., 48 N. H. 455. § 4983.
- Deming v. Puleston, 55 N. Y. 655; affirming 35 N. Y. Super. 309; 3 Jones & G. (N. Y.) 309. §§ 2018, 3901, 4196, 4208, 4222, 4372.
- Deming v. Puleston, 33 N. Y. Super. Ct. 235. § 3446.
- De Mony v. Johnston, 7 Ala. 51. § 3454.
- Demott v. Stockton Paper & Co., 33 N. J. Eq. 124, 132. §§ 7033, 7046.
- Dempsey v. Willett, 16 Hun (N. Y.), 264. § 3163.
- Den v. Pen, 10 N. J. L. 237. § 7398.
- Den v. Tunis, 25 N. J. L. 633. § 5060.
- Den v. Van Houten, 10 N. J. L. 270. § 518.
- Denham, Re, 25 Ch. Div. 752. § 4606.
- Denham v. County Commrs, 108 Mass. 202. § 5596.
- Denike v. New York & C. Cement Co., 80 N. Y. 599. §§ 4539, 6696, 6696, 6701.
- Dennett v. Wyman, 13 Va. 485. § 5762.
- Dennis v. Barber, 6 Serg. & E. 420. § 2471.
- Dennis v. Kennedy, 19 Barb. (N. Y.) 517. §§ 4565, 4566.
- Dennis v. Maynard, 15 Ill. 477, 478. § 5046.
- Dennis v. Superior Court, 91 Cal. 548. § 3676.
- Dennis v. Table & C. Co., 10 Cal. 369. §§ 3406, 5137, 5763.
- Dennison, Ex parte, 3 Ves. Jr. 552. § 2653.
- Dennison v. Austin, 15 Wis. 334, 336. § 5149.
- Dennistoun v. New York & C. R. Co., 1 Hill. (N. Y.) 62. § 7463.
- Denny v. Hamilton, 16 Mass. 402. § 2777.
- Denny v. Lyon, 38 Pa. St. 98. § 2405.
- Denny v. Manhattan Co., 2 Denio (N. Y.), 115. §§ 4119, 4473.
- Denny v. North Western & C. University, 16 Ind. 220. § 1950.
- Denny v. Richardson, 4 Gray (Mass.), 274. §§ 3704, 3817, 4327, 4346.
- Denny v. Willard, 11 Pick. (Mass.) 519. § 7507.
- Densmore v. Stone Co. (Minn.), 48 N. W. Rep. 528. § 3004.
- Densmore Oil Co. v. Densmore, 64 Pa. St. 43 §§ 457, 460.
- Dent's Case, L. R. 15 Eq. 407. §§ 1578, 1579, 1592.
- Dent v. Chiles, 5 Stew. & P. (Ala.) 383. § 2460.
- Dent v. London Tramway Co., L. R. 16 Ch. 344. § 2268.
- Dent v. West Virginia, 129 U. S. 114. § 8109.
- Dental Vulcanite Co. v. Wetherbee, 2 Cliff. (U. S.) 555. §§ 530, 7665, 7682.
- Denton v. East Anglian R. Co., 3 Car. & K. 16. § 5039.
- Denton v. International Co., 36 Fed. Rep. 1. § 7487.
- Denton v. Jackson, 2 Johns. Ch. (N. Y.) 324. § 39.
- Denton v. Livingston, 9 Johns. (N. Y.) 98. §§ 1070, 3231, 3317.
- Denton v. Logan, 3 Met. (Ky.) 434. § 1430.
- Denton v. Macnell, L. R. 2 Eq. 350. §§ 1392, 1394, 1449.
- Denver v. Kent, 1 Colo. 336. § 7783.
- Denver & C. Coal Co. v. Union Pac. R. Co., 34 Fed. Rep. 386. § 5591.
- Denver & C. R. Co. v. Denver City R. Co., 2 Colo. 673. §§ 5335, 5402, 7642.
- Denver & C. R. Co. v. Harris, 122 U. S. 597. §§ 6279, 6304, 6369, 6392.

- Denver Fire Ins. Co. v. McClelland, 9 Colo. 11. § 6025.
 De Pass's Case, 4 De Gex & J. 544. §§ 3222, 3256.
 Deposit Bank v. Barrett (Ky.), 13 S. W. Rep. 337; 11 Ky. L. Rep. 210. § 6547.
 Deposit Gen. Life Ins. Co. v. Ayscough, 6 El. & Bl. 761. §§ 1431, 1442, 1455.
 Derainsnes v. Merchants' Mutual Ins. Co., 1 N. Y. 371. §§ 1546, 7231, 7232, 7244.
 Derby Canal Co. v. Wilmot, 9 East, 360. § 5093.
 Derby Turpin Co. v. Parks, 10 Conn. 522. § 5381.
 Derrenbacher v. Lehigh Valley R. Co., 21 Hun (N. Y.), 612; 59 How. Pr. (N. Y.) 283. § 7697.
 Derrick v. Lamar Ins. Co., 74 Ill. 404. § 6321.
 Derrickson v. Smith, 27 N. J. L. 166. §§ 3050, 3052, 4164, 4166, 4167.
 Derry v. Peek, 14 App. Cas. 337; 37 Ch. Div. 541. §§ 1463, 1464, 4147.
 De Ruvigne's Case, 5 Ch. Div. 306. §§ 459, 4039, 4154.
 De Ruyter v. St. Peter's Church, 3 Barb. Ch. (N. Y.) 119; 3 N. Y. 238, 134. §§ 6133, 6166, 6467, 6184, 6514.
 Descombes v. Wood, 91 Mo. 196. §§ 5092, 6473.
 Desdouty, Ex parte, 1 Wend. (N. Y.) 98. § 734.
 Deslandes v. Gregory, 2 El. & Bl. 602. § 5146.
 Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, § 7784.
 Des Moines Gas Co. v. West, 50 Iowa, 16. §§ 5259, 6078, 6262, 6268.
 Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co., 73 Iowa, 513, §§ 5398, 5402.
 Des Moines Water Co's Appeal, 48 Iowa, 324, 336. §§ 2813, 2847.
 Desmond v. McCarthy, 17 Iowa, 525. § 738.
 Despard v. Walbridge, 15 N. Y. 374. § 2937.
 Despatch Line v. Bellamy Man. Co., 12 N. H. 205. §§ 706, 733, 3359, 3384, 3393, 3396, 3911, 3914, 3926, 3932, 3945, 3983, 4849, 5126, 5132, 5143, 5286, 5295, 5298, 5303, 5304, 6133, 6191, 6542.
 Dessau v. Boura, 1 McAllister (U. S.), 20. § 5137.
 Dester v. Ross, 85 Mich. 370. § 6246.
 Deters v. Renick, 37 Mo. 597. § 5680.
 Detroit v. Dean, 106 U. S. 537. §§ 4479, 4501, 4508.
 Detroit v. Jackson, 1 Doug. (Mich.) 103. §§ 4881, 4891, 5129, 5176.
 Detroit v. Mutual Gas Co., 43 Mich. 594. §§ 6131, 6132.
 Detroit v. Wabash & C. R. Co., 63 Mich. 712. § 7445.
 Detroit & C. Plank Road Co. v. Fisher, 4 Mich. 37. §§ 5915, 5917, 5942.
 Detroit & C. Plank Road Co. v. Mahoney, 68 Mich. 265. § 5933a.
 Detroit & C. R. Co. v. Stearnes, 38 Mich. 698. § 1353.
 Dietweiler v. Breckenkamp, 83 Mo. 45. §§ 5645, 5715a.
 Dietwiller v. Com., 131 Pa. St. 614. § 743, 814.
 Devany v. Vulcan Iron Works, 4 Mo. App. 236. § 6350.
 De Varaigne v. Fox, 2 Blatchf. (U. S.) 95. § 5592.
 De Vaucene, Matter of, 31 How. Pr. (N. Y.) 289. § 658.
 Devaux v. Steinkeller, 3 Jur. 1053. § 4146.
 Devaynes v. Noble, 1 Mer. 528; 2 Russ. & M. 495. § 3320.
 Deveau, Re, 54 Ga. 673. § 123.
 De Vendell v. Hamilton, 27 Ala. 156. § 2421.
 Devendorf v. Beardsley, 23 Barb. (N. Y.) 656. §§ 4923, 7234, 7244, 7249, 7253.
 Devereux v. Kilkenny & C. R. Co., 1 Lown. M. & P. 730; 5 Ex. 834. § 3557.
 De Vignier v. New Orleans, 16 Fed. Rep. 11, 12. § 2851.
 Devoss v. Gray, 22 Ohio St. 159. §§ 5005, 5167.
 De Vries v. Conklin, 22 Mich. 255. § 2928.
 Devron v. Municipality No. One, 4 La. An. 11. § 7784.
 Dewar v. Spence, 2 Whart. (Pa.) 211. § 7507.
 Dewers v. Pike, Murph. & H. 131. § 5167.
 Dewey v. Baker, 16 Gray (Mass.), 130. §§ 4246, 7869.
 Dewey v. Bowman, 8 Cal. 145, 151. §§ 2616, 2619, 2622.
 Dewey v. Central Car & C. Co., 42 Mich. 399. § 7538.
 Dewhurst v. Allegheny City, 95 Pa. St. 437. §§ 619, 625.
 Dewey v. St. Albans Trust Co., 37 Vt. 332. § 3097.
 Dewey v. St. Albans Trust Co., 55 Vt. 476. § 6565.
 Dewey v. Toledo & C. R. Co., 91 Mich. 351. §§ 6016, 6018, 6025.
 Dewing v. Wentworth, 11 Crash. (Mass.) 499. § 6398.
 De Wilton v. Brecon, 23 Beav. 200. § 6927.
 De Witt v. Chandler, 11 Abb. Pr. (N. Y.) 450. § 7602.
 De Witt v. Hastings, 69 N. Y. 518. §§ 4228, 4233.
 De Witt v. Hastings, 40 N. Y. Superior Ct. 463. §§ 505, 507, 518, 532.
 De Witt v. San Francisco, 2 Cal. 289. § 5793.
 De Witt v. Walton, 9 N. Y. 571. §§ 5126, 5132, 5152, 5171.
 De Wolf v. Mallett, 8 Dana (Ky.), 214. § 3066.
 Dexter & C. Co. v. Dexter, 6 R. I. 353. § 6657.
 Dexter & C. Plank Road Co. v. Millard, 3 Mich. 91. § 1185.
 Dexterville Man. & C. Co., Re, 4 Fed. Rep. 873. § 7050.
 Dezell v. Odell, 3 Hill (N. Y.), 215. § 5246.
 De Zeng v. Beekman, 2 Hill (N. Y.), 489. 5045.
 Diamond v. Lawrence County, 37 Pa. St. 353. § 6064.
 Diamond Match Co. v. Powers, 51 Mich. 145. § 7385.
 Diddle v. Pier Co., Re (1891), 2 Ch. 355. § 2285.
 Dick v. Balch, 8 Pet. (U. S.) 33. § 1941.
 Dickinson v. Chamber of Commerce, 29 Wis. 45. §§ 849, 851, 856, 861, 908, 909, 4395, 5474.
 Dickinson v. Cook, 17 Johns. (N. Y.) 332. § 2617.
 Dickinson v. Fitchburg, 13 Gray (Mass.), 546. § 5628.
 Dickinson v. Seelye, 12 Barb. (N. Y.) 99. § 6331.
 Dickinson v. Van Tine, 1 Sandf. (N. Y.) 724. § 6935.
 Dickey v. Tennis, 27 Mo. 373. §§ 5595, 5596.
 Dickinson v. Cent. Nat. Bank, 129 Mass. 279. § 2396.
 Dickinson v. Gay, 7 Allen (Mass.), 29. § 2538.
 Dickinson v. Valpy, 10 Barn. & C. 128, 141; 5 Man. & R. 126. §§ 1800, 1877, 3989, 5735, 5957.
 Dickson v. Metacomet Nat. Bank, 130 Mass. 132. § 7047.
 Dickson v. Dickinson, 29 Conn. 600. § 4548.
 Dickson v. Evans, 6 T. R. 57. § 3797.
 Dickinson v. Mayer, 25 Abb. N. Cas. (N. Y.) 257; 13 N. Y. Supp. 651; 35 N. St. Rep. 482. § 6517.
 Dickson v. Morgan, 7 La. An. 490. § 7810.
 Dickson v. Neath & C. R. Co., L. R. 4 Ex. 87. § 3594.
 Dickson v. United States, 125 Mass. 311. § 5785.
 Dietrich v. Madison Relief Assn., 45 Wis. 79. § 5855.
 Dietrich v. Murdock, 42 Mo. 279. §§ 5592, 5600.
 Dietz v. Farish, 12 Jones & S. (N. Y.) 252; 53 How. Pr. (N. Y.) 223. § 1253.
 Diggle v. London & C. R. Co., 5 Ex. 442. § 5297.
 Dighton v. Stratford-on-Avon, 2 Keb. 641; 1 Raym. 188. §§ 768, 805, 817, 820.
 Diligent Fire Co. v. Com., 75 Pa. St. 291, 291. § 850.
 Dill v. Wabash & C. R. Co., 21 Ill. 91. §§ 1311, 1719.
 Dill v. Wareham, 7 Metc. (Mass.) 438. § 5983.
 Dillars v. Central Va. Iron Co., 82 Va. 734. §§ 7526, 7539.
 Dillenback v. Jerome, 7 Cow. (N. Y.) 294. § 2479.
 Diller v. Brubaker, 52 Pa. St. 498. § 2667.
 Diller v. Roberts, 13 Serg. & R. (Pa.) 60. §§ 3363, 7507.
 Dillingham v. Russell, 73 Tex. 47. § 7131.
 Dillingham v. Snow, 5 Mass. 517. § 7694.
 Dillon v. Barnard, 21 Wall. (U. S.) 430, 437. §§ 1667, 6195.
 Dillon v. Byrne, 5 Cal. 455. § 3187.
 Dimpfel v. Ohio & C. R. Co., 9 Bias. (U. S.) 127. § 6159.
 Dimpfel v. Ohio & C. R. Co., 110 U. S. 209. §§ 4501, 4508.
 Dingledein v. Third Ave. R. Co., 9 Bosw. (N. Y.) 79. § 5324.
 Dingley v. Boston, 100 Mass. 544. § 5611.
 Dingman v. People, 51 Ill. 277. § 5482.
 Dinkgrave v. Vicksburg Co., 10 La. An. 514. §§ 1714, 1758.
 Dinsmore v. Duncan, 57 N. Y. 573. § 6064.
 Dinsmore v. Racine & C. R. Co., 12 Wis. 649. § 6199.
 Directors v. Houston, 71 Ill. 318. § 27.
 Directors v. Kisch, L. R. 2 H. L. 99. §§ 1361, 1364, 1372, 1373, 1383, 1388, 1413, 1424, 1484, 1800, 6335.
 Direct Spanish Tel. Co., Re, 34 Ch. Div. 307; 56 L. J. (Ch.) 353. § 2115.
 Direct U. S. Cable Co. v. Dominion Tel. Co., 81 N. Y. 153; reversing 22 Hun (N. Y.), 568. § 8009.
 Disderi & Co., Re, L. R. 11 Eq. 242. §§ 1261, 4039, 4154.
 District Attorney v. Lynn & C. R. Co., 16 Gray (Mass.), 242. § 7774.
 District of Columbia v. Waggaman, 4 Mackey (D.C.), 328. § 1021.

Distilled—Douglas **TABLE OF CASES CITED.**

- Distilled Spirits, The, 11 Wall. (U. S.) 356. §§ 5190, 5200.
- Ditchett v. Spuyten Duyvil & R. Co., 67 N. Y. 425; reversing 5 Hun (N. Y.), 185. § 5884.
- Dively v. Cedar Falls, 21 Iowa, 565. §§ 7756.
- Diven v. Duncan, 41 Barb. (N. Y.) 520. §§ 3320, 3669.
- Diven v. Lee, 36 N. Y. 302; 34 How. Fr. 197. §§ 3020, 3023, 3330, 3655.
- Diven v. Phelps, 34 Barb. (N. Y.) 224. § 3797.
- Diveny v. Elmira, 51 N. Y. 506. § 7756.
- D'Yvernois v. Leavitt, 32 Barb. (N. Y.) 63, 80. § 6477.
- Diversey v. Johnson, 93 Ill. 547. § 7085.
- Diversey v. Smith, 103 Ill. 378. § 239.
- Dow v. Memphis & C. R. Co., 20 Fed. Rep. 260, 269. §§ 6943, 7207.
- Dix v. Akers, 30 Ind. 431. § 7747.
- Dix v. Briggs, 3 Paige (N. Y.), 595. § 3484.
- Dix v. Planders, 1 N. H. 246. § 3383.
- Dix v. Dummerston, 19 Vt. 262. § 7754.
- Dixon's Case, L. R. 5 Ch. 79; L. R. 5 H. L. 606. §§ 1552, 1553, 1797, 1798, 1802.
- Dixon v. Evans, L. R. 5 H. L. 606. § 1802.
- Dixon v. Hannibal & C. R. Co., 31 Mo. 409. § 7540.
- Dixon v. Order of Railway Conductors, 49 Fed. Rep. 910. § 8039.
- Dixon v. Rutherford, 26 Ga. 149. § 7001.
- Dixon County v. Field, 111 U. S. 83. § 5262.
- Doak v. Bank, 6 Ired. Law (N. C.), 309. §§ 2616, 2619, 2620.
- Doan v. Boley, 38 Mo. 449. § 7552.
- Doane v. Clinton, 2 Utah, 417. § 7759.
- Doane v. Eddy, 19 Wend. 523. § 2617.
- Doane v. Millville & Ins. Co., 45 N. J. Eq. 274; reversing 43 N. J. Eq. 622. §§ 5987, 7059.
- Doane v. Treasurer of Pickaway, Wright (Ohio), 752. § 1297.
- Doane v. Weil, 58 Cal. 334. § 617.
- Dobbins v. Etowah Man. & C. Co., 75 Ga. 232. § 5060.
- Dobbins v. Walton, 37 Ga. 614. § 2337.
- Dobell v. Stevens, 3 Barn. & C. 623. § 1372.
- Dobison v. Hawks, 16 Sim. 407. § 1108.
- Doboy & Tel. Co. v. De Magathias, 25 Fed. Rep. 697. § 7368.
- Dobson's Case, L. R. 1 Ch. 231. § 3330.
- Dobson v. Blackmore, 9 Ad. & El. (n. s.) 991. § 6373.
- Dobson v. Simonton, 86 N. C. 492. §§ 265, 530, 6723, 6726.
- Doek v. Elizabethtown & Man. Co., 34 N. J. L. 312. §§ 7505, 7503, 7524.
- Doek Company v. La Marche, 8 Barn. & C. 42, 51. § 5661.
- Dodd v. Wilkinson, 42 N. J. Eq. 647. §§ 4108, 4111.
- Dodd v. Williams, 3 Mo. App. 278. §§ 6342, 6371.
- Doddington v. Hallet, 1 Ves. Jr. 497. § 1084.
- Dodds v. Hills, 2 Hen. & M. (Va.) 424. § 2593.
- Dodge v. Barnes, 31 Me. 290. § 292.
- Dodge v. Burlington & C. R. Co., 34 Iowa, 276. § 6362.
- Dodge v. County Comm'rs, 3 Met. (Mass.) 380. §§ 6343, 6346.
- Dodge v. Havemeyer, 42 Hun (N. Y.), 659. §§ 1618, 1629.
- Dodge v. Gridley, 10 Ohio, 174, 178. § 5680.
- Dodge v. Mastin, 17 Fed. Rep. 660. § 4301.
- Dodge v. Minnesota & C. Roofing Co., 14 Minn. 49. § 7661.
- Dodge v. Minnesota & C. Roofing Co., 16 Minn. 368. §§ 3004, 3078, 3082, 3467, 3502, 3503.
- Dodge v. Pyrolusite Manganese Co., 69 Ga. 665. §§ 6839, 6840.
- Dodge v. Tulleys, 144 U. S. 451. § 7633.
- Dodge v. Woolsey, 18 How. (U. S.) 331. §§ 2916, 4479, 4480, 4481, 4490, 4500, 4518, 4520, 4532, 4564, 4566, 4578, 4585, 5381, 5369, 5570, 7457, 7570.
- Dodge et al. Man. Co., Re, 77 N. Y. 101; reversing 14 Hun (N. Y.), 440. § 6874.
- Dodgson's Case, 3 De Gex & S. 85. §§ 1416, 6321.
- Dodgson v. Scott, 2 Ex. 457; 6 Dowl. & L. 27. §§ 3170, 3161, 3399.
- Dodson v. Harris, 10 Ala. 566. § 7958.
- Doe v. Bold, 11 Ad. & El. (n. s.) 127. § 5058.
- Doe v. Ingersoll, 11 Smedes & M. (Miss.) 249. § 7507.
- Doe v. Jones, 1 Camp. (N. P.) 367. § 7733.
- Doe v. Miller, 1 Barn. & Ald. 699. § 292.
- Doe v. Norton, 11 Mees. & W. 913, 928. § 289.
- Doe v. Pitcher, 6 Taunt. 359, 369. § 1048.
- Doe v. Pott, 2 Dougl. 710. § 6141.
- Doe v. Robertson, 11 Wheat. (U. S.) 332. § 7964.
- Doe v. Woodman, 8 East, 228. §§ 5045, 6302.
- Doernbecher v. Columbia City Lumber Co., 21 Or. 573. §§ 3936, 6478, 6480.
- Dohn v. Farmers' Joint Stock Ins. Co., 5 Lana. (N. Y.) 277, 278. § 5265.
- Dolan v. Court Good Samaritan, 128 Mass. 437. §§ 912, 1034.
- Dolan v. New York, 68 N. Y. 274. § 4708.
- Dolbear v. American Bell Teleph. Co., 126 U. S. 147. § 8123.
- Dolesale v. Pierce, 124 Ill. 140. § 611.
- Dolloff v. Hardy, 26 Me. 545, 552. § 7693.
- Doloret v. Rothschild, 1 Sim. & Stu. 590. § 2728.
- Doman's Case, 3 Ch. Div. 21. § 3288.
- Dominion Salvage & C. Co. v. Attorney-General, 21 Can. S. C. 72. § 6773.
- Donahoe v. Gamble, 38 Cal. 340. § 2680.
- Donahoe v. Mariposa Land & C. Co., 66 Cal. 317. § 3996.
- Donaldi v. New York & C. Ins. Co., 2 E. D. Smith (N. Y.), 519. § 7512.
- Donaldson v. Gillet, L. R. 3 Eq. 274. § 2501.
- Donaldson v. Johnson, 3 S. C. 216. § 4546.
- Donaldson v. Mississippi & C. R. Co., 18 Iowa, 280. § 6276.
- Donaldson v. Newman, 3 Mo. App. 235. § 5018.
- Doncaster & C. Building Society, Re, L. R. 3 Eq. 158. § 3170.
- Donellan v. Read, 3 Barn. & Adol. 899. § 5018.
- Donoghue v. Indiana & C. R. Co., 87 Mich. 13. § 3906.
- Donohoe v. Mariposa L. & M. Co., 5 Sawy. (U. S.) 163. § 7453.
- Donovan's Appeal, 40 Conn. 154. § 7547.
- Donovan v. Board of Education, 85 N. Y. 117. § 6349.
- Donovan v. McAlpin, 85 N. Y. 185. § 6349.
- Donnell v. Lewis County Sav. Bank, 80 Mo. 165. §§ 4748, 5698.
- Donnelly v. People, 11 Ill. 532. § 6792.
- Donnelly v. St. John's Church, 26 La. An. 738. § 5730.
- Donner v. Dayton & C. R. Co., 1 Cinc. (Ohio) 130. § 3994.
- Donworth v. Coolbaugh, 5 Iowa, 300. §§ 1082, 3091, 3392, 3394, 3597, 3630, 4331, 5438.
- Dooley v. Cheshire Glass Co., 15 Gray (Mass.), 494. §§ 1859, 1870, 3652, 7650, 7689, 7704.
- Dooley v. Wolcott, 4 Allen (Mass.), 406. § 3363.
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- Doremus v. Dutch Reformed Church, 3 N. J. Eq. 332. § 817.
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 Edwards v. Kearzey, 96 U. S. 595. §§ 3035, 3036.
 Edwards v. Kilkenny & Co., 3 Com. B. (N. s.) 786. § 3357.
 Edwards v. Kilkenny Co., 2 Com. B. (N. s.) 397. § 3399.
 Edwards v. Jagers, 19 Ind. 407. §§ 5334, 5386.
 Edwards v. Midland R. Co., 6 Q. B. Div. 287; 43 L. T. (N. s.) 494. § 6312.
 Edwards v. Midland R. Co., 43 L. T. (N. s.) 494. § 6298.
 Edwards v. Norton, 55 Tex. 405, 410. §§ 6931, 7794.
 Edwards v. Police Jury, 39 La. An. 855. § 611.
 Edwards v. Railway Co., 1 Myne & C. 650. § 480.
 Edwards v. Russell, 21 Wend. (N. Y.) 63. § 7755.
 Edwards v. Southern Pac. R. Co., 48 Cal. 460. § 7434.
 Edwards v. Stonington Cemetery Asso., 20 Conn. 460. § 5599.
 Edwards v. Thomas, 66 Mo. 468, 483. §§ 4724, 5236.
 Edwards v. Union Bank, 1 Fla. 136. §§ 6303, 7423.
 Edwards v. United States, 103 U. S. 471, 473. § 7509.
 Eel River & Co. Asso. v. Topp, 16 Ind. 242. § 7691.
 Eel River Navigation Co. v. Struwer, 41 Cal. 616. § 7510.
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 Egery v. Buchanan, 5 Cal. 53. § 7507.
 Eggleston v. Columbia Turnp. R. Co., 82 N. Y. 278. § 5235.
 Eggleston v. New York & R. Co., 35 Barb. (N. Y.) 162. § 5279.
 Egmann v. Blanke, 40 Mo. App. 318. § 2062.
 Ehle v. Chittenden Park, 24 N. Y. 548. §§ 2152, 2228.
 Ehrenzeller v. Union Canal Co., 1 Rawle (Pa.), 181, 183. §§ 4692, 5391, 5441, 5459.
 Ehrlich v. Ewald, 66 Cal. 97. § 2656.
 Ehrman v. Teutonia Ins. Co., 1 McCrary (U. S.), 123. §§ 7957, 7958.
 Ehrman v. Union Central Life Ins. Co., 35 Ohio St. 324. § 5799.
 Eichbaum v. Chicago Grain Elevators (1891), 3 Ch. 459. § 2248.
 Eichbaum v. Irons, 6 Watts & S. (Pa.) 67. § 5167.
 Eichelman v. Weiss, 7 Mo. App. 87. § 2479.
 Eidman v. Bowman, 59 Ill. 444. §§ 78, 2094.
 Eigenman v. Rockport Building & Co. Asso., 79 Ind. 41. § 7749.
 Einsphar v. Wagner, 12 Neb. 458. § 4029.
 Einstein v. Rosenfeld, 38 N. J. Eq. 309. § 6847.
 Eisenlord v. Oriental Ins. Co., 29 N. J. Eq. 437. § 7073.
 Eisfeld v. Kenworth, 50 Iowa, 389. §§ 2977, 4236.
 Eitel v. Bracken, 38 N. Y. Super. Ct. 7, 15. § 5245.
 Ekins v. Brown, 1 Ecol. & Adm. Rep. (Spink.) 400. § 1084.
 Ekins v. East India Co., 1 P. Wms. 395. § 3821.
 Elder v. Cozart, 59 Ga. 199. § 3383.
 Elder v. Rouse, 15 Wend. (N. Y.) 218. § 3842.
 Eldred v. Bell Tel. Co., 119 U. S. 513. § 1695.
 Eldridge v. Smith, 34 Vt. 484. §§ 5354, 5600, 6137, 6140, 6194.
 Electrical Supply Co. v. Jersey City Electric Light Co., 42 Hun (N. Y.), 659; 4 N. Y. St. Rep. 516. § 5251.
 Elevator Co. v. Memphis & C. R. Co., 85 Tenn. 703. §§ 2244, 5721, 5732, 5968, 5973.
 Elgin v. Eaton, 83 Ill. 535. § 5626.
 Elgin Canning Co. v. Atchison & C. R. Co., 24 Fed. Rep. 866. §§ 7556, 8007.
 Elizabeth v. Force, 29 N. J. Eq. 587. § 6064.
 Elizabeth City Academy v. Lindsey, 6 Ired. (N. C.) 476. §§ 496, 1850.
 Elizabethtown & C. R. Co. v. Helm, 8 Bush (Ky.), 681. § 5626.
 Elizabethtown Gaslight Co. v. Green, 46 N. J. Eq. 118. §§ 5337, 6586, 6587, 6810.
 Elkington's Case, L. R. 2 Ch. 511. §§ 1612, 1643.
 Elkins v. Boston & C. R. Co., 19 N. H. 337. § 7593.
 Elkins v. Camden & C. R. Co., 36 N. J. Eq. 5. § 4520.
 Elkins v. Camden & C. R. Co., 36 N. J. Eq. 233. §§ 2285, 2273.
 Elkins v. Camden & C. R. Co., 36 N. J. Eq. 241. §§ 4487, 4533.
 Elkins v. Camden & C. R. Co., 36 N. J. Eq. 467. §§ 792, 3851.
 Ellerman v. Chicago & C. R. Co., 49 N. J. Eq. 217. §§ 4485, 4487, 5641, 5724, 5842, 5868, 6399.
 Elliott v. United States Ins. Co., 7 Gill (Md.), 307. § 7090.
 Elliott v. Abbot, 12 N. H., 549. §§ 705, 4760, 4789, 4793, 4802.
 Elliott v. Callan, 1 Pa. Rep. 24. § 1486.
 Elliott v. Hughes, 3 Post. & Fin. 337. § 2480.
 Elliott v. Jenness, 111 Mass. 29. § 5918.
 Elliott v. Pell, 1 Paige (N. Y.), 263. § 6189.
 Elliott Bank v. Western & C. R. Co., 2 Lea (Tenn.) 676. §§ 5737, 5738.
 Ellis v. Boston & C. R. Co., 107 Mass. 1. §§ 6403, 6188, 6940.
 Ellis v. Davis, 109 U. S. 485. § 3453.
 Ellis v. Essex Merrimac Bridge Co., 2 Pick. (Mass.) 243. § 2394.
 Ellis v. Howe Sewing Machine Co., 9 Daly (N. Y.), 78. § 4716.
 Ellis v. Kyger, 90 Mo. 600. § 5817.
 Ellis v. Little, 27 Kan. 707. §§ 6984, 7158, 7326.
 Ellis v. Marshall, 2 Mass. 269. §§ 52, 1937, 5416.
 Ellis v. North Carolina Institution & Co., 68 N. C. 423. § 788, 3900.
 Ellis v. Ohio & C. Co., 4 Ohio St. 628. § 1717.
 Ellis v. Pulsifer, 4 Allen (Mass.), 165. §§ 4650, 5077, 5087.
 Ellis v. Schmoeck, 5 Bing. 521. §§ 1364, 1877.
 Ellis v. Temple, 4 Coldw. (Tenn.) 315. § 7045.
 Ellis v. Ward, 137 Ill. 507. § 4683.
 Ellis v. Ward, 137 Ill. 509. §§ 4128, 4389, 4682, 6527.
 Ellison v. Mobile & C. R. Co., 36 Miss. 572. § 1288.
 Ellison v. Schneider, 25 La. An. 435. § 2340.
 Ellsworth v. St. Louis & C. Co., 98 N. Y. 553; 33 Hun (N. Y.), 7. § 6069.
 Ellsworth v. Wollen Man. Co. v. Faunce, 79 Me. 440. §§ 725, 3863, 4120, 4622, 4623.
 Elmendorf v. Taylor, 10 Wheat. (U. S.) 152. § 3774.
 Elmwood Township v. Marcy, 92 U. S. 289. § 590.
 Elphinstone, Ex parte, L. R. 10 Eq. 412. § 3122.
 Elphinstone v. Monkland Iron Co., 11 App. Cas. 332. § 3122.
 Elston v. Piggett, 94 Ind. 14. § 7983.
 Elwell v. Dodge, 33 Barb. (N. Y.) 338. §§ 4633, 4802, 4891, 4958, 5133, 5757.
 Elwell v. Fosdick, 134 U. S. 500, 512. § 6876.
 Elwell v. Shaw, 15 Mass. 942; 8 Am. Dec. 126. §§ 5074, 5080.
 Elwood v. First Nat. Bank, 41 Kan. 475. §§ 4498, 4546, 4580, 6874, 6880, 6882, 7262.
 Ely v. Com., 5 Dana (Ky.), 398. § 6964.
 Ely v. Sprague, 1 Clarke Ch. (N. Y.) 351. §§ 2128, 2133, 4075, 4288, 4659.
 Elysville v. Okieko Co., 5 Md. 152. §§ 1185, 4893.
 Elysville Man. Co. v. Okieko Co., 1 Md. Ch. 392. §§ 4881, 4891, 4946, 5045, 5176.
 Elyton Land Co. v. Birmingham Warehouse & Co., 92 Ala. 407. §§ 1616, 6053.
 Embree v. Shideier, 36 Ind. 423. §§ 7233, 7234, 7235, 7240, 7247.
 Embury v. Palmer, 107 U. S. 3. § 3571.
 Embury v. Conner, 3 N. Y. 511. § 5596.
 Emerson v. Auburn & C. R. Co., 13 Hun (N. Y.), 150. §§ 4846, 8037.
 Emerson v. Lowell Gas Light Co., 3 Allen (Mass.), 410. § 6358.
 Emerson v. Patridge, 27 Vt. 8. § 7208.
 Emerson v. Providence Hat Man. Co., 12 Mass. 237. §§ 3944, 3945, 4849, 4852, 5127, 5146.
 Emery v. Lord, 26 Mich. 431. § 2928.
 Emery v. Parrott, 107 Mass. 95. §§ 457, 2478.
 Emlen v. Lehigh Coal & C. Co., 47 Pa. St. 76, 83. § 6113.
 Emma Silver Min. Co.'s Case, L. R. 10 Ch. 194. § 4427.
 Emma Silver Mining Co. v. Grant, 11 Ch. Div. 918. §§ 457, 459, 463, 465.
 Emma Silver Min. Co. v. Lewis, 4 C. P. Div. 396. §§ 415, 461, 462, 467.
 Emmert v. Smith, 40 Md. 123. § 3545.
 Emmet v. Reed, 8 N. Y. 312. §§ 1546, 7244, 7250.
 Emmet v. Smith, 40 Md. 123. § 3545.
 Emmitt v. Springfield & C. R. Co., 51 Ohio St. 23. § 1527.
 Emory v. Excelsior Distilling Co., 9 Mo. App. 578. § 4956.
 Empire City Bank, Case of, 8 Abb. Pr. (N. Y.) 192. §§ 1369, 1927, 3173, 3192, 3213, 3283, 3670, 4171.
 Empire City Bank, Re, 18 N. Y. 199. §§ 1369, 3034, 3095, 3193, 3213, 3283, 3429, 3476, 3670, 3786, 3809, 4171.
 Empire Man. Co. v. Stuart, 46 Mich. 482. § 5255.

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- Emporia v. Norton**, 13 Kan. 569. § 580.
- Emporium & Co. v. Emrie**, 54 Ill. 345. § 4389.
- Empress Engineering Co., Re.** 16 Ch. Div. 125. § 6547.
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- Enfield Toll Bridge Co. v. Hartford & C. R. Co.**, 17 Conn. 40, 17 Conn. 454. §§ 5348, 5349, 5381, 5398, 5401, 5404, 5615, 5616.
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- Englar v. Offutt**, 70 Md. 78. §§ 7085, 7096.
- Engelbert v. Blanlot**, 2 Whart. (Pa.) 240. § 6939.
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- Engleman v. State**, 2 Ind. 91. § 239.
- English v. Newhaven & Co.**, 32 Conn. 240. § 5411.
- English Channel Steamship Co. v. Roit**, 17 Ch. Div. 715. §§ 5697, 5702, 6150, 6849.
- Ennis & C. R. Co., Re.** 3 L. R. 1r. 187. § 3196.
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- Ensey v. Cleveland & C. R. Co.**, 10 Ind. 178. §§ 518, 528, 530, 5273, 5275.
- Ensign v. Wanda**, 1 Johns. Cas. (N. Y.) 171. § 3008.
- Ensworth v. New York Life Ins. Co.**, 1 Flip. C. C. (U. S.) 92. § 4873.
- Episcopal Charitable Society v. Episcopal Church**, 1 Pick. (Mass.) 372. §§ 286, 288, 5029, 5045, 5303.
- Episcopal Church v. Varian**, 28 Barb. (N. Y.) 644. §§ 4650, 5077, 5078, 5087, 5089.
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- Eppright v. Nickerson**, 78 Mo. 482. §§ 3417, 3419, 3553, 3620, 3686, 5091, 5092, 6469, 6473.
- Eppstein v. Salorgne**, 6 Mo. App. 352, 354. § 8070.
- Equitable Gas Light Co. v. Baltimore Tar Co.**, 65 Md. 73. § 4881.
- Equitable Life Assurance Co. v. Clements**, 140 U. S. 226; affirming 32 Fed. Rep. 273. § 5491.
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- Erickson v. Nesmith**, 15 Gray (Mass.), 221; 4 Allen, 233. §§ 3020, 3050, 3055, 3056, 3429, 3439, 3466, 3495.
- Erickson v. Nesmith**, 46 N. H. 371. §§ 3050, 3074, 3338, 3432, 3493, 3495, 3540, 3544, 3819.
- Ericsson v. Brown**, 38 Barb. (N. Y.) 390. § 3146.
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- Erle & C. Plank Road Co. v. Brown**, 25 Pa. St. 156. §§ 1216, 1228.
- Erle & C. R. Co. v. Casey**, 26 Pa. St. 287. §§ 5184, 5411, 5421, 6579, 6580, 6581, 6644, 6758.
- Erle & C. R. Co. v. Patrick**, 2 Keyes (N. Y.), 256. §§ 1253, 1256.
- Erle City v. Schwingler**, 22 Pa. St. 384. §§ 6392, 6363.
- Erle City Iron Works v. Barber**, 102 Pa. St. 156. §§ 6327, 6328.
- Erle R. Co. v. Com.**, 66 Pa. St. 84. §§ 5372, 8131.
- Erle R. Co. v. Delaware & C. R. Co.**, 21 N. J. Eq. 283. § 5260, 5261.
- Erle R. Co. v. Heath**, 8 Blatchf. (U. S.) 413. § 7411.
- Erle R. Co. v. Pennsylvania**, 15 Wall. (U. S.) 282. § 8113.
- Erle R. Co. v. Pennsylvania**, 21 Wall. (U. S.) 492; affirming 66 Pa. St. 84. § 8102.
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- Erlanger v. New Sombrero Phosphate Co.**, 3 App. Cas. 1218; 5 Ch. Div. 73. §§ 452, 457, 459, 460, 476.
- Ernest v. Crossbill**, 2 De Gex, M. & G. 175. § 4009.
- Ernest v. Nicholls**, 6 H. L. C. 401, 423. § 3969.
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- Erskine v. Loewenstein**, 11 Mo. App. 595. §§ 1681, 2937, 3614.
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- Erwin v. Branch Bank**, 14 Ala. 307. §§ 4758, 4802.
- Erwin v. Davenport**, 9 Heisk. (Tenn.) 45. §§ 7159, 7215.
- Erwin v. Oregon Ry. & Nav. Co.**, 35 Hun (N. Y.), 544. § 2495.
- Erwin v. United States**, 97 U. S. 392. § 6469.
- Eschweiler v. Stowell**, 78 Wis. 316. § 4504.
- Esmay v. Gorton**, 18 Ill. 483, 486. § 5018.
- Esmund v. Bullard**, 16 Hun (N. Y.), 65. §§ 3112, 4164, 4182, 4331.
- Espallan v. Wilson**, 86 Ala. 487. § 5018.
- Esparto Trading Co.**, 12 Ch. D. 131. §§ 1523, 1764.
- Espy v. Bank of Cincinnati**, 18 Wall. (U. S.) 604. §§ 4817, 4833.
- Essex Bridge Co. v. Tuttle**, 2 Vt. 393. § 1187.
- Essex Company v. Lawrence Machine Shop**, 10 Allen (Mass.), 352. § 3531.
- Essex Public Road Board v. Skinkle**, 140 U. S. 334. § 5383.
- Essex Road Board v. Skinkle**, 49 N. J. L. 641; affirmed, 47 N. J. L. 93. § 5283.
- Essex Turnp. Co. v. Collins**, 8 Mass. 292. §§ 1245, 1823, 4874, 4887, 5045, 5060.
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- Estabrook v. Messersmith**, 18 Wis. 545. §§ 6589, 6835.
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- Estes v. Whipple**, 12 Vt. 373. § 3446.
- Estey Man. Co. v. Rannels**, 55 Mich. 130. § 521.
- Estill v. New York & C. R. Co.**, 41 Fed. Rep. 849. § 7426.
- Etheridge v. Sperry**, 139 U. S. 266. § 6984.
- Ettling v. Commercial Bank**, 7 Rob. (La.) 459. § 4732.
- Ettlinger v. Persian Rng & Co.**, 49 N. Y. St. Rep. 408; 20 N. Y. Supp. 772. § 6881.
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- Eureka Co. v. Bailey Co.**, 11 Wall. 488. §§ 5074, 5176.
- Eureka Iron & C. Works v. Bresnahan**, 60 Mich. 332. §§ 3976, 5016, 5029, 6015, 6131.
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- European & C. R. Co. v. McLeod**, 3 Pugsley (N. B.), 3. §§ 1713, 1959, 1965.
- European & C. R. Co. v. McLeod**, 1 Pugsley, (N. B.), 314. § 1235.
- European & C. R. Co. v. McLeod**, 3 Pugsley, (N. B.), 331, 340. § 1179.
- European & C. R. Co. v. Poor**, 59 Me. 277. §§ 4022, 4024, 4043, 4060, 4068, 4071.
- European Bank, Re.** L. R. 5 Ch. 353. § 5209.
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- Evans's Case**, L. R. 2 Ch. 427. §§ 1190, 1251.
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- Evans v. Bailey**, 66 Cal. 112. § 1108.
- Evans v. Bicknell**, 6 Ves. 174. § 1425.
- Evans v. Boston Heating Co.**, 157 Mass. 37. §§ 6132, 6174.
- Evans v. Brandon**, 53 Tex. 56. §§ 4119, 4471, 4472, 4566, 4578.
- Evans v. Browne**, 37 Ind. 514. § 634.
- Evans v. Collins**, 5 Q. B. 803, 804, 820. § 1462.
- Evans v. Coventry**, 5 De Gex, M. & G. 911. § 7222.
- Evans v. Coventry**, 3 De Gex, M. & G. 835. § 1521.
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Evans v. Smallcombe, L. R. 3 H. L. 249. §§ 1523, 1552, 1798, 1799, 5298.
Evans v. Smallcombe, L. R. 3 H. L. 263. § 1552.
Evans v. Snyder, 64 Mo. 516. § 526.
Evans v. Stokes, 1 Keen, 24. § 4565.
Evans v. Trenton, 24 N. J. L. 764. § 4336.
Evans v. Trimountain & Ins. Co., 9 Allen (Mass.), 329. §§ 915, 7225.
Evans v. Underwood, 1 Wils. 262. § 1389.
Evans v. Warren, 122 Mass. 303. § 2553.
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Evansville & C. R. Co. v. Posey, 12 Ind. 363. §§ 1149, 1311, 1395, 1513.
Evansville & C. R. Co. v. Shearer, 10 Ind. 244. §§ 1332, 1335, 1344, 1377.
Evansville & C. R. Co. v. Spellbring, 1 Ind. App. 167. § 7426.
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Evansville Bank v. Britton, 105 U. S. 322. §§ 676, 2872.
Evarts v. Becker, 8 Paige (N. Y.), 505. § 3495.
Evarts v. Killingworth Man. Co., 20 Conn. 447. §§ 6655, 7510.
Evelyn v. Lewis, 3 Hare, 472. § 7128.
Evening Journal Asso. v. McDermott, 44 N. J. L. 430. § 6310.
Evening Journal Asso. v. State Board of Assessors, 47 N. J. L. 34. § 6556.
Everdell v. Sheboygan & C. R. Co., 41 Wis. 395. §§ 7804, 7805.
Everett v. Smith, 22 Minn. 53. § 725.
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Evergreen Cemetery Asso. v. Beecher, 53 Conn. 551. § 5549.
Everhart v. Philadelphia & C. R. Co., 28 Pa. St. 339, 353. §§ 1278, 2247, 2493.
Everhart v. Westchester & C. R. Co., 28 Pa. St. 339. §§ 72, 1294, 1961, 5417.
Everson v. Eddy, 36 N. Y. St. Rep. 763; 12 N. Y. Supp. 872; 59 Hun, 620. §§ 6172, 6516.
Everson v. Ellingson, 67 Wis. 634. § 505.
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Ewing v. Croville Mining Co., 56 Cal. 649. § 2105.
Ewing v. Medlock, 5 Port. (Ala.) 82. § 7595.
Ewing v. Robeson, 15 Ind. 26. §§ 532, 5254, 7670, 7689, 7691.
Excelsior Fire Ins. Co., Re, 16 Abb. Pr. (N. Y.) 8. § 745.
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Excelsior Grain Binding Co. v. Stayner, 61 How. Pr. (N. Y.) 456; 25 Hun (N. Y.), 91. § 1222.
Exchange Bank v. City and District Savings Bank, L. R. 6 Q. B. 96, 196. §§ 2601, 2935, 3213.
Exchange Bank v. Hinds, 3 Ohio St. 1. § 658.
Exchange Bank v. Monteth, 25 N. Y. 505. § 5738.
Exchange Bank v. Sibley, 71 Ga. 726. § 1467.
Exchange Bank v. Tiddy, 67 N. C. 163. § 5441.
Exchange Nat. Bank v. Capps, 32 Neb. 242. §§ 7653, 7664, 7666.
Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372. §§ 2867, 2870, 2871.
Exeter v. Glide, 4 Mod. 33. § 820.
Exeter & C. R. Co. v. Buller, 11 Hun. 527. § 355.
Exeter Bank v. Rogers, 7 N. H. 21. § 4905.
Exmouth Docks Co., Re, L. R. 17 Eq. 181. § 6838.
Exposition & C. v. Canal Street & C. Co., 42 La. An. —. § 1724.
Express Co. v. Korentze, 8 Wall. (U. S.) 342, 351. § 7457.
Express Co. v. Ware, 20 Wall. (U. S.) 543. § 7841.
Eyerman v. Kriekhaus, 7 Mo. App. 455. §§ 3537, 7820.
Eyerman v. Second Nat. Bank, 13 Mo. App. 289 affirmed, 84 Mo. 408. § 5338.
Eyre's Case, 31 Beav. 177. §§ 2054, 2055, 3255.
Eyre v. Harmon, 92 Cal. 530. § 4234.
Eyre v. McDonald, 15 Ir. Ch. (N. S.) 534. § 7014.
Eyssallenne v. Citizens' Bank, 3 La. An. 663. § 6189.
Eyton v. Denbigh & C. R. Co., L. R. 6 Eq. 14. § 6999.
Eyton v. Denbigh & C. R. Co., L. R. 6 Eq. 488. § 6999.
Facey v. Fuller, 13 Mich. 527. §§ 779, 788.
Factors' & Ins. Co. v. Marine Dry Dock & C. Co., 31 La. An. 149. §§ 2455, 2615, 2621, 5210.
Factors' & Ins. Co. v. New Harbor Protection Co., 37 La. An. 233. § 5689.
Fagan v. Boyle Ice Machine Co., 65 Tex. 324. § 7759.
Failey v. Stockwell, 2 Pa. Dist. Rep. 197. §§ 6494, 6703.
Fairbank v. Merchants' National Bank, 132 Ill. 120. § 2181.
Fairbanks v. Metcalf, 8 Mass. 238. § 1253.
Fairchild v. Hunt, 5 Mo. App. 583. § 11.
Fairchild v. Masonic Hall Association, 71 Mo. 526. §§ 10, 11, 3032, 3101, 5657, 5658, 6651.
Fairchild v. New Orleans & C. R. Co., 60 Miss. 931. § 5301.
Fairchild v. Ogdensburgh & C. R. Co., 15 N. Y. 337. § 5124.
Fairfax v. Hunter, 7 Cranch (U. S.), 603. §§ 5795, 7918.
Fairfield v. Adams, 16 Pick. (Mass.) 381. §§ 7593, 7594.
Fairfield v. Paine, 2 Me. 498. §§ 3363, 7507.
Fairfield Co. Turnpike v. Thorp, 13 Conn. 173, 175. §§ 943, 1149, 4785, 4919, 4920.
Fairfield Savings Bank v. Chase, 72 Me. 226. §§ 5202, 5204, 5221, 5233.
Fairthorne v. Weston, 3 Hare, 387. § 4482.
Falconer v. Campbell, 2 McLean (U. S.), 195. §§ 2, 9, 40, 44, 234, 532, 4171, 5656, 7620, 7659, 7661.
Falk v. Flint, 12 R. I. 14. § 2772.
Falkner v. Hunt, 16 Cal. 167. § 2913.
Fall Brook Coal Co. v. Lynch, 47 How. Pr. (N. Y.) 520. § 599.
Fall River Iron Works v. Old Colony R. Co., 5 Allen (Mass.), 221. §§ 72, 74.
Fall River Union Bank v. Sturtevant, 12 Cush. (Mass.) 372. § 5229.
Fanning v. First Nat. Bank, 76 Ill. 53. § 8076.
Fanning v. Insurance Co., 39 Ohio St. 333. §§ 1146, 1148.
Fargo v. McVicker, 55 Barb. (N. Y.) 437. §§ 7449, 7454.
Fargo v. Michigan, 121 U. S. 230. §§ 5562, 8106, 8117, 8118.
Fargo v. Redfield, 22 Blatchf. (U. S.) 527; 22 Fed. Rep. 373. § 5539.
Farley v. Eysaut, 32 Me. 474. § 1568.
Farnet v. Olverit, 44 Ind. 212. § 1430.
Farmers' & C. Bank v. Baldwin, 23 Minn. 198. §§ 5751, 5950, 6036.
Farmers' & C. Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125; 14 N. Y. 623; 28 N. Y. 425; 4 Duer (N. Y.), 219. §§ 4616, 4814, 4815, 4816, 4834, 4837, 4838, 4839, 4889, 5158, 5737, 5949.
Farmers' & C. Bank v. Chester, 6 Humph. (Tenn.) 458. § 4887.
Farmers' & C. Bank v. Colby, 64 Cal. 352. § 5143.
Farmers' & C. Bank v. Dearing, 91 U. S. 29. §§ 670, 671, 3054, 7301.
Farmers' & C. Bank v. Detroit & C. R. Co., 17 Wis. 372. §§ 518, 5274, 7617, 7618.
Farmers' & C. Bank v. Downey, 53 Cal. 466. §§ 4012, 4029, 4668, 4123, 4479.
Farmers' & C. Bank v. Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275; 10 Abb. Pr. (N. Y.) 47. §§ 4722, 4724, 4699, 5739, 5740.
Farmers' & C. Bank v. Haight, 3 Hill (N. Y.), 493. §§ 5069, 5070.
Farmers' & C. Bank v. Harrison, 67 Mo. 503. §§ 5340, 5969, 5977, 5981.
Farmers' & C. Bank v. King, 57 Pa. St. 202. § 7092.
Farmers' & C. Bank v. Little, 8 Watts & S. (Pa.) 207. §§ 6723, 6724, 6754, 8062.
Farmers' & C. Bank v. Nelson, 12 Md. 35. § 4402.
Farmers' & C. Bank v. Payne, 25 Conn. 444. §§ 5197, 5208, 5221.
Farmers' & C. Bank v. Philadelphia & C. R. Co., 14 Phila. (Pa.) 451. §§ 6840, 7008, 7116.
Farmers' & C. Bank v. Rayner, 2 Hall (N. Y.), 195. § 7669.

TABLE OF CASES CITED. Farmers—Feibelman

- Farmers' & Co. Bank v. Rogers**, 15 N. Y. Civ. Proc. 250; 1 N. Y. Supp. 757. \$ 7851.
- Farmers' & Co. Bank v. Sutton Man. Co.**, 52 Fed. Rep. 191. \$ 5740.
- Farmers' & Co. Bank v. Troy City Bank**, 1 Doug. (Mich.) 457. §§ 632, 4802, 4803, 4804, 5155, 7665, 7705.
- Farmers' & Co. Bank v. Wasson**, 48 Iowa. 336. 339. §§ 1031, 1032, 2311, 2317, 3234, 4649, 6498, 6502.
- Farmers' & Co. Bank v. Wayman**, 5 Gill (Md.), 536, 356. \$ 2528.
- Farmers' & Co. Bank v. Williamson**, 61 Mo. 259. §§ 7681, 7697.
- Farmers' & Co. Bank v. Wilson**, 53 Cal. 600. §§ 2392, 2410.
- Farmers' & Co. v. Cary**, 13 Wis. 110. \$ 6199.
- Farmers' & Co. v. Central R. Co.**, 7 Fed. Rep. 537. §§ 6988, 7149.
- Farmers' & Co. v. Chicago & C. R. Co.**, 27 Fed. Rep. 146. \$ 6210, 6212.
- Farmers' & Co. v. Chicago & C. R. Co.**, 42 Fed. Rep. 6. \$ 7207.
- Farmers' & Co. v. Clowes**, 3 N. Y. 470. \$ 7883.
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- Farmers' & Co. v. Commercial Bank**, 11 Wis. 207; on appeal, 15 Wis. 424. \$ 6199.
- Farmers' & Co. v. Curry**, 13 Bush (Ky.), 312. \$ 5491.
- Farmers' & Co. v. Curtis**, 7 N. Y. 466. §§ 5795, 5797, 5798, 5967.
- Farmers' & Co. v. Fisher**, 17 Wis. 114. §§ 6141, 6146, 6199.
- Farmers' & Co. v. Floyd**, 47 Ohio St. 525. \$ 4218.
- Farmers' & Co. v. Green Bay & C. R. Co.**, 11 Biss. (U. S.) 324. \$ 6281.
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- Farmers' & Co. v. Hendrickson**, 25 Barb. (N. Y.) 484. \$ 8097.
- Farmers' & Co. v. Hughes**, 11 Hun (N. Y.), 130. \$ 693.
- Farmers' & Co. v. Iowa Cent. R. Co.**, 17 Fed. Rep. 758. \$ 7196.
- Farmers' & Co. v. Kansas City & C. R. Co.**, 53 Fed. Rep. 182. §§ 6823, 6824, 6825, 6875, 6876, 6926, 7114, 7115, 7116, 7118, 7119, 7120, 7121, 7174.
- Farmers' & Co. v. Long Beach Improv. Co.**, 27 Hun (N. Y.), 89. \$ 6145.
- Farmers' & Co. v. Mann**, 4 Robt. (N. Y.) 356. \$ 4655.
- Farmers' & Co. v. McCullough**, 25 Pa. St. 303. §§ 5074, 5104.
- Farmers' & Co. v. McKinney**, 6 McLean (U. S.), 1. \$ 7292.
- Farmers' & Co. v. Maquillian**, 3 Dill. (U. S.) 379. §§ 4756, 7462, 7464, 7468, 7469.
- Farmers' & Co. v. Minneapolis Engine & Works**, 35 Minn. 543. \$ 6952.
- Farmers' & Co. v. Missouri & C. R. Co.**, 21 Fed. Rep. 264. §§ 7042, 7046.
- Farmers' & Co. v. Needles**, 53 Mo. 17. §§ 518, 7334, 7647, 7658.
- Farmers' & Co. v. New York**, 4 Bosw. (N. Y.) 80. \$ 5046.
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- Farmers' & Co. v. Perry**, 3 Sandf. Ch. (N. Y.) 339. §§ 5736, 6134.
- Farmers' & Co. v. San Diego Street Car Co.**, 45 Fed. Rep. 518. §§ 4631, 6058, 6503, 6530, 6531.
- Farmers' & Co. v. St. Joseph & C. R. Co.**, 1 McChary (U. S.), 247. \$ 5888.
- Farmers' & Co. v. Taylor**, 73 Pa. St. 342, 343. \$ 4887.
- Farmers' & Co. v. Texas Western R. Co.**, 32 Fed. Rep. 359. \$ 6216.
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- Farmers' & Co. v. Warring**, 20 Wis. 290. §§ 8021, 8036.
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- Farmers' Bank v. Beaton**, 7 Gill & J. (Md.) 421. §§ 6919, 7812.
- Farmers' Bank v. Ellis**, 32 N. Y. 583. §§ 5755, 5758.
- Farmers' Bank v. Gallaher**, 43 Mo. App. 482. §§ 1616, 3468, 3712.
- Farmers' Bank v. Garten**, 34 Mo. 119. \$ 531.
- Farmers' Bank v. Gettinger**, 4 W. Va. 305. \$ 7892.
- Farmers' Bank v. Iglehart**, 6 Gill (Md.), 50. §§ 2320, 2336, 3240.
- Farmers' Bank v. McKee**, 2 Pa. St. 318. §§ 4617, 4877.
- Farmers' Bank v. Maxwell**, 32 N. Y. 579. §§ 5754, 5755, 5758.
- Farmers' Bank v. Watson**, 32 N. Y. 583. §§ 5755, 5758.
- Farmingdon Academy v. Allen**, 14 Mass. 172. §§ 1205, 1206.
- Farmington Sav. Bank v. Fall**, 71 Me. 49. 5948.
- Farnan v. Brooks**, 9 Pick. (Mass.) 212. \$ 7839.
- Farnsworth v. Drake**, 11 Ind. 101. \$ 6762.
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- Farnsworth v. Robbins**, 36 Minn. 369. §§ 1517, 1547, 1739.
- Farnsworth v. Terre Haute R. Co.**, 29 Mo. 75. §§ 7993, 7998, 8060.
- Farnsworth v. Western Union Tel. Co.**, 6 N. Y. St. Rep. 735. \$ 5293.
- Farnsworth v. Wood**, 91 N. Y. 308. \$ 3563.
- Farnum v. Ballard Vale Machine Shop**, 12 Cush. (Mass.) 507. §§ 3382, 3504, 3731, 7579, 7580.
- Farnum v. Blackstone Canal Corp.**, 1 Sumn. (U. S.) 46. §§ 319, 688, 6638.
- Farnum v. Concord**, 2 N. H. 392. \$ 6373.
- Farnum v. Johnson**, 62 Wis. 630. \$ 643.
- Farquhar v. Hadden**, L. R. 7 Chan. 1. \$ 1034.
- Farrah v. Gilman**, 19 Me. 440. §§ 4789, 5158.
- Farrar v. Rollins**, 37 Vt. 295. \$ 2460.
- Farrar v. Walker**, 3 Dill. (U. S.) 506. §§ 1140, 1365, 1450, 1451, 1962.
- Farrel Foundry v. Dart**, 26 Conn. 376. §§ 5197, 5219, 5221.
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- Farrow v. Bivings**, 13 Rich. Eq. (S. C.) 25. §§ 3816, 4377.
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- Farwell v. Metcalf**, 53 N. H. 276. \$ 6951.
- Fash v. Third Avenue R. Co.**, 1 Daly (N. Y.), 148. \$ 5235.
- Fatman v. Lobach**, 1 Duer (N. Y.), 354. \$ 2636.
- Faulds v. Yates**, 57 Ill. 416. \$ 4447.
- Faulkner v. Delaware & C. Canal Co.**, 1 Denio (N. Y.), 441. §§ 7341, 7900.
- Faulkner v. Hebard**, 26 Vt. 459. §§ 1961, 2756.
- Faul v. Alaska Gold & Silver Mining Co.**, 14 Fed. Rep. 657; 8 Sawy (U. S.) 420. §§ 3577, 7813.
- Faure Electric Accumulator Co. Re**, 40 Ch. Div. 141; 58 L. J. (Ch.) 48; 37 Week. Rep. 116. §§ 2342, 4019, 4873.
- Faurie v. Millaudon**, 3 Mart. (N. s.) (La.) 476. \$ 4472.
- Faviell v. Eastern Counties Railway Co.**, 2 Ex. 344; 17 L. J. (Ex.) 297. §§ 4867, 5059.
- Fawcett v. Charles**, 13 Wend. (N. Y.) 473. §§ 802, 847.
- Fawcett v. New Haven Organ Co.**, 47 Conn. 224. \$ 4697.
- Fawcett v. Whitehouse**, 1 Russ. & M. 132. §§ 457, 4022, 4024.
- Fay v. Brewster**, 45 N. J. L. 432. \$ 7939.
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- Fayles v. National Ins. Co.**, 49 Mo. 380. \$ 4883.
- Feable, Ex parte**, 13 Mo. 467. \$ 6931.
- Featherstonhaugh v. Fenwick**, 17 Ves. 298. §§ 1064, 4548.
- Feckheimer v. National Exch. Bank**, 79 Va. 80. §§ 3233, 3236.
- Fee v. Big Sand Iron Co.**, 13 Ohio St. 563. §§ 7504, 7516.
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- Fehr v. Schuykill Nav. Co.**, 69 Pa. St. 161. §§ 6343, 6346.
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 Feital v. Middlesex R. Co., 109 Mass. 398. § 6353.
 Felgate's Case, 2 De Gex, J. & S. 456. §§ 1362, 6321.
 Felker v. Standard Yarn Co., 148 Mass. 226. §§ 4194, 4211, 4244, 4:51.
 Fell v. Burchett, 7 El. & Bl. 537. § 3591.
 Fell v. Northern Pac. R. Co., 44 Fed. Rep. 248. § 6385.
 Fell v. State, 42 Md. 71. § 643.
 Fellows v. Commercial & Bank, 6 Rob. (La.) 246. § 6534.
 Fellows v. Fellows, 4 Cow. (N. Y.) 682. § 3527.
 Fellows v. Steamer Powell, 16 La. An. 316. § 6332.
 Feisenthal v. Thieben, 23 Ill. App. 569. § 4842.
 Felt v. Heye, 23 How. Pr. (N. Y.) 359. § 2633.
 Feltmakers v. Davis, 1 Bos. & P. 98, 100. § 1021.
 Felton's Executors' Case, L. R. 1 Eq. 219. § 4121.
 Felton v. McClave, 14 Jones & S. (N. Y.) 53. § 4891.
 Female Orphan Asylum v. Johnson, 43 Me. 180. §§ 3918, 3945, 4074.
 Fenton v. Sewing Machine Co., 9 Phila. (Pa.) 189. § 6276.
 Fenton v. Wilson Sewing Machine Co., 9 Phila. (Pa.) 189. § 6312.
 Fenwick's Case, 1 De Gex & S. 557. § 3203.
 Ferguson v. Gill, 46 N. Y. St. Rep. 474; 19 N. Y. Supp. 149. §§ 4196, 4193.
 Ferguson v. Clifford, 37 N. H. 86. § 6200.
 Ferguson v. Landram, 5 Bush (Ky.), 230. § 1853.
 Ferguson v. Miners & C. Bank, 3 Sneed (Tenn.), 609. §§ 38, 632, 5408, 6734.
 Ferguson v. Soden, 11 Mo. 203. § 7942.
 Fernie, Re, 6 Week. Not. Cas. 657. § 5837.
 Ferrao's Case, L. R. 9 Ch. 355. §§ 1573, 1604, 1613.
 Ferraria v. Vasconcellos, 31 Ill. 25. § 927.
 Ferris v. Bramble, 5 Ohio St. 109. §§ 5595, 5596.
 Ferris v. Purdy, 10 Johns. (N. Y.) 359. § 7247.
 Ferris v. Strong, 3 Edw. Ch. (N. Y.) 127. §§ 1906, 4578, 6568.
 Ferris v. Thaw, 72 Mo. 446; 5 Mo. App. 279. §§ 2971, 6005, 5171.
 Ferris v. Van Vechten, 73 N. Y. 113. § 7104.
 Ferry v. Bank of Central New York, 15 How. Pr. (N. Y.) 445. § 6704.
 Ferry Co. v. Balch, 8 Gray (Mass.), 303. § 1172.
 Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669. § 5460.
 Fessler v. Ellis, 40 Pa. St. 248. § 3578.
 Ffooks v. London & C. R., 17 Jur. 365. § 71.
 Fidelity & C. Co. v. Mobile Street R. Co., 53 Fed. Rep. 687. § 7143.
 Fidelity & C. Co. v. Niven, 5 Houst. (Del.) 163. § 5044.
 Fidelity & C. Co. v. Niven, 5 Houst. (Del.) 416. § 5337.
 Fidelity & C. Co. v. Railroad Co., 32 W. Va. 244. §§ 5104, 5106.
 Fidelity & C. Co. v. Shenandoah & C. R. Co., 33 W. Va. 761. § 6127.
 Fidelity & C. Co. v. United New Jersey R. & C. Co., 36 N. J. Eq. 405. § 6095.
 Fidelity & C. Co. v. West Pennsylvania & C. R. Co., 138 Pa. St. 494. § 6164.
 Field v. Auditor, 83 Va. 882. § 636.
 Field v. Burr Brewing Co., 13 N. Y. Supp. 456. § 4688.
 Field v. Com., 32 Pa. St. 478. § 7784.
 Field v. Cooks, 16 La. An. 153. §§ 239, 417.
 Field v. Crawford, 6 Gray (Mass.), 116. §§ 950, 7816.
 Field v. Directors of Girard College, 54 Pa. St. 233. § 805.
 Field v. Field, 9 Wend. (N. Y.) 305. § 725.
 Field v. Haines, 24 Blatchf. (U. S.) 160; 28 Fed. Rep. 919. § 3581.
 Field v. Jones, 11 Ga. 413. §§ 6898, 7812.
 Field v. Leavitt, 5 Jones & S. (N. Y.) 215. § 2656.
 Field v. New York, 6 N. Y. 179, 186. §§ 6141, 6145.
 Field v. Nickerson, 13 Mass. 131, 137, 138. § 5752.
 Field v. Pierce, 102 Mass. 253. § 2357.
 Field v. Ripley, 20 How. Pr. (N. Y.) 26. § 6880.
 Field v. Schieffelin, 7 Johns. Ch. 150. §§ 2529, 4930.
 Fielder v. Jessup, 24 Mo. App. 91. § 8073.
 Fietsam v. Hay, 122 Ill. 293. 25, 5335, 5336, 5353, 5354, 6466, 6471.
 Fifield v. Northern R. R., 42 N. H. 225, 236. § 3968.
 Fifth Avenue Bank v. Forty-second Street R. Co., 17 N. Y. Supp. 826. § 2577.
 Fifth Baptist Church v. Baltimore & C. R. Co., 4 Mackey (D. C.), 43. §§ 219, 221.
 Fifth Nat. Bank v. Navassa Phosphate Co., 119 N. Y. 256. §§ 4624, 4662.
 Fifth Nat. Bank v. Pittsburgh & C. R. Co., 1 Fed. Rep. 190. § 4477.
 Filder v. London & C. R. Co., 1 Hem. & M. 489, 493. § 4567.
 Filley v. Phelps, 18 Conn. 294. § 1084.
 Fili v. Delaware & C. R. Co., 37 Fed. Rep. 65. § 7488.
 Filon v. Miller Brew Co., 38 N. Y. St. Rep. 602; 15 N. Y. Supp. 87. §§ 3906, 5721, 5722, 5724.
 Filson v. Heimes, 5 Pa. St. 452. § 1048.
 Finance Co. v. Charleston & C. R. Co., 52 Fed. Rep. 524. §§ 7114, 7119.
 Finance Co. v. Charleston & C. R. Co., 52 Fed. Rep. 678. § 7054.
 Financial Corporation v. Lawrence, L. R. 4 Com. P. 731. § 3209.
 Finch v. Northern P. R. Co., 47 Minn. 36. § 6390.
 Finch v. Travelers' Ins. Co., 87 Ind. 302. § 7982.
 Finch v. Ullman, 105 Mo. 255. §§ 5651, 7642.
 Fine v. Hornsby, 2 Mo. App. 61. §§ 1068, 2387.
 Fine v. St. Louis Public Schools, 30 Mo. 166. § 7758.
 Fink v. Berberich, 7 Mo. App. 577. § 7547.
 Fink v. Canyon Road Co., 5 Or. 301, 308. § 4634.
 Finlay v. Bristol & C. R. Co., 7 Ex. 409. § 5058.
 Finlay v. Lindsay, 7 Ir. C. L. 1. § 4423.
 Finley v. Brent, 87 Va. 103. § 5387.
 Finley v. Philadelphia, 32 Pa. St. 381. § 8095.
 Finley & C. Co. v. Kurtz, 34 Mich. 89. §§ 3975, 3981, 4968, 5222.
 Finn v. Donahue, 35 Conn. 216. § 7958.
 Finnegan v. Noerenberg, 52 Minn. 239. §§ 7697, 7698, 7701.
 Finnell v. Burt, 2 Handy (Ohio), 202. § 7064.
 Finnell v. Nesbit, 16 B. Mon. (Ky.) 351, 354. §§ 6901, 6964.
 Finnell v. Sandford, 17 B. Mon. (Ky.) 748. § 1960.
 Finney's Appeal, 59 Pa. St. 398. § 2390.
 Finney v. Sommerville, 80 Pa. St. 53. § 5604.
 Firbank v. Humphreys, 18 Q. B. Div. 54; 56 L. J. (Q. B.) 57; 56 L. R. (N. S.) 37. § 1504.
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 Firemen's Association v. Lounsbury, 21 Ill. 511. §§ 611, 612.
 Firemen's Ins. Co., Ex parte, 6 Hill (N. Y.), 243. § 2445.
 First Baptist Church v. Branham, 90 Cal. 22. § 7642.
 First Baptist Church v. Brooklyn Fire Ins. Co., 18 Barb. (N. Y.) 69; 19 N. Y. 305. §§ 4920, 5024, 5175.
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 First Baptist Soc. v. Papalee, 16 Wend. (N. Y.) 605. §§ 518, 5273.
 First Congregational Church v. Muscatine, 2 Iowa, 69. § 7350.
 First M. E. Church v. Atlanta, 76 Ga. 181. § 5633.
 First Nat. Bank v. Almy, 117 Mass. 476. §§ 2983, 2989, 2992, 3073, 7216, 4355, 6195.
 First Nat. Bank v. Anderson, 75 Va. 250. § 6195.
 First Nat. Bank v. Armstrong, 36 Fed. Rep. 59. §§ 7091, 7092, 7106.
 First Nat. Bank v. Armstrong, 42 Fed. Rep. 193; 39 Fed. Rep. 231. §§ 7088, 7090, 7091, 7295.
 First Nat. Bank v. Barnum Wire & C. Works, 60 Mich. 587. §§ 6945, 7194.
 First Nat. Bank v. Bennett, 33 Mich. 520. §§ 4615, 4622.
 First Nat. Bank v. Bennington, 16 Blatchf. (U. S.) 53, 54. § 6107.
 First Nat. Bank v. Board of Reviewers, 41 La. An. 181, 184. §§ 2816, 2840.
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 First Nat. Bank v. Burch, 80 Mich. 242. §§ 8069, 8020.
 First Nat. Bank v. Charlotte, 85 N. C. 433. § 1273.
 First Nat. Bank v. Christopher, 40 N. J. L. 435. §§ 3905, 5206, 5208, 5221, 5225.
 First Nat. Bank v. Clark, 61 Md. 400. § 5154.
 First Nat. Bank v. Davenport & C. R. Co., 45 Iowa, 120. § 7805.
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- First Nat. Bank v. Herkshire, 31 Iowa, 18. § 2877.
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- First Presbyterian Church v. Fort Wayne, 36 Ind. 338. § 5575.
- First Universalist Society v. Currier, 3 Met. (Mass.) 417. §§ 7669, 7675.
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- Fisher v. McGirr, 1 Gray (Mass.), 1. § 5821.
- Fisher v. National Bank, 48 N. J. L. 390. § 4827.
- Fisher v. Sellman, 75 Mo. 13. §§ 733, 2936.
- Fisher v. Seligman, 7 Mo. App. 383. §§ 1902, 2935, 2086.
- Fisher v. Stevens, 16 Ill. 397. § 5301.
- Fisher v. Taylor, 2 Haro, 218. § 5702.
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- Fishkill Savings Inst. v. National Bank of Fishkill, 80 N. Y. 162; affirming 19 Hun (N. Y.), 354. §§ 5224, 5230, 6322, 6325, 6330.
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- Fitch v. Snedaker, 38 N. Y. 248. § 5899.

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- Fitzgerald v. Falconberg, 112 N. Y. 211. § 5191.
- Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169. § 5512.
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- Fitzgerald v. Missouri & C. R. Co. (Neb.), 45 Fed. Rep. 812. § 3906.
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- Fitzhugh v. Franco-Texas Land Co., 81 Tex. 306. §§ 4622, 4623, 4626, 4632.
- Fitzpatrick v. Dispatch Publishing Co., 83 Ala. 604. § 2105.
- Fitzpatrick v. Troy Ins. Co., 5 Biss. (U. S.) 48. § 5833.
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- Flagg v. Farnsworth, 12 W. N. C. (Pa.) 500. § 7758.
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- Flagg v. Manhattan R. Co., 10 Fed. Rep. 413. §§ 4079, 4080.
- Flagg v. Palmyra, 33 Mo. 440. § 1118.
- Flagg v. Stowe, 85 Ill. 164. § 2972.
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- Flagstaff Silver Mining Co. v. Patrick, 2 Utah, 304. § 3951.
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- Flanagan v. Philadelphia, 42 Pa. St. 218. § 5568.
- Flash v. Conn, 109 U. S. 371. §§ 3026, 3321, 3375, 3397, 3398, 3453.
- Flash v. Conn, 16 Fla. 428. §§ 2987, 4166.
- Flashbush Avenue, Re, 1 Barb. (N. Y.) 286. § 5919.
- Fleckner v. Bank of United States, 8 Wuent. (U. S.) 338. §§ 3947, 3988, 4748, 4749, 4789, 4790, 4791, 4804, 4891, 5045, 5049, 5061, 5133, 5751, 5950, 5969, 5975, 5977.
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- Fleming v. Chicago & Co. R. Co., 34 Iowa, 353. § 6343.
- Fleming v. Hull, 73 Iowa, 598. § 5450.
- Flemming v. Marine Ins. Co., 4 Whart. (Pa.) 59. § 4944.
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- Fletcher v. Howard, 2 Vt. 115. § 2619.
- Fletcher v. Manning, 2 Story (U. S.), 555. § 6141.
- Fletcher v. Peck, 6 Cranch (U. S.), 87. §§ 5381, 5419.
- Flick v. Troxell, 7 Watts & S. (Pa.) 65. § 7507.
- Flight v. Cook, 2 Ves. Sr. 619. § 1506.
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- Flint & Co. v. Woodhull, 25 Mich. 99. § 5419.
- Florida & Co. v. Varnedoe, 81 Ga. 175. § 4885.
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- Floyd v. Perrin, 30 S. C. 1. § 614.
- Floyd County v. Day, 19 Ind. 450. §§ 5124, 6084.
- Flud v. Peabody, 109 Mass. 141. § 2866.
- Fluit v. Boston, 99 Mass. 141. § 2866.
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- Flying Scud, The, 6 Wall. (U. S.) 263. § 1094.
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- Flyn v. Hudson River R. Co., 6 How. Fr. (N. Y.) 308. §§ 4846, 7512, 8037.
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- Fogarty v. Bourke, 2 Drury & War. 580. § 6826.
- Fogel v. Looming Ins. Co., 3 Grant Cas. (Pa.) 77. § 5988.
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- Follett's Heirs v. Rose, 3 McLean (U. S.), 332. § 5070.
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- Foot v. Prowse, 1 Strange, 625. §§ 792, 3851.
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- Forbes and Judd's Case, L. R. 5 Oh. 270. §§ 1254, 1608, 1618, 1643.
- Forbes v. Halsey, 26 N. Y. 53, 65. § 4060.
- Forbes v. Marshall, 11 Ex. 166. §§ 5126, 5139, 5153.
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- Ford, Ex parte, 7 Ves. 617. § 6434.
- Ford v. Bank of Mobile, 9 Port. (Ala.) 471. § 7760.
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- Ford v. Detroit Dry Dock Co., 50 Mich. 358. § 7527.
- Ford v. French, 72 Mo. 250. § 5197.
- Ford v. Hopkins, 1 Salk. 233. § 3645.
- Ford v. Judson Mercantile Co., 62 Ark. 426. § 6922.
- Ford v. Peering, 1 Ves. 72. § 1687.
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- Ford v. Williams, 13 N. Y. 577. § 5077.
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- Fordyce v. Beecher (Tex. Civ. App.), 21 S. W. Rep. 179. § 7163.
- Fordyce v. Withers (Tex. App.), 20 S. W. Rep. 766. §§ 7131, 7197.
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- Foreman v. Canterbury, L. R. 6 Q. B. 214; 40 L. J. (Q. B.) 138; 24 L. T. (N. S.) 385. §§ 6363, 6364.
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- Forney v. Fremont & Co. R. Co., 23 Neb. 465. § 5625.
- Forrest v. Manchester & Co. R. Co., 4 De Gex, F. & J. 126; 7 Jur. (N. S.) 887. §§ 4567, 4568.
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- Forward v. Pittard, 1 T. R. 27. § 6340.
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- Fosdick v. Hempstead, 125 N. Y. 581. § 5829.
- Fosdick v. Perryburg, 14 Ohio St. 472. § 1118.
- Fosdick v. Schall, 99 U. S. 235. §§ 6117, 6823, 6824, 6826, 6926, 7024, 7033, 7055, 7114, 7116, 7118, 7119, 7120, 7121, 7206, 7208, 7210, 7211.
- Fosdick v. Sturges, 1 Biss. 255. §§ 1595, 2049, 2050.
- Foss v. First Nat. Bank, 3 Fed. Rep. 185. § 7437.
- Foss v. Harbottle, 2 Hare, 461; 7 Jur. 163. §§ 355, 452, 4480, 4481, 4483, 4499, 4500, 4508, 4518.
- Foster, Re, 60 L. J. Ch. 175; 45 Ch. Div. 629. § 2192.
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- Foster v. Essex Bank, 16 Mass. 245. §§ 530, 590, 6738.
- Foster v. Essex Bank, 17 Mass. 479. §§ 4622, 4660, 4824, 4825, 4827, 4841, 4898, 5029, 5045, 5951, 7392.
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- Foster v. Fuller, 6 Mass. 58. § 5126.
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- Foster v. Mansfield, 36 Fed. Rep. 627. §§ 4479, 4494, 4495.
- Foster v. McO'Brien, 18 Mo. 88. § 2028.
- Foster v. Moulton, 35 Minn. 458. § 7651.
- Foster v. Mullanphy Planing Mill Co., 92 Mo. 79, 88; 16 Mo. App. 150. §§ 726, 3479, 3914, 3923, 3932, 6466, 6473, 6480, 6494, 6495, 6498, 6501.
- Foster v. Ohio Colorado Reduction & Co., 17 Fed. Rep. 130. § 5125.
- Foster v. Potter, 37 Mo. 525. §§ 2765, 2771, 2777, 7813.
- Foster v. Rockwell, 104 Mass. 167. §§ 5299, 5326.
- Foster v. Shaw, 7 Serg. & R. (Pa.) 166. § 5104.
- Foster v. Stevens, 63 Vt. 165. § 2824.
- Foster v. Townshend, 68 N. Y. 203; 2 Abb. N. Cas. (N. Y.) 29; reversing 6 Daly (N. Y.), 136; overruling in part, 12 Abb. Pr. (N. S.) (N. Y.) 469. § 7027.
- Foster v. White, 86 Ala. 467. §§ 4412, 4426, 4431.
- Foster v. White Cloud City Co., 32 Mo. 505. §§ 7702, 7736.
- Foster v. Wood, 6 Johns. Ch. (N. Y.) 87, 89. § 7819.
- Foster v. Woodfin, 11 Ired. L. (N. C.) 339. § 2617.
- Fothergill's Case, L. R. 8 Ch. 270. §§ 1578, 1605, 1608, 1618.
- Fougeray v. Cord, 50 N. J. Eq. 185. §§ 2129, 4059, 4073, 4545, 4557.
- Foulke v. San Diego & C. R. Co., 51 Cal. 365. §§ 5018, 5182, 5294, 5303.
- Fountain v. Anderson, 33 Ga. 372. §§ 377, 3121, 4930.
- Fountain v. Carmathew & C. R. Co., L. R. 5 Eq. 316. § 3969.
- Fountain Ferry Turnpike R. Co. v. Jewell, 8 B. Mon. (Ky.) 140. §§ 1976, 1977.
- Four Mile Valley R. Co. v. Bailey, 18 Ohio St. 203. § 1272.
- Fourth Nat. Bank v. Franklyn, 120 U. S. 747. §§ 3020, 3038, 3368, 3375, 3422, 3453, 3473.
- Fourth Nat. Bank v. Olney, 63 Mich. 58. §§ 7728, 7729.
- Fourth School District v. Wood, 13 Mass. 193, 199. § 5045.
- Foushee v. Grigsby, 12 Bush (Ky.), 75. § 3145.
- Fowle v. Alexandria, 3 Oranch (U. S.), 70. § 6339.
- Fowle v. New Haven & C. O., 107 Mass. 352; 112. Mass. 334. § 6343.
- Fowle v. Ward, 113 Mass. 548. § 2478.
- Fowler's Case, L. R. 14 Eq. 316. §§ 1260, 4154.
- Fowler v. Atkinson, 6 Minn. 578. § 5129.
- Fowler v. Clowery & C. Bank, 113 N. Y. 450. § 7098.
- Fowler v. Churchill, 11 Mees. & W. 323. § 2631.
- Fowler v. Lee, 10 Gill & J. (Md.) 358. § 3363.
- Fowler v. Ludwig, 34 Me. 455. §§ 3192, 3283, 3284.
- Fowler v. Pierce, 2 Cal. 165. §§ 636, 637.
- Fowler v. Pittsburgh & C. R. Co., 35 Pa. St. 22. § 7805.
- Fowler v. Pratt, 11 Vt. 369. § 5913.
- Fowler v. Rickerby, 2 Man. & C. R. 760. § 3392.
- Fowler v. Robinson, 31 Me. 189. §§ 1695, 3446, 3714.
- Fowler v. Shearer, 7 Mass. 14. § 5074.
- Fox's Case, 3 De Gex, J. & S. 465. §§ 1919, 1923, 7733, 7740.
- Fox's Case, L. R. 5 Eq. 118. §§ 1412, 1553, 3288.
- Fox, Will of, 52 N. Y. 530. § 5785.
- Fox v. Allenville & C. Turnp. Co., 46 Ind. 31. § 5942.
- Fox v. Clifton, 6 Bing. 776; 9 Bing. 115. §§ 421, 1332, 1377, 1577, 1732, 1738, 1800, 1912.
- Fox v. Drenckhahn, 6 Mich. 536. § 5929.
- Fox v. Hills, 1 Conn. 295. § 2774.
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- Fox v. McComb, 15 N. Y. Supp. 783. § 2992.
- Fox v. Northern Liberties, 3 Watts & S. (Pa.) 103. § 4887.
- Fox v. Reed, 3 Grant Cas. (Pa.) 81. § 7847.
- Fox v. Sackett, 10 Allen (Mass.), 535. § 6374.
- Foy v. Blackstone, 31 Ill. 538. § 1311.
- Foy v. Lexington R. Co., 2 Met. (Ky.) 314. § 1577.
- Frabley v. Central Fire Ins. Co., 9 Phila. (Pa.) 219. § 6959.
- Frakes v. Brown, 2 Blackf. (Ind.) 295. § 2775.
- Franceis v. Sompers, 92 Cal. 503. § 4234.
- France v. Clark, 26 Q. B. Div. 257; 22 Ch. Div. 830. § 2591.
- Francis, Re, 2 Sawy. (U. S.) 289. §§ 1377, 1909.
- Francis v. Atchison & C. R. Co., 19 Kan. 303. § 583.
- Francis v. Evans, 69 Wis. 115. §§ 7093, 7102.
- Franklyn v. Sprague, 121 U. S. 215. §§ 278, 4454.
- Franklyn v. Sprague, 10 Hun (N. Y.), 589. § 7044.
- Franco v. Franco, 3 Ves. 75. § 4682.
- Franco-Texan Land Co. v. Bousset, 70 Tex. 422. § 1557.
- Franco-Texan Land Co. v. Laigle, 59 Tex. 339. § 696.
- Frank, Ex parte, 52 Cal. 606. §§ 1018, 1021.
- Frank v. Board of Chosen Freeholders, 39 N. J. L. 347. § 7758.
- Frank v. Drenkhahn, 76 Mo. 508. § 5115.
- Frank v. Levie, 5 Robt. (N. Y.) 599. § 300.
- Frank v. Morrison, 55 Md. 300. § 2025.
- Frank v. New York & C. R. Co., 122 N. Y. 197. §§ 6235, 7746.
- Frank v. New York & C. R. Co., 44 Hun (N. Y.) 624; 7 N. Y. St. Rep. 814. §§ 5893, 5894.
- Frankenthal v. Goldstein, 44 Mo. App. 189. § 1629.
- Frankfort & C. Turnpike Co. v. Churchill, 6 T. B. Mon. (Ky.) 427. §§ 1770, 5303, 5304, 5321.
- Frankfort Bank v. Anderson, 3 A. K. Marsh. (Ky.) 1. §§ 5046, 7392.
- Frankfort Bank v. Johnson, 24 Me. 490. §§ 3995, 3998.
- Frankfort Bridge Co. v. Frankfort, 18 B. Mon. (Ky.) 41. § 5174.
- Franklin v. Atlantic Ins. Co., 42 Mo. 456. § 5265.
- Franklin v. Bank of England, 9 Barn. & C. 156. § 2531.
- Franklin v. Bank of England, 1 Russ. Ch. 575. § 2531.
- Franklin v. Menown, 10 Mo. App. 570. §§ 3447, 3553, 3620, 3730.
- Franklin v. Menown, 11 Mo. App. 592. § 3620.
- Franklin v. Neale, 13 Mees. & W. 481. § 3193.
- Franklin v. Twogood, 18 Iowa, 515. § 518.
- Franklin & C. Co. v. Campbell, 2 Humph. (Tenn.) 467. § 5404.
- Franklin & C. Co. v. County Court, 8 Humph. (Tenn.) 342. § 5404.
- Franklin & C. Co. v. Crockett, 2 Sneed (Tenn.), 263. § 6282.
- Franklin & C. Co. v. Hart, 31 Md. 59. §§ 1322, 4388, 7368.
- Franklin & C. Co. v. Hewitt, 3 B. Mon. (Ky.) 231. § 5024.
- Franklin & C. Co. v. Jenkins, 3 Wend. (N. Y.) 130. §§ 4095, 4119, 4124, 4125, 4177, 4318, 4477, 4582, 4992.

- Franklin & Co. v. Louisville & Co. Packet Co., 9 Bush (Ky.), 590. §§ 7950, 7952, 7953.
- Franklin's & Co. Inst. v. Heinsman, 1 Mo. App. 336. § 5759.
- Franklin & Co. Inst. v. Preetorius, 6 Mo. App. 470. §§ 2660, 2661, 2675.
- Franklin Avenue & Co. Inst. v. Board of Education, 75 Mo. 408. §§ 509, 5030, 6033, 6038.
- Franklin Bank, Matter of, 1 Paige (N. Y.), 85. §§ 6885, 7219.
- Franklin Bank v. Cooper, 36 Me. 179. §§ 6733, 6735.
- Franklin Bank v. Commercial Bank, 36 Ohio St. 350. §§ 1102, 1103, 1105, 6546.
- Franklin Bank v. Lynch, 52 Md. 270. § 5154.
- Franklin Bank v. Steward, 37 Me. 519. § 4779.
- Franklin Benevolent Association v. Com., 10 Pa. St. 357. §§ 858, 875.
- Franklin Branch Bank v. State, 1 Black (U. S.), 474. § 5570.
- Franklin Bridge Co. v. Wood, 14 Ga. 80. §§ 35, 36, 110.
- Franklin College v. Hurlburt, 28 Ind. 344. §§ 1317, 1335.
- Franklin Co. v. Lewiston Inst., 68 Me. 43. §§ 1102, 1103, 1105, 2070, 5973.
- Franklin Co. v. Nashville & Co. R. Co., 12 Lea (Tenn.), 521. § 658.
- Franklin Co. Const. v. Deposit Bank, 87 Ky. 370, 382. § 2828.
- Franklin County Grammar School v. Bailey, 62 Vt. 467. § 5336.
- Franklin County Nat Bank v. First Nat. Bank, 138 Mass. 515. § 7047.
- Franklin Glass Co. v. Alexander, 2 N. H. 380. §§ 1187, 1550, 1720.
- Franklin Glass Co. v. White, 14 Mass. 286. §§ 1187, 1550, 1734.
- Franklin Tel. Co., Re., 119 Mass. 447. §§ 6614, 6644.
- Franklin Oil Co. v. McCleary, 63 Pa. St. 317, 319. §§ 3063, 3222, 3262.
- Franz v. Sutton Building Asso., 24 Md. 259. § 520.
- Fraser v. Charleston, 11 S. C. 486. § 2392.
- Fraser v. Freeman, 43 N. Y. 565. §§ 5238, 6301.
- Fraser v. General Assembly, 53 Hun (N. Y.), 30; 33 N. Y. St. Rep. 347; 11 N. Y. Supp. 384; on appeal, 124 N. Y. 479. § 7919.
- Fraser v. Little, 13 Mich. 195. § 3133.
- Fraser v. Whalley, 2 Hem. & M. 10. § 4481.
- Fray v. Voules, 1 Bl. & El. 839. § 4943.
- Fraylor v. Souora & Co. Co., 17 Cal. 594. §§ 4098, 5303.
- Frayser v. Richmond & Co. R. Co., 81 Va. 388. §§ 6919, 6932.
- Frazee, Ro, 63 Mich. 396. § 1024.
- Frazier, Ex parte, 54 Cal. 94. §§ 601, 658.
- Frazier v. Ritchie, 8 Ill. App. 554. § 2062.
- Frazier v. Shelleys, 6 Phila. (Pa.) 429. § 5086.
- Frazier v. Pennsylvania R. Co., 38 Pa. St. 104. § 6350.
- Frazier v. Railway Co., 88 Tenn. 133. §§ 5424, 6134, 6137.
- Frazier v. Virginia Military Inst., 61 Va. 59. § 4873.
- Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476. § 7651.
- Fredendall v. Taylor, 23 Wis. 538. § 5149.
- Frederick v. Augusta, 5 Ga. 561. §§ 590, 602.
- Frederick v. Missouri & Co. R. Co., 82 Mo. 402. § 526.
- Frederick v. Shane, 32 Iowa, 254. § 5826.
- Fredericks v. Pennsylvania Canal Co., 109 Pa. St. 50. § 611.
- Fredericktown v. Fox, 84 Mo. 59. § 7652.
- Free v. Hawkins, Holt N. P. 550. § 5760.
- Free Schools v. Flint, 13 Met. (Mass.) 539. §§ 2925, 3046.
- Freehold & Co. Loan Asso. v. Brown, 29 N. J. Eq. 121. § 5438.
- Freeholders v. State Bank, 29 N. J. Eq. 268, 274; affirmed, 30 N. J. Eq. 311. § 6920.
- Freeland v. McCullough, 1 Denio (N. Y.), 414. §§ 1989, 1992, 2925, 3078, 3118, 3173, 3187, 3556, 3628, 3632, 4222.
- Freeland v. Pennsylvania Central Ins. Co., 94 Pa. St. 604. § 521.
- Freeman v. Cooke, 2 Exch. 654; 18 L. J. Exch. 114. § 2572.
- Freeman v. Harwood, 49 Me. 195. §§ 2450, 2629, 2677, 2689.
- Freeman v. Machias & Co. Co., 38 Me. 343. §§ 56, 696, 2152, 7665, 7676.
- Freeman v. Meban, 2 Jones Eq. (N. C.) 44. § 6841.
- Freeman v. Panama R. Co., 7 Hun (N. Y.), 122. §§ 611, 612.
- Freeman v. Paul, 3 Me. 260. § 7507.
- Freeman v. Stine, 15 Phila. (Pa.) 37. § 4051.
- Freeman v. Winchester, 10 Smedes & M. (Miss.) 577. §§ 1185, 1550, 1784, 6977, 6979.
- Freeman's Nat. Bank v. Smith, 13 Blatchf. (U. S.) 220. § 6693.
- Freidenheit v. Edmundson, 36 Mo. 227; 88 Am. Dec. 141. § 6377.
- Freight Tax Case, 15 Wall. (U. S.) 232. § 8117.
- Freleigh v. State, 8 Mo. 606. §§ 5483, 5489.
- Frelinghuysen v. Baldwin, 12 Fed. Rep. 395. § 7270.
- Frelinghuysen v. Colden, 4 Paige (N. Y.), 204. § 6369.
- Fremont Ferry & Co. Co. v. Fuhrman, 8 Neb. 99. § 1332.
- French v. Connecticut River Lumber Co., 145 Mass. 261. § 1110.
- French v. Donahue, 29 Minn. 111. § 5838.
- French v. First Nat. Bank, 7 Ben. (U. S.) 498. §§ 7410, 7583, 7626.
- French v. Fuller, 23 Pick. (Mass.) 108. §§ 2231, 4473, 4733.
- French v. Gifford, 30 Iowa, 148. § 6830.
- French v. McMillan, 43 Hun, 188. § 4415.
- French v. O'Brien, 52 How. Pr. (N. Y.) 394. § 4887.
- French v. Teeschemaker, 24 Cal. 518. §§ 658, 1118, 2925, 3003, 3004, 3005, 3008, 3719.
- French v. Turner, 15 Ind. 59. § 7184.
- French Spiral Spring Co. v. New England Car Trust, 32 Fed. Rep. 44. § 4967.
- Frenkel v. Hudson, 82 Ala. 158. §§ 1637, 5189, 5205, 5207.
- Freon v. Carriage Co., 42 Ohio St. 80. § 2445.
- Fresno Canal & Co. v. Warner, 72 Cal. 379. §§ 518, 7708.
- Fresno Canal Co. v. Dunbar, 80 Cal. 530. § 7738.
- Fresno Nat. Bank v. Superior Court, 83 Cal. 491. § 7428.
- Freund v. Yaegerman, 26 Fed. Rep. 812. § 6534.
- Frevall v. Fitch, 5 Whart. (Pa.) 325. § 5121.
- Frewin v. Lewis, 4 Mylne & Cr. 249; 9 Sim. 66, 69. § 7774.
- Friedlander v. Slaughter House Co., 31 La. An. 523. §§ 2509, 2521.
- Friedlander v. Texas & Co. R. Co., 130 U. S. 416. § 6332.
- Friedline v. Carthage College Trustees, 24 Ill. App. 494. § 7590.
- Friend v. Pettingill, 116 Mass. 515. § 1048.
- Friend v. Powers, 93 Ala. 114. §§ 3493, 3530.
- Friezen v. Allemania Fire Ins. Co., 30 Fed. Rep. 349. § 7988.
- Frith v. Cortland, 1 Hem. & M. 417. § 7104.
- Fritts v. Palmer, 132 U. S. 282. §§ 5795, 6033, 6039, 7953, 7964.
- Fritz v. Com. 17 Pa. St. 135. § 1816.
- Fritz v. Muok, 62 How. Pr. (N. Y.) 69. §§ 881, 882, 910, 4394, 7602.
- Fronm v. Sierra Nevada Silver Min. Co., 61 Cal. 629. § 2453.
- Frontin v. Small, 1 Strange, 705; 2 Ld. Raym. 1418. § 5074.
- Frorer v. People, 141 Ill. 171. § 5493.
- Frost v. Belmont, 6 Allen (Mass.), 152. § 5209.
- Frost v. Brishin, 19 Wend. (N. Y.) 11. § 8001.
- Frost v. Clarkson, 7 Cow. (N. Y.) 24. §§ 379, 2646.
- Frost v. Domestic Sewing Machine Co., 133 Mass. 563. § 4857.
- Frost v. Frostburg Coal Co., 24 How. (U. S.) 278. §§ 1185, 1697, 6599.
- Frost v. Saratoga Mutual Ins. Co., 5 Denio (N. Y.), 154. § 8731.
- Frost v. Walker, 60 Me. 468. §§ 14, 1377, 1895, 2926.
- Frost Man. Co. v. Foster, 76 Iowa, 535. §§ 1135, 4137.
- Frostburg & Co. Asso. v. Lowdermilk, 50 Md. 175. § 5833.
- Frthingham v. Barney, 6 Hun (N. Y.), 366. §§ 324, 1270, 4010.
- Fry v. Bennett, 28 N. Y. 324. § 7965.
- Fry v. Bennett, 4 Duer (N. Y.) 247. § 6379.
- Fry v. Evans, 8 Wend. (N. Y.) 530. § 7302.
- Fry v. Lexington & Co. R. Co., 2 Met. (Ky.) 314. §§ 67, 68, 72, 74, 92, 1138, 1185, 1288, 1881.
- Fry v. Russell, 3 Com. B. (N. S.) 665. § 3283.
- Fry v. State, 63 Ind. 552. § 5512.
- Frye v. Bank of Illinois, 10 Ill. 332. §§ 7618, 7653, 7660.
- Frye v. Partridge, 82 Ill. 267. § 598.
- Frye v. Tucker, 24 Ill. 180. §§ 4096, 5748, 5754, 5866.

TABLE OF CASES CITED. Fryebug—Garretzen

Fryeburg Canal v. Frye, 5 Me. 38. §§ 3956, 7754.
Fuld v. Burr Brewing Co., 18 N. Y. Supp. 456. § 5724.
Fulgam v. Macon & C. Co., 41 Ga. 597. § 1140.
Fullam v. Cummings, 16 Vt. 697. § 2455.
Fullam v. West Brookfield, 9 Allen (Mass.), 1. §§ 5074, 5076, 5077, 5085, 5171.
Fuller v. Academic School, 6 Conn. 532. §§ 10, 799, 804, 810, 812, 829, 831, 832, 840, 841, 846, 904, 4398, 5535.
Fuller v. Bennett, 2 Hare, 34. §§ 5190, 5194.
Fuller v. Dame, 18 Pick. (Mass.) 472. §§ 4017, 4019, 4022, 4043.
Fuller v. Earle, 7 Exch. 796; 21 L. J. Exch. 314. § 2797.
Fuller v. Hooper, 3 Gray (Mass.), 334. §§ 5126, 5139.
Fuller v. Ledden, 87 Ill. 310. §§ 3075, 3170, 3172, 3173, 3460.
Fuller v. Naugatuck R. Co., 21 Conn. 557, 570. § 5645.
Fuller v. Paige, 26 Ill. 358. § 7085.
Fuller v. People, 92 Ill. 182. §§ 610, 611.
Fuller v. Rowe, 57 N. Y. 23. §§ 2969, 2970.
Fuller v. Steglitz, 27 Ohio St. 355. § 8072.
Fuller & Co. Man. Co. v. Foster, 4 Dak. 329. §§ 7979, 7980.
Fulton v. Sterling Land & Co., 47 Kan. 621. § 5960.
Fulton Bank v. Benedict, 1 Hall (N. Y.), 480. § 5219.
Fulton Bank v. New York & Co. Canal Co., 1 Paige (N. Y.), 311. §§ 7410, 7626.
Fulton Bank v. New York & Co. Can. Co., 4 Paige (N. Y.), 127. §§ 3885, 4642, 4892, 5191, 5196, 5197, 5199, 5205, 5212, 5214, 5221.
Fulton Bank v. Sharon Canal Co., 1 Paige (N. Y.), 219. § 7409.
Fulton County v. Marsh, 10 Wall. (U. S.) 677. § 73.
Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648. § 5363.
Fulweller v. St. Louis, 61 Mo. 479. § 7756.
Fund v. Parks, 10 Me. 441. § 7591.
Furdonjee's Case, 3 Ch. Div. 264, 268. §§ 2206, 3209, 3722.
Furnam v. Nichols, 8 Wall. (U. S.) 44. § 5397.
Furniss v. Gilchrist, 1 Sandf. S. C. (N. Y.) 53. §§ 1546, 5134, 5698, 5755, 7232, 7244.
Furniss v. Sherwood, 3 Sandf. (N. Y.) 521. § 6493.
Furnivall v. Coomes, 5 Man. & G. 736; 7 Jur. 399. §§ 5077, 5085.
Fussell v. Elwin, 7 Hare, 29. § 4582.
Fusz v. Spaunhorst, 67 Mo. 256; reversing 5 Mo. App. 583. §§ 1462, 3003, 4150, 4301.
Fyfe's Case, L. R., Ch. 768. §§ 3285, 3288.
Gable v. Miller, 19 Paige (N. Y.), 627. § 911.
Gadsden v. Woodward, 103 N. Y. 242. § 4164.
Gaehle's Piano Man. Co. v. Berg, 45 Md. 113. § 1514.
Gaff v. Fleisher, 33 Ohio St. 107, 453. §§ 1511, 1863, 2088.
Gaffney v. Colville, 6 Hill (N. Y.), 567. §§ 4175, 4178, 4294, 4295, 4341, 4342, 4582.
Gafford v. American Mortgage & Co., 77 Iowa, 736. § 7738.
Gaines v. Allen, 58 Mo. 537. § 6225.
Gaines v. Bank, 12 Ark. 769. §§ 518, 7658, 7666, 7689, 7712.
Gaines v. Coates, 51 Miss. 335. § 5670.
Gaines v. Fuentes, 92 U. S. 10. §§ 673, 3453.
Gainsford v. Carroll, 2 Barn. & C. 624. § 2480.
Gaither v. Ballew, 4 Jones L. (N. C.) 488. § 6934.
Gaither v. Stockbridge (Md.), 8 Cent. Rep. 789. § 6998.
Galbraith v. Elder, 8 Watts (Pa.), 81, 93. § 4011.
Gale's Petition, R. M. Charit. (Ga.) 109. § 693.
Gale v. Burrell, 7 Ad. & El. (N. S.) 850. § 6141.
Gale v. Eastman, 7 Met. (Mass.) 44. § 3050.
Gale v. Kalamazoo, 23 Mich. 344. § 1028.
Gale v. Lewis, 9 Ad. & El. (N. S.) 730, 744. § 5212.
Galena & C. R. Co. v. Appleby, 28 Ill. 283. §§ 5470, 5507.
Galena & C. R. Co. v. Crawford, 25 Ill. 529. § 5504.
Galena & C. R. Co. v. Ennor, 117 Ill. 55. § 6039.
Galena & C. R. Co. v. Ennor, 123 Ill. 503. § 6127.
Galena & C. R. Co. v. Loomis, 13 Ill. 548. §§ 5470, 5472, 5507.
Galena & C. R. Co. v. Menzies, 26 Ill. 121. §§ 6148, 6260.
Galena & C. R. Co. v. Sumner, 24 Ill. 631. § 4337.

Galina v. Hot Springs Railroad, 13 Fed. Rep. 116. § 6388.
Gallagher v. Black, 44 Me. 99. § 5154.
Gallarti v. Orser, 4 Bosw. (N. Y.) 94. § 4190.
Gallatian v. Cunningham, 8 Cow. (N. Y.) 361, 370. § 3555.
Gallery v. National Exch. Bank, 41 Mich. 169. §§ 4016, 4033, 4614, 4622, 4752, 5206.
Gallman v. Perrie, 47 Miss. 131. § 2775.
Galloway's Case, 18 Jur. 885. §§ 5698, 5700.
Galloway v. Hamilton, 68 Wis. 651. § 5305.
Galloway v. Matthew, 10 East, 264. § 13.
Galpin v. Page, 18 Wall. (U. S.) 350. §§ 1166, 7769.
Galt v. Provident Sav. Bank, 18 Abb. N. Cas. (N. Y.) 431. § 8009.
Galt v. Swain, 9 Gratt. (Va.) 633. §§ 1175, 1206, 1332.
Galvanized Iron Co. v. Westoby, 16 Jur. 892. § 1235.
Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459. §§ 374, 694, 695, 1870, 5016, 6226, 7118.
Galveston & C. R. Co. v. Donahoe, 56 Tex. 162. § 6337.
Galveston & C. R. Co. v. Galveston & C. R. Co., 63 Tex. 529. § 6588.
Galveston & C. R. Co. v. Gonzales, 151 U. S. 496. §§ 7489, 7556.
Galveston & C. R. Co. v. Horne, 69 Tex. 643; 9 S. W. Rep. 440. § 7426.
Galveston City Co. v. Sibley, 56 Tex. 269. §§ 2044, 2522.
Galveston City R. Co. v. Hook, 40 Ill. App. 547. § 7936.
Galway v. United States Steam Sugar Refining Co., 36 Barb. (N. Y.) 256; affirming 13 Abb. Pr. (N. Y.) 211; 21 How. Pr. (N. Y.) 313. §§ 6630, 9612.
Galwey v. United States Sugar Refining Co., 13 Abb. Pr. (N. Y.) 211; 36 Barb. (N. Y.) 256. § 4539.
Gamble v. Queens County Water Co., 123 N. Y. 91; reversing 52 Hun. 166. §§ 1564, 1585, 1616, 1617, 1618, 1621, 1631, 4461, 4479, 4480, 4487, 4517, 4520, 4578, 5821, 6056, 6057.
Ganewell & Tel. Co. v. Mayor, 31 Fed. Rep. 312. § 7626.
Gannell v. Potter, 6 Iowa, 548. § 5607.
Gans v. Switzer, 9 Mont. 408. § 4228.
Gansevoort v. Williams, 14 Wend. (N. Y.) 133. § 5740.
Gantly v. Ewing, 3 How. (U. S.) 707. § 322.
Garden Gulley & Co. v. McLister, 1 App. Cas. 39. §§ 1766, 1792, 1803, 4524.
Gardiner v. Pollard, 10 Bosw. (N. Y.) 674. §§ 4471, 4472, 4473, 4578.
Gardner, Re, 68 N. Y. 467, 469. § 6803.
Gardner v. Boston & C. R. Co., 70 Me. 181. § 4985.
Gardner v. Butler, 30 N. J. Eq. 702. §§ 4039, 4061, 4381, 6164.
Gardner v. Collector, 6 Wall. (U. S.) 499. § 634.
Gardner v. Daingerfield, 5 Beav. 389. § 4185.
Gardner v. Graham, 7 Vin. Abr. 22, pl. 3. § 6153.
Gardner v. Haney, 86 Ind. 17. § 590.
Gardner v. Hope Ins. Co., 9 R. I. 194. §§ 67, 5417.
Gardner v. Howell, 60 Ga. 11. §§ 6823, 6887.
Gardner v. London & C. R. Co., L. R. 2 Ch. 201. § 6151.
Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162. §§ 5610, 6312, 6371.
Gardner v. Ogden, 22 N. Y. 327. §§ 4059, 4060.
Gardner v. Post, 43 Pa. St. 19. § 3651.
Garesche v. Lewis, 15 Mo. App. 565; 93 Mo. 197. §§ 2023, 3329, 3343.
Garland, Ex parte, 10 Ves. 119. § 3330.
Garland v. Reynolds, 20 Me. 45. §§ 4963, 7591, 7594, 7595.
Garlick v. James, 12 Johns. (N. Y.) 146. §§ 2619, 2668.
Garing v. Baechtel, 41 Md. 305. §§ 1895, 1904, 3714.
Garlighthouse v. Jacobs, 29 N. Y. 297. § 6363.
Garn v. Prewitt, 32 Ala. 13, 18. § 5218.
Garnet & Co. Mining Co. v. Sutton, 3 Best & S. 321. §§ 3785, 3786, 3793.
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- Giles v. Hutt**, 3 Ex. 18. § 1784.
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- Giles v. Park Vale R. Co.**, 2 El. Bl. 322. § 6303.
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 Glenn v. Bussey, 5 Mackey (D. C.), 235. §§ 1170, 3570.
 Glenn v. Charlotte, &c. R. Co., 63 N. C. 10. § 85.
 Glenn v. Clabaugh, 65 Md. 65. §§ 3570, 3722.
 Glenn v. Dorsheimer, 23 Fed. Rep. 695. § 2009.
 Glenn v. Dorsheimer, 23 Fed. Rep. 695; 24 Fed. Rep. 536. § 3570.
 Glenn v. Dorsheimer, 48 Fed. Rep. 19. § 3172.
 Glenn v. Farmers' Bank, 72 N. C. 626. § 3487.
 Glenn v. Foote, 36 Fed. Rep. 824. §§ 2003, 2305, 3172, 3227, 3570.
 Glenn v. Garth, 133 N. Y. 18; affirming 39 N. Y. St. Rep. 473; 15 N. Y. Supp. 202. § 3303.
 Glenn v. Gill, 2 Md. 1. § 6898.
 Glenn v. Hatchett, 91 Ala. 316. § 1514.
 Glenn v. Howard, 81 Ga. 383. §§ 1703, 2005.
 Glenn v. Howard, 65 Md. 40. §§ 3570, 3722.
 Glenn v. Liggett, 135 U. S. 533. §§ 1993, 2005, 3046, 3049, 3392, 3395, 3404, 3492, 3499, 3542, 3754.
 Glenn v. Macon, 32 Fed. Rep. 7. § 2007.
 Glenn v. Marbury, 145 U. S. 499. §§ 3370, 6980.
 Glenn v. McAllister, 46 Fed. Rep. 833. § 3736.
 Glenn v. Orr, 96 N. C. 413. §§ 3558, 3570, 3557.
 Glenn v. Priest, 48 Fed. Rep. 19. §§ 3172, 3227.
 Glenn v. Priest, 51 Fed. Rep. 400. § 3172.
 Glenn v. Savage, 65 Md. 40. § 3570.
 Glenn v. Saxton, 68 Cal. 353. §§ 2005, 3570.
 Glenn v. Scott, 28 Fed. Rep. 804. § 3570.
 Glenn v. Semple, 80 Ala. 159. §§ 2003, 2005, 3404, 3419, 3537, 3570.
 Glenn v. Soule, 22 Fed. Rep. 417. § 3570.
 Glenn v. Springs, 26 Fed. Rep. 494. §§ 3393, 3570.
 Glenn v. Sumner, 132 U. S. 152. §§ 3672, 3673.
 Glenn v. Williams, 60 Md. 93. §§ 2003, 3395, 3104, 3419, 3537, 3570, 3754.
 Glenn v. Langdon, 98 U. S. 20. § 6469.
 Glidewell v. Martin, 51 Ark. 558. § 635.
 Glines v. Supreme Sitting of Order of Iron Hall, 50 N. Y. St. Rep. 231; 21 N. Y. Supp. 543; affirming 20 N. Y. Supp. 275. §§ 6355, 6860.
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 Globe New Patent Iron & Co., Re, 48 L. J. Ch. 295. § 6152.
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 Globe Works v. Wright, 106 Mass. 207. §§ 4622, 4629.
 Gloninger v. Pittsburgh &c. R. Co., 139 Pa. St. 13. §§ 6050, 6134, 6164.
 Gloucester Bank v. Salem Bank, 17 Mass. 33. § 4824.
 Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 198. §§ 671, 5460, 7878, 7879, 7913, 8094, 8096, 8105, 8126.
 Glyn v. Baker, 13 East, 509. § 5121.
 Godbold v. Branch Bank, 11 Ala. 191. §§ 4102, 4103, 4107, 4014.
 Godcharles v. Wigeman, 113 Pa. St. 431, 437. § 5192.
 Goddard v. Grand Trunk R. Co., 57 Me. 202. §§ 6276, 6298, 6383, 6385, 6390, 6392.
 Goddard v. Hodges, 3 Tyrwh. 209; 1 Cromp. & Mees. 33. § 429.
 Goddard v. Merchants' Exchange, 9 Mo. App. 290. §§ 1010, 1014, 1018, 1052.
 Goddard v. Ordway, 101 U. S. 745. § 6232.
 Goddard v. Pratt, 16 Pick. (Mass.) 412. §§ 2973, 2974.
 Goddard v. Seymour, 30 Conn. 394, 397. § 2913.
 Godfrey v. Macomber, 128 Mass. 188. § 7815.
 Godfrey v. Ohio &c. R. Co., 116 Ind. 30. § 6954.
 Godfrey v. Terry, 97 U. S. 171. §§ 3533, 3540, 3542, 5440.
 Godfrey v. White, 43 Mich. 171. § 4548.
 Godwin v. Francis, L. R. 5 C. P. 295. § 5028.
 Goff v. Great Northern R. Co., 3 L. T. (N. S.) 850. 30 L. J. (Q. B.) 148; 3 El. & El. 672. §§ 6298, 6303, 6313.
 Goff v. Hawkeye Pump & Windmill Co., 62 Iowa, 691. §§ 1242, 1956, 5249.
 Goff v. Toledo &c. R. Co., 28 Ill. App. 529. § 4899.
 Goff v. Winchester College, 6 Bush (Ky), 443. §§ 1180, 1355.
 Gogebic Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427. §§ 1567, 2952, 3635, 3712, 3718.
 Gold v. Clyne, 134 N. Y. 262; affirming 58 Hun (N. Y.), 419; 35 N. Y. St. Rep. 532; 12 N. Y. Supp. 531. §§ 4187, 4226, 4228.
 Gold v. Housatonic R. Co., 1 Gray (Mass.), 424. §§ 7998, 8069.
 Gold Mining Co. v. National Bank, 96 U. S. 640. §§ 502, 5300, 5303, 5814, 6015.
 Gold Washing &c. Co. v. Keyes, 96 U. S. 199. § 7477.
 Goldbeck v. Kensington Nat. Bank, 147 Pa. St. 267. § 5258.
 Goldbeck v. Kensington Nat. Bank (Pa. C. P.) 48, Phila. Leg. Int. 76; affirmed 147 Pa. St. 267. § 5303.
 Golden v. Morning News, 42 Fed. Rep. 112. § 8030.
 Golden v. Prince, 3 Wash. C. O. (U. S.) 312. § 5458.
 Golden Canal Co. v. Bright, 8 Colo. 144, 148. § 5818.
 Golden Gate &c. Co. v. Superior Court, 65 Cal. 137. § 7350.
 Goldrey v. Morning News, 156 U. S. 518; 42 Fed. Rep. 112. §§ 7556, 8030.
 Goldsmit's Case, 16 Beav. 262. § 1802.
 Goldsmit v. First M. E. Church, 25 Minn. 202. § 2665.
 Goldsmith v. Georgia R. Co., 62 Ga. 485. § 613.
 Goldsmith v. Home Ins. Co., 62 Ga. 379. §§ 7930, 7940.
 Goldsmith v. Rome R. Co., 62 Ga. 473. § 613.
 Gompertz v. Bartlett, 2 El. & Bl. 849. §§ 1390, 2741.
 Gooch's Case, L. R. 8 Ch. 365; L. R. 14 Eq. 454. § 3272.
 Gooch v. London Banking Asso., 32 Ch. Div. 41. § 3122.
 Gooch v. McGee, 83 N. C. 59. §§ 6837, 7848, 7849.
 Good v. Sherman, 37 Tex. 660. § 7860.
 Good v. Zercher, 12 Ohio, 364. § 590.
 Goodale v. Portage Lake Bridge Co., 55 Mich. 413. § 5937.
 Goodall v. Richardson, 14 N. H. 572. § 2675.
 Gooday v. Colchester &c. R. Co., 17 Bear. 132. § 5058.
 Gooday v. Colchester &c. R. Co., 15 Eng. L. & Eq. 596. § 5297.
 Goodbar v. City National Bank, 78 Tex. 461. § 2319.
 Goodell v. Buck, 67 Me. 514. § 7096.
 Goodenow v. Duffield, Wright (Ohio), 455. § 7335.
 Good Hope Co. v. Railway Barb Fencing Co., 22 Fed. Rep. 635. §§ 7487, 8022, 8030.
 Goodin, Ex parte, 67 Mo. 637. § 5338.
 Goodin v. Cincinnati &c. Canal Co., 18 Ohio St. 169. §§ 5279, 6526.
 Goodin v. Crumps, 8 Leigh (Va.), 120. § 1118.
 Goodin v. Evans, 18 Ohio St. 150. §§ 80, 97, 100.
 Goodlett v. Louisville &c. R. Co., 122 U. S. 391. §§ 7472, 7890, 7891, 7893.
 Goodloe v. Cincinnati, 4 Ohio, 500. §§ 6275, 6305.
 Goodloe v. Godley, 13 Smedes & M. (Miss.) 233. §§ 5232, 5233.
 Goodman v. Harvey, 4 Ad. & El. 870. §§ 4724, 5236.
 Goodman v. Simonds, 20 How. (U. S.) 343. §§ 4724, 5236, 5755, 6081.
 Goodman v. Whitcomb, 1 Jac. & Walk. 592. § 6434.
 Goodrich v. Milwaukee, 24 Wis. 422. § 5680.
 Goodrich v. Reynolds, 31 Ill. 490. §§ 513, 1339, 1383, 1385, 1431, 1432, 1657, 1849, 1852, 1853, 4354, 4638, 5748, 5754, 5757.
 Goodrum v. Carroll, 2 Humph. (Tenn.) 490. § 1166.
 Goodspeed v. East Haddam Bank, 22 Conn. 530. §§ 6276, 6305, 6312, 6314.
 Goodwin v. American Nat. Bank, 48 Conn. 530, 584. §§ 377, 3121, 4930.
 Goodwin v. Hardy, 57 Me. 143. § 2172.
 Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480, 491. § 5265.
 Goodwin v. McGee, 15 Ala. 232. §§ 375, 6527.
 Goodwin v. Ottawa &c. R. Co., 13 Up. Can. C. P. 254. § 254.
 Goodwin v. Roberts (H. L.), 1 App. Cas. 476. § 2591.
 Goodwin v. United States Ins. Co., 24 Conn. 591. §§ 3968, 5175.
 Goodwin v. Union Screw Co., 34 N. H. 378. §§ 3907, 4847, 5176, 5182.
 Goodwin Invalid Bedstead Co. v. Darling, 133 Mass. 358. § 7666.
 Goodwyn v. Baldwin, 59 Ala. 127. § 3774.
 Goodyear v. Betts, 7 How. Pr. (N. Y.) 187. § 6835.
 Goodyear v. Phelps, 3 Blatchf. (U. S.) 91. § 4140.
 Goodyear Dental Vulcanite Co. v. Caduc, 144 Mass. 85. § 5328.
 Goodyear Rubber Co. v. Scott Co., 96 Ala. 439. §§ 6492, 6503, 6546.
 Gorder v. Plattsburgh Canning Co., 36 Neb. 548. §§ 4068, 5029.
 Gordon's Case, 3 De Gex & S. 249. § 1191.

- Gordon v. Appeal Tax Court, 3 How. (U. S.) 133. §§ 2827, 2828, 5570.
- Gordon v. Baltimore, 5 Gill (Md.), 231. §§ 2828, 5571, 5577.
- Gordon v. Bulkeley, 14 Serg. & R. (Pa.) 331. § 5295.
- Gordon v. Preston, 1 Watts (Pa.), 385, 388. § 5035.
- Gordon v. Parmelee, 2 Allen (Mass.), 213. § 1392.
- Gordon v. Preston, 1 Watts (Pa.), 335. §§ 3929, 3932, 3985, 4062, 5206, 5291, 5292, 5293, 5298, 5299, 6131, 6133, 6153, 6165, 6183.
- Gordon v. Richmond & C. R. Co., 78 Va. 501. §§ 2109, 2292.
- Gordon v. Richmond & C. R. Co., 81 Va. 621. §§ 2230, 2292.
- Gordon v. Sea, Fire & Life Ins. Co., 1 Hurlst. & N. 599. § 5058.
- Gordon v. Swan, 43 Cal. 564. § 3906.
- Gordon v. Winchester & C. Assn., 12 Bush (Ky.), 110. § 648.
- Gorgas v. Philadelphia & C. R. Co., 144 Pa. St. 1 § 5326.
- Gorgier v. Mifville, 3 Barn. & C. 45. § 6064.
- Gorham v. Gale, 7 Cow. (N. Y.) 739. § 4943.
- Gorham v. Gilson, 28 Cal. 479. § 4490.
- Gorman v. Guardian Savings Bank, 4 Mo. App. 180. § 1719.
- Gorman v. Pacific R. Co., 26 Mo. 441. §§ 3352, 5470, 5504.
- Gorman v. Sinking Fund Comm'rs., 25 Fed. Rep. 647. § 6113.
- Gormly v. Vulcan Iron Works, 61 Mo. 492. § 6350.
- Gormully Man. Co. v. Pope Man. Co., 34 Fed. Rep. 818. § 7485.
- Gortemiller v. Rosengarn, 103 Ind. 414. § 7758.
- Goshen v. Kerr, 63 Ind. 468. § 1028.
- Goshen v. Stonington, 4 Conn. 209, 221. § 590.
- Goshen & C. Turnp. v. Hurin, 9 Johns. (N. Y.) 218. §§ 1039, 1138, 1185, 1216, 1217, 1560, 1577, 1784, 1794, 7381.
- Goshen & C. Turnpike Co. v. Sears, 7 Conn. 86. §§ 59, 6358, 6360.
- Goshorn v. Board of Supervisors, 1 W. Va. 308. §§ 7890, 7892, 7999, 8012.
- Gosling v. Veley, 7 Ad. & El. (N. s.) 406, 451; 19 L. J. (Q. B.) 135. § 938.
- Goss v. Austin, 11 Allen (Mass.), 525. § 1430.
- Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 597. § 5638.
- Gott v. Adams Express Co., 100 Mass. 320. §§ 7660, 7671, 7676.
- Gottfried v. Miller, 104 U. S. 521, 528. § 2767.
- Goubot v. De Crouy, 2 Dowl. P. O. 86. § 3363.
- Gould v. Bangor & C. R. Co., 82 Me. 122. § 8069.
- Gould v. Cayuga County Nat. Bank, 56 How. Pr. (N. Y.) 505. §§ 4656, 5229.
- Gould v. Head, 35 Fed. Rep. 895. §§ 6404, 6413.
- Gould v. Head, 41 Fed. Rep. 240. §§ 2431, 2440, 2494, 6413, 7572.
- Gould v. Hudson River R. Co., 12 Barb. (N. Y.) 616, 628. § 5600.
- Gould v. Mortimer, 26 How. Pr. (N. Y.) 167. § 7162.
- Gould v. Ontario, 71 N. Y. 298. § 4458.
- Gould v. Segoe, 5 Duer (N. Y.), 260. § 6083.
- Gould v. Seney, 5 N. Y. Supp. 928; 6 Rail. & Corp. L. J. 143. § 337.
- Gould v. Thompson, 39 How. Pr. (N. Y.) 5. § 7582.
- Gould v. Town of Venice, 29 Barb. 442. § 1118.
- Gould v. Tryon, Walk. Ch. (Mich.) 353. § 6826.
- Goulding v. Clark, 34 N. H. 148. §§ 256, 704.
- Gouldie v. Northampton Water Co., 7 Pa. St. 233. §§ 5795, 6033, 7964.
- Gourlay v. Somerset, 19 Ves. 439. §§ 7408, 7754.
- Gouthwaite's Case, 3 De Gex & S. 258. §§ 1577, 1903, 3518, 3530.
- Gouthwaite, Ex parte, 3 Macn. & G. 187. §§ 3318, 3335.
- Gouverneur v. Warner, 2 Sandf. (N. Y.) 624. § 6898.
- Gover's Case, 1 Ch. Div. 182. § 457.
- Grover's Case, L. R. 20 Eq. 114; affirmed 1 Ch. Div. 182. § 476.
- Governor v. Allen, 8 Humph. (Tenn.) 176. § 8.
- Governor v. Baker, 14 Ala. 652. § 1654.
- Governor v. Gridley, 1 Walk. (Miss.) 328. § 29.
- Gowen's Appeal, 10 Week. Not. Cas. (Pa.) 85. § 3378.
- Gowen v. Penobscot R. Co., 44 Me. 140. §§ 69, 5436, 5437.
- Gowen Marble Co. v. Tarrant, 73 Ill. 608. § 5247.
- Gower's Case, L. R. 6 Eq. 77. §§ 1550, 1802.
- Grace v. Smith, 2 W. Black, 998. §§ 1377, 1903.
- Grady's Case, 1 De Gex & S. 488. §§ 1792, 1803, 3278.
- Grady v. American Central Ins. Co., 60 Mo. 116. § 4679.
- Graft v. Pittsburgh & C. R. Co., 31 Pa. St. 489. §§ 446, 1369, 1377, 1400, 1427, 1516, 1517, 1579, 1899, 1940, 1956, 2499, 3224, 3262, 5173, 6334, 7732.
- Graham v. Birkenhead & C. R. Co., 2 Macn. & G. 146; 12 Beav. 460; 2 Hall & T. 450. §§ 4494, 4518, 4568, 4226.
- Graham v. Conger, 85 Ky. 582. § 611.
- Graham v. Hendricks, 22 La. An. 523. § 5828.
- Graham v. Hoy, 38 N. Y. Super. 506. § 2964.
- Graham v. Mt. Sterling Coalroad Co., 14 Bush (Ky.), 425. § 7758.
- Graham v. Pacific R. Co., 66 Mo. 536. § 6383.
- Graham v. Railroad Co., 102 U. S. 148, 161. §§ 3367, 6165, 6526.
- Graham v. Railroad Co., 118 U. S. 161. § 7890.
- Graham v. St. Joseph, 67 Mich. 652. §§ 2846, 2848.
- Graham v. Van Diemens' Land Co., 1 Hurl. & N. 54. § 1777.
- Gram v. Seton, 1 Hall (N. Y.), 262. § 5295.
- Granby Mining & C. Co. v. Richards, 95 Mo. 106. §§ 37, 215, 226, 240, 241, 2975.
- Grand Gulf & C. R. Co. v. Buck, 53 Miss. 246. § 5572.
- Grand Gulf Bank v. Archer, 8 Smedes & M. (Miss.) 151. §§ 5981, 6598, 6600.
- Grand Gulf R. & C. Co. v. State, 10 Smedes & M. (Miss.) 428. §§ 6466, 6750.
- Grand Jury, Re, 62 Fed. Rep. 834. § 7782.
- Grand Lodge v. Waddill, 36 Ala. 313. §§ 5712, 5714, 6007.
- Grand Rapids Bridge Co. v. Prange, 35 Mich. 400. §§ 511, 530.
- Grand Rapids Safety Deposit Co. v. Cincinnati Safe & C. Co., 45 Fed. Rep. 671. §§ 4623, 4627.
- Grand Rapids Sav. Bank's Appeal, 52 Mich. 557. § 3332.
- Grand Rapids Sav. Bank v. Warren, 52 Mich. 561. § 3397.
- Grand River Bridge Co. v. Rollins, 13 Colo. 4. § 5321, 7642.
- Grand Tower & C. Co. v. Ullman, 89 Ill. 244. § 4982.
- Grand Trunk & C. R. Co. v. Brodie, 9 Hare, 822. §§ 440, 445.
- Grand Trunk R. Co. v. Richardson, 91 U. S. 454. § 5878.
- Granger v. Hsley, 2 Gray (Mass.), 521. § 1430.
- Granger v. Original Empire & C. Co., 59 Cal. 678. §§ 717, 3927.
- Grangers' Life & C. Ins. Co. v. Kamper, 73 Ala. 325. §§ 2079, 7892.
- Grangers' Ins. Co. v. Turner, 61 Ga. 561. § 1424.
- Grangers' Market Co. v. Vinson, 6 Or. 172. § 1195.
- Granite State Mut. Aid Assn. v. Porter, 58 Vt. 581. § 7941.
- Graniteville Man. Co. v. Roper, 15 Rich. L. (S. C.) 138. § 5397.
- Grannahan v. Hannibal & C. R. Co., 30 Mo. 546. § 5497.
- Grant v. Attrill, 11 Fed. Rep. 439. § 1719.
- Grant County v. Lake County, 17 Or. 452. §§ 5642, 7360.
- Grant v. Courter, 24 Barb. (N. Y.) 232. § 1118.
- Grant v. Chapman, 38 N. Y. 293. § 6477.
- Grant v. Cropsey, 8 Neb. 205. § 4779.
- Grant v. Green, 46 Ill. 469. § 4560.
- Grant v. Henry Clay Coal Co., 80 Pa. St. 208. §§ 6033, 6039.
- Grant v. Ludlow, 8 Ohio St. 1, 81. § 6841.
- Grant v. Mechanics' Bank, 15 Serg. & R. (Pa.) 240. §§ 3293, 3246.
- Grant v. Norway, 10 Com. B. 665. §§ 1501, 6331, 6332.
- Grant v. Spokane Nat. Bank, 47 Fed. Rep. 673. § 7134.
- Grant v. United Kingdom Switchback R. Co., 40 Ch. Div. 135. § 718.
- Grantham v. Hawley, Hobart, 132. §§ 6141, 6143.
- Grape Sugar & C. Co. v. Small, 40 Md. 395. § 5253.
- Gratz v. Redd, 4 B. Mon. (Ky.) 193. §§ 1550, 1570, 1794, 4152, 4153, 4293, 6188.
- Gravenstone's Appeal, 49 Pa. St. 310. § 4479.
- Graves v. Key, 2 Barn. & Ad. 318. § 2572.
- Graves v. Lebanon Nat. Bank, 10 Bush (Ky.), 23. § 4148.
- Graves v. Merry, 6 Cow. (N. Y.) 701. § 1913.
- Graves v. Mono Lake & C. Co., 81 Cal. 303. §§ 2353, 4042, 4068.

- Graves v. Robertson, 22 Tex. 130. § 7820.
 Gray's Case, 1 Ch. Div. 864. §§ 3198, 3277.
 Gray v. Allen, 14 Ohio. 58. § 6246.
 Gray v. Barton, 55 N. Y. 68, 72. §§ 2390, 5105.
 Gray v. Chaplin, 2 Sim. & St. 267; 2 Russ. 126. §§ 4519, 4566, 6826.
 Gray v. Coffin, 9 Cush. (Mass.) 192. §§ 2925, 3013, 3021, 3026, 3033, 3206, 3319, 3816, 3817, 4377.
 Gray v. Hartford Fire Ins. Co., 1 Blatchf. (U. S.) 280. § 1034.
 Gray v. Hook, 4 N. Y. 449. § 7958.
 Gray v. Lewis, L. R. 8 Eq. 526. §§ 1261, 4519, 4566, 4595.
 Gray v. Mechanics' Bank of Alexandria, 2 Cranch C. C. (U. S.) 51. § 3857.
 Gray v. Medical Soc., 24 Barb. (N. Y.) 570, 574. § 1021.
 Gray v. Monongahela Nav. Co., 2 Watts & S. (Pa.) 156. §§ 73, 82, 84, 1278, 1280, 1749, 1757, 1816, 2247, 5381, 7613.
 Gray v. National Steamship Co., 115 U. S. 116. § 6548.
 Gray v. New York & C. Steam Co., 3 Hun (N. Y.), 383. §§ 4010, 4043, 4480, 4479.
 Gray v. Oxnard Bros. Co., 31 N. Y. St. Rep. 968; 8 Rail. & Corp. L. J. 104; 11 N. Y. Supp. 118. § 6906.
 Gray v. Pullen, 5 Best & S. 970; 34 L. J. (Q. B.) 265; 13 Week Rep. 257; 11 L. T. (N. S.) 569. § 6362.
 Gray v. Portland Bank, 3 Mass. 364. §§ 246, 1019, 2094, 2097, 2251, 4462, 7392.
 Gray v. Quicksilver Min. Co., 21 Fed. Rep. 288. § 7592.
 Gray v. Salt River Valley Co. (Ariz.), 12 Pac. Rep. 607. § 4455.
 Gray v. Seligman, 75 Mo. 40. § 733.
 Gray v. Supreme Lodge, 118 Ind. 293. § 5987.
 Gray v. Taper Sleeve Pulley Works, 16 Fed. Rep. 436. § 8006.
 Grayble v. York & Co. Co., 10 Serg. & R. (Pa.) 269. § 1833.
 Graydon v. Church, 7 Mich. 36. §§ 7339, 7340, 7343.
 Grays v. Turnpike Co., 4 Rand. (Va.) 578. §§ 501, 7659, 7661, 7665, 7702, 7730.
 Grayville & Co. R. Co. v. Burns, 92 Ill. 302. § 4920.
 Greasy v. Coddling, 2 Bing. 263, 266. §§ 6373, 7781.
 Greason v. Keteltas, 17 N. Y. 491. §§ 7408, 7754.
 Great Barrington v. County Comm'rs, 16 Pick. (Mass.) 572. § 2848.
 Great Britain Mut. Life Ins. Soc., Re, 16 Ch. Div. 246. § 7219.
 Great Britain Mut. Life Ins. Co., Re, 19 Ch. Div. 39; affirmed, 20 Ch. Div. 352. § 7219.
 Great Falls & Co. Ins. Co. v. Harvey, 45 N. H. 292. § 1011.
 Great Falls & Co. R. Co. v. Copp, 38 N. H. 124. § 1707.
 Great Falls Man. Co. v. Fernald, 47 N. H. 444, 456. §§ 5593, 5607.
 Great Luxembourg R. Co. v. Magnay, 25 Beav. 586. §§ 453, 4009, 4022, 4024, 4025, 4026, 4036, 4066, 4090.
 Great Northern & Co. Ry. Co. v. Manchester & Co. Ry. Co., 5 De Gex & S. 138. § 5297.
 Great Northern R. Co. v. Kennedy, 4 Ex. 417. § 1784.
 Great Northern R. Co. v. Eastern Counties R. Co., 9 Hare, 305. §§ 5358, 5880.
 Great Northern R. Co. v. Tabourdin, 13 Q. B. Div. 320. § 6838.
 Great Northern Salt & Co. Works, Re, 44 Ch. Div. 473. § 3367.
 Great Western Ins. Co. v. Thayer, 4 Lans. (N. Y.) 459; 60 Barb. (N. Y.) 633. § 5755.
 Great Western Min. Co. v. Woodmas & Co., 12 Colo. 46; 13 Am. St. Rep. 204; 20 Pac. Rep. 71. §§ 7503, 7514.
 Great Western R. Co. v. Bacon, 30 Ill. 347. § 4337.
 Great Western R. Co. v. Hanks, 36 Ill. 281. § 4337.
 Great Western R. Co. v. Metropolitan R. Co., 23 L. J. Ch. 332; 9 Jur. (N. S.) 562. §§ 1102, 1108.
 Great Western R. Co. v. Oxford, 3 De Gex, M. & G. 341. § 4334.
 Great Western R. Co. v. Rushout, 5 De Gex & S. 290; 10 Eng. L. & Eq. 72. § 4527.
 Great Western R. Co. v. The Queen, 1 El. & Bl. 874. § 7827.
 Great Western R. Co. v. Wheeler, 20 Mich. 419, 424. § 5203.
 Great Western Tel. Co. v. Burnham, 79 Wis. 47. §§ 1721, 3539, 3499.
 Great Western Tel. Co. v. Gray, 122 Ill. 630. §§ 1309, 1567, 1582, 2005, 3493, 3494, 3499, 3537, 3570, 6568, 6874, 7582.
 Greaves v. Gouge, 69 N. Y. 154. §§ 4479, 4480, 4509, 4503, 4578.
 Greeley v. Smith, 3 Story (U. S.), 657. §§ 530, 6720, 6723, 7720.
 Green v. Abietine Medical Co., 96 Cal. 322. §§ 2932, 3001, 5282.
 Green v. African Methodist Episcopal Society, 1 Serg. & R. (Pa.) 254. §§ 858, 869, 893, 901, 906.
 Green v. Barrett, 1 Sim., 45. §§ 440, 443, 1425, 1506.
 Green v. Beckman, 59 Cal. 545. §§ 1992, 2925.
 Green v. Beeson, 31 Ind. 7. § 5901.
 Green v. Biddle, 8 Wheat. (U. S.) 1. 84. § 3035.
 Green v. Cannaan, 29 Conn. 157. § 5870.
 Green v. Farmers & Co. Bank, 25 Conn. 452. § 8073.
 Green v. Graves, 1 Doug. (Mich.) 351. §§ 505, 506, 632, 654.
 Green v. Green, 34 Ill. 320. § 6586.
 Green v. Hart, 1 Johns. (N. Y.) 580. § 4190.
 Green v. Hugo, 81 Tex. 452. §§ 3984, 4072, 4951.
 Green v. Kindy, 43 Mich. 278. § 3363.
 Green v. Lake, 54 Miss. 540. § 5470.
 Green v. Lanier, 5 Heisk. (Tenn.) 678. § 7507.
 Green v. London & Co. Omnibus Co., 1 L. T. (N. S.) 95; 7 C. B. (N. S.) 290. §§ 6298, 6316.
 Green v. Mayor, R. M. Charit. (Ga.) 368. § 611.
 Green v. Mayor of Durham, 1 Burr. 127. § 1026.
 Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402. § 5239.
 Green v. Miller, 6 Johns. (N. Y.) 39. § 3914.
 Green v. Nixon, 23 Beav. 530. §§ 3399, 3401, 3594.
 Green v. Pope, 1 Ld. Raym. 125; 2 Salk. 428. § 833.
 Green v. Relf, 14 La. An. 841. §§ 3500, 3827.
 Green v. Reading, 9 Watts (Pa.), 332. § 6370.
 Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285. §§ 6718, 6719.
 Green v. Southern Ex. Co., 41 Ga. 515. § 4947.
 Green v. Van Buskirk, 5 Wall. (U. S.) 307; 7 Wall. (U. S.) 139. §§ 7208, 8095.
 Green v. Walkill Nat. Bank, 7 Hun (N. Y.), 63. §§ 7268, 7317.
 Green v. Watkins, 6 Wheat. (U. S.) 260. § 4344.
 Green v. Weller, 32 Miss. 650, 677. § 3920.
 Green v. Winter, 1 Johns. Ch. (N. Y.) 60. § 6977.
 Green's Bank v. Wickham, 23 Mo. App. 663. § 8073.
 Green's Brine Ultras Vires, 2d ed., 50, and American notes. §§ 1571, 1595, 5738, 6321.
 Green's Case, L. R. 18 Eq. 428. § 4154.
 Green Bay & Co. R. Co. v. Union Steamboat Co., 107 U. S. 98. § 5872.
 Green Briar Lumber Co. v. Ward, 3 S. E. Rep. 227. §§ 6600, 6733, 7642.
 Green Mount & Co. Turnpike Co. v. Bulla, 45 Ind. 1. §§ 2371, 2372, 2445.
 Green Mountain Turnp. Co. v. Hemmingway, 2 Vt. 512. §§ 5923, 5933 a.
 Greenbaum v. Elliott, 60 Mo. 25, 32. § 3329.
 Greene v. Dennis, 6 Conn. 293. §§ 220, 497, 498, 500.
 Greene v. People (Ill.), 21 N. E. Rep. 605. § 6810.
 Greene v. Smith (R. L.), 19 Atl. Rep. 1031; 17 R. L. 28. §§ 2210, 2219.
 Greene v. Sprague Man. Co., 52 Conn. 330. § 6955.
 Greenville & Co. R. Co. v. Johnson, 8 Baxt. (Tenn.) 332. §§ 72, 6538.
 Greenhagh v. Manchester R. Co., 3 Mylne & C. 784. § 5246.
 Greening, Ex parte, 13 Ves. 206. § 2356.
 Greening v. Wilkinson, 1 Car. & P. 625. §§ 2479, 2480.
 Greenleaf v. Ludington, 15 Wis. 558. §§ 2518, 2519, 2044.
 Greenleaf v. Norfolk Southern R. Co., 91 N. C. 33. § 5288.
 Greenlee v. McDowell, 1 Ired. Eq. (N. C.) 485. § 4943.
 Greenlee v. Greenlees, 62 Ala. 350. § 3774.
 Greenpoint Sugar Co. v. Kings Co. Man. Co., 7 Hun (N. Y.), 44. §§ 6172, 6173.
 Greenpoint Sugar Co. v. Whitin, 69 N. Y. 325. §§ 6172, 6173.
 Greensboro & Co. Turnpike Co. v. Stratton, 120 Ind. 294. § 4386.
 Greensburgh & Co. v. McCormick, 45 Ind. 239. §§ 6134, 6177.
 Greenshield's Case, 5 De Gex & S. 599. § 3208.
 Greenup v. Barbee, 1 Bibb (Ky.), 320. § 5167.
 Greenville & Co. R. Co. v. Cathcart, 5 Rich. (S. C.) 89. § 1784.

TABLE OF CASES CITED. Greenville—Guntton

- Greenville &c. R. Co. v. Coleman**, 3 Rich. (S. C.) 118. §§ 1278, 1287, 1311, 1377, 1513, 1879, 1901.
Greenville &c. R. Co. v. Johnson, 64 Tenn. 332. §§ 110, 289, 1297.
Greenville &c. R. Co. v. Partlow, 5 Rich. L. (S. C.) 428. § 5626.
Greenville &c. R. Co. v. Partlow, 14 Rich. (S. C.) 337. § 7332.
Greenville &c. R. Co. v. Smith; 6 Rich. (S. C.) 91. § 1903.
Greenville &c. R. Co. v. Woodsides, 5 Rich. L. (S. C.) 145. §§ 1220, 1904.
Greenwich v. Easton, 24 N. J. Eq. 217. § 5671.
Greenwood's Case, 3 De Gex, M. & G. 459. § 3752.
Greenwood's Case, 18 Jur. 118, 387; 23 Eng. L. & Eq. 422. § 3138.
Greenwood v. Bishop of London, 5 Taunt. 727. § 1048.
Greenwood v. Freight Co., 105 U. S. 13. §§ 5413, 5615.
Greenwood v. Lake Shore R. Co., 10 Gray (Mass.), 373. §§ 7676, 7678.
Greenwood v. Taylor, 1 Russ. & Myl. 851. § 7045.
Greer v. Charter's R. Co., 96 Pa. St. 139. §§ 1180, 1182.
Greer v. School Dist., 6 Vt. 76. § 4482.
Gregg v. Wells, 10 Ad. & El. 97. § 2572.
Gregg v. Wyman, 4 Cush. (Mass.) 322. § 7959.
Gregory v. German Bank, 3 Colo. 332. §§ 4164, 4168.
Gregory v. Lamb, 16 Neb. 205. § 4697.
Gregory v. Leigh, 33 Tex. 813. §§ 5126, 5132.
Gregory v. Mighell, 18 Ves. 328. § 7754.
Gregory v. Patchett, 33 Barb. 595. §§ 4479, 4481, 4494, 4495, 4518, 4519, 5298.
Gregory v. Perkins, 4 Dev. L. (N. C.) 50. § 2617.
Gregory v. Piper, 9 Barn. & C. 591; 4 Man. & R. 500. § 6303.
Gregory v. Shelby College, 2 Met. (Ky.) 589. § 5189.
Gregory v. Wendell, 39 Mich. 337. § 2589.
Grenada County v. Brogden, 112 U. S. 261. § 590.
Gresham v. Island City Sav. Bank (Tex. Civ. App.), 21 S. W. Rep. 556. § 5943.
Grew v. Breed, 10 Met. (Mass.) 569. §§ 1927, 2937, 3134, 3192, 3213, 3283, 3318, 3319, 3320, 3327, 3374, 3483, 3488, 3733, 3737, 3743, 3799, 3842, 4345.
Gridley v. Lafayette &c. R. Co., 7 Ill. 200. §§ 4332, 4385.
Grier v. Hazard, 13 N. Y. Supp. 583. § 5321.
Griesa v. Massachusetts Ben. Assco., 15 N. Y. Supp. 71. §§ 7931, 8009.
Griesa v. Massachusetts Ben. Assco., 133 N. Y. 619; affirming 15 N. Y. Supp. 71. § 7619.
Griffen v. House, 18 Johns. (N. Y.) 397. §§ 5911, 5913, 5933.
Griffith v. Green, 129 N. Y. 517. § 2681.
Griffin v. Central Bank, 3 Ga. 371. § 7068.
Griffin v. Heaton, 2 Bailey, 58. §§ 1989, 4362.
Griffin v. Inman, 57 Ga. 370. § 4079.
Griffin v. Kentucky Ins. Co., 3 Bush (Ky.), 592. §§ 92, 93, 5413.
Griffin v. Macaulay, 7 Gratt. (Va.) 476. § 7538.
Griffin v. Rogers, 38 Pa. St. 382. § 6474.
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Griffin v. St. Louis &c. Assco., 4 Mo. App. 595. §§ 826, 4581.
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Griffith v. Green, 59 Hun (N. Y.), 619; 37 N. Y. St. Rep. 705; 13 N. Y. Supp. 470. § 3769.
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Griffith v. Mangam, 73 N. Y. 611. §§ 3429, 3469, 3481, 3493.
Griffith v. Paget, 6 Ch. Div. 511. §§ 2278, 2280.
Griffith v. Watson, 19 Kan. 23. § 2847.
Griggs v. Flicken tein, 14 Minn. 81, 93. § 1476.
Grignon v. Astors, 2 How. (U. S.) 319. § 3729.
Grigsby v. Chappell, 5 Rich. L. (S. C.) 443. § 6358.
Grimball v. Cruise, 70 Ala. 534. § 6267.
Grimley v. Ball, 11 Mees. & W. 531, 533. § 6939.
Grindle v. Stone, 78 Me. 476. §§ 3553, 3740.
Grindley v. Barker, 1 Bos. & P. 229. §§ 3914, 4959.
Grisell's Case, L. R. 1 Ch. 528. §§ 3786, 3797, 3793.
Griswell v. Bristows, L. R. 3 Com. P. 112. §§ 3221, 3308.
Grisser v. McIlrath, 4 McCrary (U. S.), 412. § 5549.
Grisson v. Commercial Nat. Bank, 87 Tenn. 350. § 7098.
Griswold v. Haven, 25 N. Y. 595. § 6321.
Griswold v. North Stonington, 5 Conn. 367. § 7754.
Griswold v. Peoria University, 26 Ill. 41. § 1823.
Griswold v. Seligman, 72 Mo. 110. §§ 733, 1597, 1901, 1902, 2933, 2936, 3215, 3702.
Griswold v. Trustees, 26 Ill. 41. § 1542.
Grizzle v. Frost, 2 Post. & Fin. 622. § 6350.
Grocers' Nat. Bank v. Clark, 48 Barb. (N. Y.) 26. §§ 2356, 4122, 4324.
Grosch v. State, 42 Ind. 547. § 643.
Groff's Appeal, 128 Pa. St. 621. § 5906.
Groome v. Lewis, 33 Md. 137. § 7812.
Grose v. Hilt, 36 Me. 22. §§ 3020, 3021, 3137, 3713, 3714, 3786, 3794, 3812, 6560.
Gross v. Nichols, 72 Iowa, 239. §§ 7510, 8029, 8040.
Gross v. Sackett, 2 Bosw. (N. Y.) 617. § 4010.
Grosse Isle Hotel Co. v. l'Anson, 42 N. J. L. 10. § 1702.
Grosse Isle Hotel Co. v. l'Anson, 43 N. J. L. 442. § 1702.
Grosvenor v. United Society, 118 Mass. 78. § 6603.
Ground v. Albany, 15 Wend. (N. Y.) 374. § 5826.
Grove, Ex parte, 1 Atk. 104. § 7045.
Grove v. Todd, 41 Md. 633. § 590.
Grover & Baker Sewing Machine Co. v. Butler, 53 Ind. 454. § 7913.
Groves v. Kansas City &c. R. Co., 57 Mo. 304. § 4986.
Groves v. Slaughter, 15 Pet. (U. S.) 449. § 3003.
Grubb v. Mahoning Nav. Co., 14 Pa. St. 305. §§ 1749, 1816.
Grubbs v. State, 24 Ind. 295. § 619.
Grubbs v. Vicksburg &c. R. Co., 60 Ala. 398. § 1755.
Gruber v. Washington &c. R. Co., 92 N. C. 1. § 6279.
Gruman v. Smith, 81 N. Y. 25. §§ 2483, 2695, 2696.
Grund v. Tucker, 5 Kan. 70. §§ 1082, 3132, 3392, 3399, 3416, 3463, 4331.
Guadalupe &c. Stock Assco. v. West, 70 Tex. 391. §§ 205, 240.
Guadalupe &c. Stock Assco. v. West, 76 Tex. 461. §§ 1925, 7734.
Guage Iron Co. v. Dawson, 4 Blackf. (Ind.) 202. §§ 7665, 7669, 7977.
Guardian Mut. Life Ins. Co., Re, 74 N. Y. 617; affirming 13 Hun (N. Y.), 115. §§ 6960, 7228.
Guardian Permanent Building Soc., Re, 23 Ch. Div. 440. § 5669.
Guardian &c. Life Ins. Co. Matter of, 13 Hun (N. Y.), 115; affirming 74 N. Y. 617. § 7228.
Guardian Fire &c. Ass. Co. v. Guardian and General Insurance Co., 50 L. J. Ch. 253. § 296.
Gue v. Tide Water Canal Co., 24 How. (U. S.) 257. §§ 6837, 7848, 7849, 7853, 7854, 7856.
Guernsey v. American Ins. Co., 13 Minn. 278. §§ 8021, 8050.
Guernsey v. Cook, 117 Mass. 548. §§ 5165, 5166.
Guernsey v. Cook, 120 Mass. 501. § 4017.
Guest v. Lower Merion Water Co., 142 Pa. St. 610. § 7758.
Guest v. Worcester &c. R. Co., L. R. 4 C. P. 9. § 1597.
Guild v. Chicago, 82 Ill. 472. § 611.
Guild v. Parker, 43 N. J. L. 430. § 4048.
Guliford v. Western Union Tel. Co., 43 Minn. 434. §§ 2044, 2520.
Guimbilot v. Abat, 6 Rob. (La.) 284. § 5298.
Guinault v. Louisville &c. R. Co., 41 La. An. 571. § 7423.
Guinn v. Nelson, 1 Tenn. Ch. 614. § 6268.
Guinness v. Land Corp. of Ireland, 22 Ch. Div. 349. § 2244.
Gulf &c. R. Co. v. Moore, 69 Tex. 157. § 6387.
Gulf &c. R. Co. v. Rambolt, 67 Tex. 654. § 659.
Gulf City Street R. Co. v. Galveston Street R. Co., 65 Tex. 502. §§ 5399, 5400.
Gulliver v. Roelle, 100 Ill. 141. § 2986.
Gull River Lumber Co. v. Keefe, 6 Dak. 160. §§ 7979, 7980.
Gumbel v. Abrams, 20 La. An. 568. §§ 6972, 7098.
Gunkle's Appeal, 48 Pa. St. 13. §§ 4126, 4324.
Gunn's Case, L. R. 3 Ch. 40. § 1179.
Gunn v. Barry, 15 Wall. (U. S.) 615. § 3036.
Gunn v. Central R. &c. Co., 74 Ga. 509. § 5838.
Gunn v. White Sewing Machine Co., 57 Ark. 24. § 7879.
Gunnison County Comm'rs v. Owen, 7 Colo. 467. § 653.
Gunter v. Dale County, 44 Ala. 639. §§ 610, 4336.
Gunter v. Jones, 9 Cal. 643. § 3328.
Gunterman v. People, 138 Ill. 518. § 6805.
Gunter v. Bennett, 72 Md. 384. § 7738.
Guntton v. Ingle, 4 Cranch C. C. (U. S.) 438. § 774.

- Gurney v. Behrend, 3 El. & Bl. 622. §§ 2516, 2587.
 Gurney v. Union Transfer & Co., 25 Jones & S. (N. Y.) 444; 29 N. Y. St. Rep. 274. §§ 1635, 1644.
 Gurney v. Wormersley, 4 El. & Bl. 133. §§ 1390, 2741.
 Guthrie v. Imbrie, 12 Or. 182. § 5145.
 Gutzeil v. Pennie, 95 Cal. 598. §§ 5029, 7938.
 Guy v. Baltimore, 100 U. S. 434. § 5481.
 Guy C. Goss, The, 53 Fed. Rep. 839. § 7875.
 Guyon v. Lewis, 7 Wend. (N. Y.) 26. § 5088.
 Gwatrein v. Campbell, 1 Jur. (N. Y.) 131. § 3485.
 Gwinn v. Rooker, 24 Mo. 290. § 5295.
 Gyfford v. Woodgate, 11 East, 297. § 7507.
 Haack v. Fearing, 5 Rob. (N. Y.) 528; 35 How. Pr. (N. Y.) 459. §§ 4930, 6283.
 Haar v. Consolidated Caran River Dredging Co., 17 N. Y. Supp. 28. § 4494.
 Haas v. Chicago Building Soc., 89 Ill. 498. § 6880.
 Haben v. Harshaw, 49 Wis. 379. § 6951.
 Habersham v. Vincent, 2 Ves. Jr. 232. § 1068.
 Habersham & Co. Turpn. Co. v. Taylor, 73 Ga. 552. § 5436.
 Habershon's Case, L. R. 5 Eq. 289. § 1588.
 Habich v. Folger, 20 Wall. (U. S.) 1. § 7720.
 Habicht v. Pemberton, 4 Sandf. (N. Y.) 657. §§ 7579, 7600, 7602.
 Hacheny v. Leary, 12 Or. 40. § 7936.
 Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548. §§ 501, 5236, 5069.
 Hackley v. Draper, 60 N. Y. 188; affirming 2 Hun (N. Y.), 523; & Thomp. & C. (N. Y.) 614. §§ 7010, 7162.
 Hackley v. Swigert, 5 B. Mon. (Ky.) 86; 41 Am. Dec. 255. §§ 6931, 7794.
 Hackney v. Alleghany Mut. Ins. Co., 4 Pa. St. 185. §§ 4916, 4923.
 Haddock's Case, 1 Ld. Raym. 435, 439. §§ 256, 802, 810.
 Haddon v. Ayers, 1 El. & E. 118. § 1515.
 Haddon v. Ayers, 5 Jur. (N. s.) 403. § 5721.
 Hade v. McVay, 31 Ohio St. 231. §§ 7251, 7300, 7301.
 Haden v. Farmers' & Fire Asso., 80 Va. 683. §§ 4890, 5973, 5986.
 Hadencamp v. Second Avenue R. Co., 1 Sweeney (N. Y.) 490. § 937.
 Hadley v. Freedman's Savings & Co. (1874), 2 Tenn. Ch. 122. §§ 682, 7899.
 Hadley v. Harpeth Turnp. Co., 2 Humph. (Tenn.) 555. § 5904.
 Hadley v. Russell, 40 N. H. 109. §§ 3429, 3432, 3493, 3800.
 Hadlock v. Hadlock, 22 Ill. 384. § 243.
 Hady v. Insurance Co., 37 Ohio St. 366. § 7553.
 Haegele v. Western Stove Co., 29 Mo. App. 486, 487. §§ 2374, 2377, 2389, 2510, 2513.
 Hagan v. Birch, 8 Iowa, 809. § 1430.
 Hagan v. Providence & Co. R. Co., 3 R. I. 88. §§ 6377, 6387.
 Hagar v. Graves, 25 Mo. App. 164. § 3531.
 Hagar v. Reclamation District, 111 U. S. 701. §§ 5448, 5449, 5450.
 Hagedorn v. Bank of Wisconsin, 1 Pinney (Wis.) 61. §§ 6898, 6931, 7812.
 Hagedorn v. Olverson, 2 Mau. & Sel. 485. § 4944.
 Hagen v. Bowery Nat. Bank, 6 Lans. (N. Y.) 490; 64 Barb. (N. Y.) 197. § 4817.
 Hager v. Adams, 70 Iowa, 748. § 8074.
 Hager v. Cleveland, 36 Md. 476. §§ 1322, 1323, 1377, 1706, 1931, 3179, 4455, 7731.
 Hager v. Thomson, 1 Black (U. S.), 80. § 2733.
 Hager v. Union Nat. Bank, 63 Me. 509, 512. § 2132.
 Hagerman v. Ohio & Co. Asso., 25 Ohio St. 186. §§ 849, 1020, 1043.
 Hagerstown Bank v. London Savings Soc., 3 Grant Cas. (Pa.) 135. §§ 4753, 4825.
 Hagerstown Turnp. Co. v. Creeger, 5 Harr. & J. (Md.) 122. §§ 498, 1151, 1958, 7597.
 Haggarty v. Pittman, 1 Paige (N. Y.), 298. § 6840.
 Haggerty v. Foster, 103 Mass. 17. § 4216.
 Haggerty v. Juday, 58 Ind. 154, 158. § 5298.
 Haggin v. Comptoir d'Escompte (Q. B. Div.), 58 L. J. (Q. B.) 508. § 7990.
 Hagg v. Southern, 117 U. S. 52. § 7780.
 Hague v. Dandeson, 2 Exch. 740. § 3320.
 Hahn's Appeal (Pa.), 7 Atl. Rep. 463. § 2933.
 Haigh v. North Bierley Union, El. B. & El. 873. § 5059.
 Haight v. Railroad Co., 6 Wall. (U. S.) 15. § 2914.
 Haight v. Sahler, 30 Barb. (N. Y.) 218, 223. §§ 5046, 5074, 5077, 5087, 5088.
 Haile v. Peirce, 32 Md. 327. §§ 5030, 5031, 5126, 5129, 5131, 5141.
 Haislip v. Wilmington & Co. R. Co., 102 N. C. 376. § 5025.
 Hait v. Benson, 18 How. Pr. (N. Y.) 302. § 7593.
 Hakim's Case, L. R. 7 Ch. 246, note. §§ 3255, 3256.
 Haldeman v. Ainslie, 82 Ky. 395. § 3824.
 Haldeman v. Hillsborough & Co. E. Co., 2 Handy (Ohio), 101. § 2881.
 Hale, Ex parte, 55 L. T. (N. s.) 670. § 1439.
 Hale v. Ames, 2 T. B. Mon. (Ky.) 143. § 2669.
 Hale v. Burlington & Co. R. Co., 2 McCrary (U. S.), 558. § 6239.
 Hale v. Continental Life Ins. Co., 16 Fed. Rep. 718. § 7626.
 Hale v. Everett, 53 N. H. 9. §§ 652, 927.
 Hale v. Frost, 39 U. S. 389. §§ 7116, 7118.
 Hale v. Hale, 4 Bear. 369. § 4548.
 Hale v. Lawrence, 23 N. J. L. 590. § 5621.
 Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.), 169. § 945.
 Hale v. Nashua & Co. R. Co., 60 N. H. 333. § 7048.
 Hale v. Republican River Bridge Co., 8 Kan. 466. §§ 4009, 4016.
 Hale v. Richards, 80 Iowa, 164. § 4829.
 Hale v. Sanborn, 16 Neb. 1. § 1235.
 Hale v. Union Mut. Fire Ins. Co., 32 N. H. 295. § 5247.
 Hale v. Walker, 31 Iowa, 344. § 3192.
 Hale v. Wetmore, 4 Ohio St. 600. § 6841.
 Haley v. Hannibal & Co. R. Co., 80 Mo. 112. § 7545.
 Haley v. Mobile & E. Co., 7 Baxt. (Tenn.) 240. § 6383.
 Haley v. Reid, 16 Ga. 437. § 7513.
 Haley Livestock Co. v. Routt County, 2 Denver Legal News, 275. § 7797.
 Halford v. Cameron's & Co. R. Co., 16 Ad. & El. (N. s.) 442; 15 Jur. 335. §§ 5058, 5126, 5156, 5735.
 Halifax Sugar Ref. Co. v. Franclyn, 8 Rail. & Corp. L. J. 91. § 3936.
 Halket v. Merchant Traders' Asso., 13 Ad. & El. (N. s.) 960. § 3842.
 Hall, Ex parte, 1 Macn. & G. 307; reversing 3 De Gex & S. 80. § 3194.
 Hall's Case, 3 De Gex & S. 514. §§ 426, 428, 435.
 Hall's Case, L. R. 5 Ch. 707; 39 L. J. (Ch.) 730; 18 Week. Rep. 1050; 23 L. T. (N. s.) 331. §§ 446, 1190, 1521, 1531, 1550, 1802.
 Hall v. Armstrong, 53 Conn. 554. § 5338.
 Hall v. Astoria & Lumber Co., 5 Rail. & Corp. L. J. 412. § 4546.
 Hall v. Auburn Turnpike Co., 27 Cal. 255. §§ 4219, 4616, 4622, 5128, 5149, 5739.
 Hall v. Bainbridge, 1 Mon. & G. 42. § 5074.
 Hall v. Bank, 14 W. Va. 584. § 6466.
 Hall v. Boyd, 52 Ga. 456. § 3713.
 Hall v. Bray, 51 Mo. 288. § 5448.
 Hall v. Carey, 5 Ga. 239. §§ 788, 1931, 3893, 3594, 4887, 6828, 6858.
 Hall v. Clagett, 48 Md. 223. § 1084.
 Hall v. Corcoran, 107 Mass. 251. § 2454.
 Hall v. Crandall, 29 Cal. 567. §§ 4219, 4995, 6125, 5149.
 Hall v. De Cuir, 95 U. S. 485, 497. § 5460.
 Hall v. Clinch, 25 S. C. 348. §§ 3416, 3418, 3449, 3474, 3746.
 Hall v. Logan, 34 Pa. St. 331. § 3446.
 Hall v. Mobile & Co. R. Co., 58 Ala. 10. § 4918.
 Hall v. Norwalk F. Ins. Co., 57 Conn. 105. § 4942.
 Hall v. Old Talsgoch Lead Mining Co., 3 Ch. Div. 749. § 1443.
 Hall v. Page, 4 Ga. 428. § 7085.
 Hall v. Rose Hill Road Co., 70 Ill. 673. §§ 2044, 2353, 2501, 2503, 2587, 2599.
 Hall v. Selma & Co. R. Co., 6 Ala. 741. §§ 1224, 1226.
 Hall v. Shultz, 4 Johns. (N. Y.) 270. § 1717.
 Hall v. Sigel, 7 Lans. (N. Y.) 206; 13 Abb. Pr. (N. s.) (N. Y.) 178; 53 N. Y. 607. §§ 4164, 4331, 4364, 5167.
 Hall v. Smith, 2 Bing. 156. § 6363.
 Hall v. Smith, 2 Dowd. & Ry. 584. § 5148.
 Hall v. Sullivan R. Co., 21 Law Rep. 138; 1 Brun. Col. Cas. 613. §§ 957, 5356.
 Hall v. Supreme Lodge, 24 Fed. Rep. 450. § 825.
 Hall v. Swansea, 5 Ad. & El. (N. s.) 528. § 5058.
 Hall v. Tanner & Co. Engine Co., 91 Ala. 363. §§ 5845, 5062.
 Hall v. Union Pacific R. Co., 3 Dill. (U. S.) 515. § 676.
 Hall v. United States Ins. Co., 5 Gill (Md.), 484. §§ 1377, 1756, 1895, 1966, 2399, 8222, 3250, 3283, 3419, 3537, 3567, 3660.

- Hall v. Vanness**, 49 Pa. St. 457, 464. § 5298.
Hall v. Vermont &c. R. Co., 28 Vt. 401. §§ 4380, 5046, 5181, 5182, 5184, 7841, 8044.
Hall v. Warren, 9 Ves. 605. § 7754.
Hallam v. Indianola Hotel Co., 56 Iowa, 178. §§ 4062, 4068, 6498.
Hallenbeck v. Hahn, 2 Neb. 377. § 5600.
Hallett's Estate, Re, 13 Ch. Div. 696. §§ 7086, 7104, 7108.
Hallett v. Dowdall, 21 L. J. (Q. B.) 98. § 2155.
Hallett v. Hallett, 2 Paige (N. Y.), 16, 19. § 3484.
Hallett v. Harrower, 33 Barb. 537. §§ 29, 236, 7675.
Halliham v. Corporation of Washington, 4 Cranch C. C. (U. S.) 304. § 1653.
Hallmark's Case, 9 Ch. Div. 329, 332; 47 L. J. (Ch.) 868. §§ 4606, 5218.
Halloway v. Memphis &c. R. Co., 23 Tex. 465. § 513.
Hallowell v. Page, 24 Mo. 590. § 7507.
Hallowell &c. Bank v. Hamlin, 14 Mass. 178. §§ 4622, 4633, 4634, 7737.
Halloway v. Ferns, L. R. 3 Ch. 467, 477. §§ 1374, 1397, 1398, 1426, 1529.
Halsey v. McLean, 12 Allen (Mass.), 438. §§ 3046, 3050, 3052, 3439, 4167, 8011.
Halsey v. Rapid Transit &c. R. Co., 47 N. J. Eq. 380. § 5641.
Halstead v. Dodge, 51 N. Y. Super. 169. § 3900.
Halstead v. New York, 5 Barb. (N. Y.) 218. §§ 5045, 5730.
Haltz v. Markel, 44 Ill. 225. § 6298.
Haly v. Lane, 2 Atk. 181. § 5760.
Hambleton v. Central Ohio R. Co., 44 Md. 551. § 2582.
Hambleton v. Glenn, 72 Md. 331. §§ 1545, 3172, 3754, 3779.
Hambleton v. Glenn (2d case), 72 Md. 351. § 3754.
Hambleton v. Glenn, 9 S. E. Rep. 129. § 6469.
Hambro v. Hull &c. Ins. Co., 3 Hurlst. & N. 789. § 5038.
Hamer's Executor's Case, 3 De Gex & S. 279. §§ 3318, 3330.
Hammersley v. Franey, 39 Conn. 176. § 2913.
Hamford Bank v. Ferris, 17 Conn. 259. § 5021.
Hamilton's Case, L. R. 8 Ch. 548. § 4154.
Hamilton v. Accessory Transit Co., 26 Barb. (N. Y.) 46. §§ 6755, 6862.
Hamilton v. Annapolis R. Co., 1 Md. Ch. Dec. 107. §§ 5805, 6698, 6600.
Hamilton v. Carthage, 24 Ill. 22. § 518.
Hamilton v. Clarion &c. R. Co., 144 Pa. St. 34. § 5683.
Hamilton v. Glenn, 85 Va. 901. §§ 3172, 3227, 3395, 3404, 3429, 3499, 3557, 3774, 3779, 6469, 7063, 7579, 7582.
Hamilton v. Grand Rapids &c. R. Co., 13 Ind. 347. § 1964.
Hamilton v. Grangers' Life &c. Ins. Co., 67 Ga. 145. § 3786.
Hamilton v. Keith, 5 Bush (Ky.), 458. § 67.
Hamilton v. Lyecoming Ins. Co., 5 Pa. St. 339. §§ 5024, 5046, 5047.
Hamilton v. Marks, 63 Mo. 167, 178. §§ 4724, 5236, 5759.
Hamilton v. Newcastle R. Co., 9 Ind. 359. §§ 4891, 5045, 5175, 5730, 5731, 5734, 5741, 5866, 7617, 7620.
Hamilton v. Rice, 7 Barb. (N. Y.) 157. § 1432.
Hamilton v. Russell, 1 Cranch (U. S.), 309. § 2774.
Hamilton v. Savannah &c. R. Co., 49 Fed. Rep. 412. § 2071.
Hamilton v. State, 3 Ind. 452. § 7830.
Hamilton v. State Bank, 23 Iowa 306. §§ 2672, 2677.
Hamilton v. Third Ave. R. Co., 13 Abb. Pr. (N. S.) (N. Y.) 318; 44 How. Pr. (N. Y.) 294. § 6308.
Hamilton v. Wright, 9 Clark & Fin. 111. §§ 4022, 4024.
Hamilton &c. Ins. Co. v. Hobart, 2 Gray (Mass.), 543. § 395.
Hamilton &c. Plank Road Co. v. Rice, 7 Barb. (N. Y.) 157, 166. §§ 245, 1152, 1170, 1201, 1235, 1335, 1739.
Hamilton Avenue, Re, 14 Barb. (N. Y.) 405. §§ 5399, 5401, 5405.
Hamilton Coal Co. v. Bernhard, 40 N. Y. St. Rep. 875; 16 N. Y. Supp. 55. § 4830.
Hamilton County v. Cincinnati &c. Turnp., Wright (Ohio), 603. § 6305.
Hamilton Co. v. Massachusetts, 6 Wall. (U. S.) 632, 638. §§ 5556, 5557, 5560.
Hamilton Mut. Ins. Co. v. Hobart, 2 Gray (Mass.), 543. §§ 343, 1937.
Hamley's Case, 5 Ch. Div. 705. §§ 1260, 4154.
Hamlin v. European &c. R. Co., 72 Me. 83. § 6145.
Hamlin v. Jerrard, 72 Me. 62. § 6195.
Hamlin v. Sears, 82 N. Y. 327. § 5311.
Hamlin v. Wright, 23 Wis. 491. § 6950.
Hamm v. Drew, 83 Tex. 77. §§ 3893, 4847, 4849, 4881.
Hammer v. Garfield Mining Co., 130 U. S. 291. §§ 220, 7712, 7933.
HammerSmith, Re, 4 Exch. 87, 97. §§ 881, 887.
Hammett v. Little Rock &c. R. Co., 20 Ark. 204. §§ 531, 6598, 7669, 7692, 7705.
Hammock v. Loan &c. Co., 105 U. S. 77. § 6186.
Hammond, Appeal of, 123 Pa. St. 503. §§ 4040, 4062.
Hammond v. Hastings, 134 U. S. 401. §§ 2333, 2337, 2353, 2354.
Hammond v. Hudson River &c. Co., 20 Barb. 378. § 2293.
Hammond v. Starr, 79 Cal. 556. § 7610.
Hammond v. Straus, 53 Md. 1. §§ 63, 1937, 2990.
Hammonds Port &c. Plank Road Co. v. Brundage, 13 How. Pr. (N. Y.) 448. § 5933 a.
Hampshire v. Franklin, 16 Mass. 76, 87. §§ 52, 1879.
Hampson v. Price's Patent Candle Co., 45 L. J. Ch. 437; 24 Week. Rep. 754; 34 L. T. (N. S.) 711. § 4519.
Hampson v. Weare, 4 Iowa, 13. §§ 1082, 3392, 3409, 3597.
Hamrick v. Combs, 14 Neb. 381. § 4943.
Hamsher v. Hamsher, 132 Ill. 273. §§ 5774, 5799, 5807.
Hamtramck v. Bank of Edwardsville, 2 Mo. 169. §§ 518, 529, 1853, 4354, 5275.
Hancock v. Halbrook, 9 Fed. Rep. 353. § 4891.
Hancock v. Hodgson, 4 Bing. 269. § 5074.
Hancock v. Holbrook, 40 La. An. 53. §§ 2957, 4062.
Hancock v. Toledo &c. R. Co., 11 Biss. (U. S.) 148. § 6246.
Hancock v. Yaden, 121 Ind. 366. § 5495.
Hancock Mutual Life Ins. Co. v. Worcester &c. R. Co., 149 Mass. 214. §§ 365, 382, 383, 6096.
Hand v. Atlantic Nat. Bank, 55 How. Pr. (N. Y.) 232. § 4578.
Hand v. Clearfield Consol. Coal Co., 143 Pa. St. 408. § 5645.
Hand v. Grant, 5 Smedes & M. (Miss.) 508. § 7507.
Hand v. Savannah &c. R. Co., 12 S. C. 314; explaining 5 S. C. 182. §§ 6087, 6117.
Hand v. Savannah &c. R. Co., 17 S. C. 219; 6 S. O. 307; 10 S. C. 406. §§ 6087, 6107, 7114, 7203.
Hand v. Savannah &c. R. Co., 21 S. C. 162. §§ 7054, 7056.
Hand v. Southern &c. R. Co., 12 S. C. 314. § 6097.
Hand Gold Min. Co. v. Parker, 59 Ga. 419. §§ 5593, 5608.
Handley v. Stutz, 137 U. S. 366. §§ 3482, 3483.
Handley v. Stutz, 139 U. S. 417. §§ 1567, 1579, 1580, 1665, 2083, 2084, 2087, 2091, 2092, 3786, 3862, 3865.
Handraham v. Cheshire Iron Works, 4 Allen (Mass.), 396. §§ 3382, 3503.
Handy v. Draper, 89 N. Y. 334, 335; 23 Hun (N. Y.), 256. §§ 3351, 3353, 3362, 3375, 6560.
Handy v. Insurance Co., 37 Ohio St. 366. § 7558.
Handy v. Philadelphia &c. R. Co., 1 Phila. (Pa.) 31. § 7621.
Haney v. Marshall, 9 Md. 194. § 8001.
Hanford v. McNair, 9 Wend. (N. Y.) 54. § 5295.
Hanger v. Abbott, 6 Wall. (U. S.) 532. §§ 1094, 3375.
Hanks v. Greenwade, 5 J. J. Marsh. (Ky.) 249. § 6245.
Hanley v. Donoghue, 116 U. S. 1. § 3754.
Hann v. Barnegat &c. Co., 7 Civ. Proc. Rep. (N. Y.) 222. § 7553.
Hanna v. Cincinnati &c. R. Co., 20 Ind. 30. §§ 355, 356, 363, 400, 1290.
Hanna v. International Petroleum Co., 23 Ohio St. 622. § 217.
Hanna v. McKenzie, 5 B. Mon. (Ky.) 314. § 7552.
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Hannibal—Harrison TABLE OF CASES CITED.

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- Hanson v. European & Co. R. Co., 62 Me. 84. §§ 6306, 6383, 6388, 6390.
- Hanson v. Vernon, 27 Iowa, 28. §§ 602, 1117, 1119, 1120.
- Harrison v. First Presbyterian Soc., 46 Conn. 529. § 5997.
- Harbold v. Stobart, 46 Ohio St. 397. § 3226.
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- Hardenburgh v. Blair, 30 N. J. Eq. 645, 660. § 3569.
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- Hardin v. Boyd, 113 U. S. 756, 761. § 7292.
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- Harding v. Chicago & Co. R. Co., 80 Mo. 659. § 7993.
- Harding v. Fiske, 25 Abb. N. Cas. (N. Y.) 348; 12 N. Y. Supp. 139. § 4531.
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- Harding v. Goodlett, 3 Yerg. (Tenn.) 40. § 5607.
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- Hardman v. Sage, 124 N. Y. 25; 35 N. Y. 54. §§ 2985, 3117, 3353, 3367, 3368, 3375, 3403.
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- Harger v. McMains, 4 Watts (Pa.), 418. § 2471.
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- Hargreaves v. Rothwell, 1 Keen, 154. § 5194.
- Hargreaves v. Chambers, 30 Ga. 590. §§ 4168, 4172, 4176, 4188, 4344, 4362, 4369, 4372.
- Harker v. Conrad, 12 Serg. & R. (Pa.) 301. § 3158.
- Harker v. New York, 17 Wend. (N. Y.) 199. § 7624.
- Harkins v. Forsyth, 11 Leigh (Va.), 294. § 6245.
- Harkness v. Manhattan R. Co., 54 N. Y. Super, 174. §§ 2234, 4450.
- Harkness v. Russell, 118 U. S. 663, 679. § 8095.
- Harland v. Bankers' & Co. Tel. Co., 32 Fed. Rep. 305. § 6925.
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- Harlem Canal Co. v. Seixas, 2 Hall (N. Y.), 504. § 1138.
- Harley v. Davis, 16 Minn. 487. § 3187.
- Harman v. Tappenden, 1 East, 655. §§ 4101, 6279.
- Harmer v. Steele, 4 Ex. 1; 19 L. J. (N. s.) 34. § 3989.
- Harmon v. Page, 62 Cal. 448. §§ 1997, 2003, 2009, 3429, 3138, 3455, 3779.
- Harmstead v. Washington Fire Co., 8 Phila. (Pa.) 331. § 856.
- Harper v. Ampt, 32 Ohio St. 271. § 5411.
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- Harper v. Charlesworth, 4 Barn. & C. 574. § 5045.
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- Harper v. Ragan, 2 Blackf. (Ind.) 39. § 7595.
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- Harrell v. Kent, 71 Ind. 602. § 6979.
- Harrell v. Mexico Cattle Co., 73 Tex. 612. § 7542.
- Harriman v. First Bryan Baptist Church, 63 Ga. 186. §§ 5710, 6002.
- Harriman v. Southam, 16 Ind. 190. §§ 505, 519, 523, 576, 1869, 5114, 5803, 7670.
- Harriman v. Stowe, 57 Mo. 93. § 4096.
- Harrington v. Taylor, 15 East, 378. § 3363.
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- Harris v. Baker, 4 Mauls & S. 97. § 6363.
- Harris v. Bank of Mobile, 5 La. An. 538. § 2918.
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- Harris v. Elliott, 10 Pet. (U. S.) 25. § 6199.
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- Harris v. Glenn, 56 Ga. 94. §§ 3342, 4170, 6731.
- Harris v. Lee, 1 P. Wms. 482. § 5979.
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- Harris v. Mississippi Valley & Co. R. Co., 51 Miss. 602. §§ 6608, 6610, 6612, 6655, 6793.
- Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267. §§ 1075, 3967, 4875, 6679, 7658, 7664, 7666.
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- Harris v. North Devon R. Co., 20 Beav. 334. §§ 1521, 1764.
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- Harris v. Royal British Bank, 2 Hurlst. & N. 535. § 3593.
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- Harris v. Somerset & Co. R. Co., 47 Me. 298. §§ 7642, 7653.
- Harris v. State, 14 Lea (Tenn.), 485. § 6444.
- Harris v. Stevens, 7 N. H. 454. § 2183.
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- Harrisburg Bank v. Commonwealth, 26 Pa. St. 451. § 3052.
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- Harrison's Case, L. R. 6 Ch. 286. §§ 3255, 3256.
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- Harrison v. Arkansas Valley R. Co., 4 McCrary (U. S.), 264. §§ 365, 375, 1665.
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- Harrison v. Great Northern R. Co., 3 Hurlst. & C. 231; 10 Jur. (N. s.) 992; 33 L. J. (Ex.) 266. § 6362.
- Harrison v. Harrison, 1 Car. & P. 412. §§ 2479, 2480.
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- Harrison v. Kramer, 3 Iowa, 543. § 2775.

TABLE OF CASES CITED. Harrison—Hathaway

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- Harrison v. Smith**, 83 Mo. 210. §§ 7086, 7094.
- Harrison v. Sterry**, 5 Cranch (U. S.), 289. \$ 7070.
- Harrison v. Timmins**, 4 Mees. & W. 510. §§ 14, 4348.
- Harrison v. Union Pacific R. Co.**, 13 Fed. Rep. 522. \$ 6547.
- Harrison v. Vermont Manganese Co.**, 20 N. Y. Supp. 894. \$ 5321.
- Harrison &c. Iron Co. v. Council Bluffs &c. Water Works Co.**, 25 Fed. Rep. 170. \$ 7758.
- Harrison County v. Berry &c. Turnp. Co. (Ky.)**, 12 S. W. Rep. 258. \$ 5941.
- Harrison Justices v. Holland**, 3 Gratt. (Va.) 247. \$ 1118.
- Harrison's Trusts**, Re, 22 L. J. (Ch.) 69. \$ 693.
- Harrod v. Hamer**, 32 Wis. 162. §§ 211, 3142.
- Harrod v. McDaniels**, 126 Mass. 413. \$ 5326.
- Harryman v. Collins**, 18 Beav. 11. \$ 5246.
- Harscot's Case**, Comb. 202. §§ 725, 1011.
- Harshman v. Bates County**, 92 U. S. 569. §§ 367, 1122.
- Hart's Case**, L. R. 6 Eq. 512. §§ 3271, 3274.
- Hart v. Albany**, 9 Wend. (N. Y.) 571. \$ 1037.
- Hart v. Anthony**, 15 Pick. (Mass.) 445. §§ 7998, 8089.
- Hart v. Baltimore &c. R. Co.**, 6 W. Va. 336. §§ 7661, 7665.
- Hart v. Bassett**, Sir T. Jones, 156; 4 Vin. Abr. 519. \$ 6373.
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- Hart v. Boston &c. R. Co.**, 40 Conn. 524. §§ 6618, 6638.
- Hart v. Boston &c. R. Co.**, 121 Mass. 510. \$ 5391.
- Hart v. Brockway**, 57 Mich. 189. \$ 4010.
- Hart v. Clarke**, 6 De Gex. M. & G. 232; 6 H. L. 633. §§ 1763, 1798, 1806, 5246.
- Hart v. Dixon**, 5 Lea. (Tenn.), 336. \$ 5299.
- Hart v. Farmers' &c. Bank**, 33 Vt. 252. \$ 5200.
- Hart v. Frontino &c. Co.**, 29 L. J. Exch. 93. \$ 2581.
- Hart v. Frontino &c. Co.**, 22 L. T. (N. S.), 30. \$ 2572.
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- Hart v. Railroad Co.**, 33 S. C. 427. §§ 6378, 6388.
- Hart v. Rensselaer &c. R. Co.**, 8 N. Y. 37. \$ 327.
- Hart v. St. Charles Street R. Co.**, 30 La. An. pt. 1. 758. \$ 2101.
- Hart v. Stone**, 30 Conn. 94. §§ 5016, 5020, 5106, 5107.
- Hart v. Ten Eyck**, 2 Johns. Ch. (N. Y.) 62. 99. \$ 2656.
- Harter v. Elitzroth**, 111 Ind. 159, 161. \$ 2739.
- Hartford &c. R. Co. v. Boorman**, 12 Conn. 530. \$ 3222.
- Hartford &c. R. Co. v. Crowell**, 5 Hill (N. Y.), 383. §§ 72, 82, 325, 1138, 1185, 1268, 1278, 1281, 1577, 4043.
- Hartford &c. R. Co. v. Kennedy**, 12 Conn. 499. §§ 1138, 1142, 1153, 1185, 1186, 1550, 1577, 1794.
- Hartford &c. Turnp. Corp. v. Baker**, 17 Pick. (Mass.) 432. \$ 5913.
- Hartford &c. Turnp. Soc. v. Hosmer**, 12 Conn. 361. \$ 5913.
- Hartford Bank v. Barry**, 17 Mass. 94. §§ 4756, 4789, 7592.
- Hartford Bank v. Hart**, 3 Day (Conn.), 491. §§ 3950, 4874, 4920.
- Hartford Bank v. Hartford Life &c. Ins. Co.**, 45 Conn. 22. \$ 2344.
- Hartford Bridge Co. v. Granger**, 4 Conn. 142. §§ 3950, 4920.
- Hartford Bridge Co. v. Union Ferry Co.**, 29 Conn. 210. §§ 5381, 5400, 5401.
- Hartford Fire Ins. Co. v. Doyle**, 3 Cent. L. J. 41. \$ 7467.
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- Hartford Fire Ins. Co. v. Raymond**, 70 Mich. 485. \$ 5450.
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- Hartga v. Bank of England**, 3 Ves. Jr. 55. \$ 2531.
- Hartley v. Creswell**, 2 MacArthur (D. C.), 495. \$ 4973.
- Hartman v. Greenhow**, 102 U. S. 672. \$ 6107.
- Hartnall v. Ryde Commrs.**, 4 Best & S. 361; 10 Jur. (N. S.) 257; 33 L. J. (Q. B.) 39. §§ 6363, 6442.
- Hartbridge v. Rockwell**, R. M. Charlt. (Ga.) 260. §§ 2054, 2082, 9069, 3979, 3981, 4070.
- Harts v. Brown**, 77 Ill. 226. §§ 275, 4074, 6503.
- Hartshorn v. Dawson**, 79 Ill. 103, 111. \$ 5092.
- Hartsville University v. Hamilton**, 34 Ind. 509. §§ 1962, 7682.
- Hart v. Harvey**, 10 Abb. Fr. (N. S.) (N. Y.) 331. §§ 751, 757, 764, 3877.
- Hartung v. People**, 22 N. Y. 95. \$ 6756.
- Hartwell v. Armstrong**, 19 Barb. (N. Y.) 166. §§ 5594, 5611.
- Harvard College v. Amory**, 9 Pick. (Mass.) 446. \$ 2202.
- Harvey v. Allen**, 16 Blatchf. (U. S.) 29. \$ 7274.
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- Harvey v. Edens**, 69 Tex. 420. \$ 7738.
- Harvey v. Harvey**, 4 Beav. 215. \$ 4565.
- Harvey v. Kay**, 9 Barn. & C. 356. \$ 1877.
- Harvey v. Lloyd**, 3 Pa. St. 331. \$ 1113.
- Harvey v. Lord**, 11 Biss. (U. S.) 144; 10 Fed. Rep. 236. §§ 3119, 7292.
- Harvey v. Rush County**, 32 Kan. 159. \$ 598.
- Harvey v. Scott**, 11 Ad. & El. (N. S.) 92. \$ 3399.
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- Harward v. St. Clair &c. Drainage Co.**, 51 Ill. 130. \$ 27.
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- Harwood v. Lowell**, 4 Cush. (Mass.) 310. \$ 6373.
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- Hasbrouck v. Vandervoort**, 4 Sandf. (N. Y.) 74. \$ 2622.
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- Hasenritter v. Kirchhoffer**, 79 Mo. 239. \$ 5276.
- Hassey v. White Pigeon Beet Sugar Co.**, 1 Doug. (Mich.) 193. \$ 5124.
- Haskell v. Cornish**, 13 Cal. 45. §§ 5126, 5132, 5137, 5145, 5153.
- Haskell v. New Bedford**, 108 Mass. 208. §§ 6275, 6276.
- Haskell v. Sells**, 14 Mo. App. 92. §§ 1513, 1516, 1542.
- Haskell v. Worthington**, 94 Mo. 560. §§ 1235, 1283, 1373, 1724, 1972, 7642.
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- Haskelhurst v. Savannah &c. R. Co.**, 43 Ga. 13. \$ 3859.
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- Hasenritter v. Kirchhoffer**, 79 Mo. 239. \$ 519.
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- Hastings v. Drew**, 76 N. Y. 9. §§ 2963, 3397, 3399.
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- Hatch v. Borroughs**, 1 Woods (U. S.), 439. §§ 3077, 3440.
- Hatch v. Chicago &c. R. Co.**, 6 Blatchf. (U. S.) 105. §§ 12, 7450, 7451, 7453, 7457.
- Hatch v. City Bank**, 1 Rob. (La.) 470. \$ 4428.
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- Hathaway v. Goodrich**, 5 Vt. 65. \$ 7507.
- Hathaway v. Hinton**, 1 Jones L. (N. C.) 243. \$ 6373.

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 Hat-Sweat Man. Co. v. Davis Sewing-Machine Co., 31 Fed. Rep. 294. §§ 7486, 7487, 7512, 8022, 8037, 8038.
 Hattersley v. Shelburne, 10 Week. Rep. 831. § 7784.
 Hatton's Case, 8 Jur. (N. S.) 380. § 3256.
 Hatton v. Haywood, L. R. 9 Ch. 299. § 6932.
 Haugen v. Albina Light & C. Co., 21 Or. 411. § 7826.
 Haun v. Mulberry & Co. Gravel Road Co., 33 Ind. 103. §§ 1714, 1748.
 Hauselt v. Vilmar, 76 N. Y. 630. § 6477.
 Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 506. § 3867.
 Havemeyer v. Iowa Co., 3 Wall. (U. S.) 294. § 1118.
 Havemeyer v. Superior Court, 84 Cal. 327. §§ 4546, 6828, 6829, 6830, 6847, 6905, 6921, 7192.
 Haven v. Adams, 4 Allen (Mass.), 80. §§ 5078, 5089, 5090.
 Haven v. Grand Junction & Co., 109 Mass. 88. §§ 6064, 6107, 6116, 6117.
 Haven v. Grand Junction & C. R. Co., 12 Allen (Mass.), 337, 340. § 6214.
 Haven v. Low, 2 N. H. 13. § 2619.
 Haven v. New Hampshire Asylum, 13 N. H. 532. §§ 944, 4891, 7691, 7734, 7735, 7749.
 Havens v. Hoyt, 6 Jones Eq. (N. C.) 115. §§ 4479, 4480, 4492.
 Havens v. National City Bank, 6 Thomp. & C. (N. Y.) 346; 1 Nat. Bank Cas. 753. § 7274.
 Haverhill & Co. Ins. Co. v. Newhall, 1 Allen (Mass.), 130. § 5169.
 Haverhill Bridge Proprietors v. County Comm'rs. 103 Mass. 120. §§ 5552, 5595, 5615.
 Haverhill Ins. Co. v. Prescott, 42 N. H. 547. §§ 7953, 7957.
 Haverhill Mut. Fire Ins. Co. v. Newhall, 1 Allen (Mass.), 130. §§ 5126, 5129, 5132.
 Haviland v. Chace, 39 Barb. (N. Y.) 283. §§ 1612, 1643.
 Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; 111 Mass. 200. §§ 2220, 1082, 2983, 2989, 3073, 3394, 4331.
 Hawes v. Blackwell, 107 N. C. 196. § 7098.
 Hawes v. Gas Consumer's Benefit Co., 9 N. Y. Supp. 490. §§ 2353, 2448.
 Hawes v. Gustin, 2 Allen (Mass.), 402. § 7756.
 Hawes v. Knowles, 114 Mass. 518. § 6298.
 Hawes v. Oakland, 104 U. S. 450. §§ 4479, 4500, 4501, 4508, 4564.
 Hawken v. Bourne, 8 Mees. & W. 703. § 5957.
 Hawkes v. Kennebeck Co., 7 Mass. 461. § 7756.
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 Hawkins v. Dutches & Co. Steamboat Co., 2 Wend. (N. Y.) 452. § 6305.
 Hawkins v. Glenn, 131 U. S. 319. §§ 1716, 1999, 2005, 3049, 3192, 3227, 3386, 3395, 3404, 3419, 3429, 3453, 3492, 3499, 3537, 3557, 3570, 3700, 3754, 3774.
 Hawkins v. Hoffman, 6 Hill (N. Y.), 586. § 2460.
 Hawkins v. Iron Valley Furnace Co., 40 Ohio St. 407. § 1990.
 Hawkins v. Furnace Co., 40 Ohio St. 507. §§ 3018, 3010.
 Hawkins v. Mansfield Gold Mining Co., 52 Cal. 513. §§ 480, 490.
 Hawkins v. Mississippi & C. R. Co., 35 Miss. 688. § 1278.
 Hawkins v. Riley, 17 B. Mon. (Ky.) 101. § 6293.
 Hawkins v. Charlemon, 107 Mass. 414, 418. §§ 6275, 6276.
 Hawks v. Pritzlaff, 51 Wis. 160. § 6835.
 Hawley v. Bennett, 4 Paige (N. Y.), 163. § 6452.
 Hawley v. Brummagin, 33 Cal. 394. §§ 2348, 2642.
 Hawley v. Cramer, 4 Cow. (N. Y.) 717. § 6225.
 Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174. § 7045.
 Hawley v. Upton, 102 U. S. 314. §§ 1140, 1185, 1566, 1962.
 Hawtayne v. Bourne, 7 Mees. & W. 595. §§ 5957, 5979.
 Hawthorn v. St. Louis, 11 Mo. 59. § 7804.
 Hawthorne v. Calef, 2 Wall. (U. S.) 10. §§ 3007, 3018, 3010, 3226, 4168, 5431.
 Hawthorne v. Smith, 3 Nev. 182. § 4170.
 Hax v. Davis Mill Co., 39 Mo. App. 453. §§ 3913, 3914, 3924, 5315.
 Haxum v. Bishop, 3 Wend. (N. Y.) 13. §§ 6133, 6467, 6514.
 Hay's Case, L. R. 10 Ch. App. 593. §§ 1588, 4024, 4039, 4154.
 Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; affirmed, 2 N. Y. 159. § 6303.
 Hay v. McCoy, 6 Blackf. (Ind.) 69. § 7589.
 Haycraft v. Greasy, 2 East, 92. § 4147.
 Hayden v. Androscooggin Mills, 1 Fed. Rep. 93. §§ 7494, 7998, 8000, 8022.
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 Hayden v. Middlesex Tp. Corp., 10 Mass. 397, 403. §§ 3967, 4875, 5045, 5050, 7392.
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 Hayman v. Governors of Rugby School, L. R. 18 Eq. 28; 30 L. T. (N. S.) 217. §§ 826, 827.
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- Helm v. Swiggett, 12 Ind. 194. §§ 3283, 3284, 4465.
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- Helsby v. Mears, 5 Barn. & C. 504. § 431.
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- Hendrix v. Harman, 19 S. C. 483. § 2656.
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- Henniker v. Contocook Valley R. R., 29 N. H. 146. § 4336.
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- Henry v. Rutland & C. R. Co., 27 Vt. 435. §§ 4382, 4386, 4387.
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- Henshaw v. Wells, 9 Humph. (Tenn.) 568. §§ 6844, 6882.
- Hensley v. Baker, 10 Mo. 157, 158. § 3613.
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- Hereford & Co., Re, 2 Ch. Div. 621. § 456.
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- Hersey v. Veazie, 21 Me. 9. §§ 4479, 4480, 4499, 4500, 4578.
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- Hess v. Werts, 4 Serg. & R. (Pa.) 356. § 417.
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- Hiern v. Mill, 13 Ves. 114. § 5194.
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- Hill v. Manchester & Co.**, 5 Barn. & Adol. 866. §§ 3969, 4036, 4455, 7731.
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- Hope & C. Ins. Co. v. Flynn**, 38 Mo. 483. § 5434.
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- Hospes v. Northwestern Man. & C. Co.**, 48 Minn. 174. §§ 1579, 2953, 3327, 3371, 3431, 3636, 3737.
- Hotchin v. Kent**, 8 Mich. 526. §§ 4887, 5287, 5306.
- Hotchkiss v. Artisans' Bank**, 2 Abb. App. Dec. (N. Y.) 403; 2 Keyes (N. Y.), 564. § 4767.
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- Hotchkiss v. Ladd**, 36 Vt. 593. § 5018.
- Hotchkiss v. National Banks**, 21 Wall. (U. S.) 354; Blatchf. (U. S.) 384. §§ 6079, 6081.
- Hotel Co. v. Wade**, 97 U. S. 13. §§ 4496, 5269, 5317.
- Hotham v. East India Co.**, 1 T. R. 638. § 2674.
- Hottenstein v. Conrad**, 9 Kan. 435. § 6882.
- Houck v. Wachter**, 34 Md. 285. § 6373.
- Hough v. Cook County Land Co.**, 73 Ill. 23. §§ 5795, 5799, 7918.
- Hough v. Cress**, 4 Jones Eq. (N. C.) 295, 297. § 7847.
- Houghland v. Bell**, 36 Barb. (N. Y.) 67. § 3359.
- Houghton v. Austin**, 47 Cal. 646. § 643.
- Houghton v. First Nat. Bank**, 26 Wis. 663. §§ 4778, 4789, 4794, 4802, 4806, 4933, 5158.
- Houghton v. McAuliff**, 2 Abb. App. Dec. (N. Y.) 409. § 5738.
- Houghton v. McAuliffe**, 26 How. Pr. (N. Y.) 270. § 4760.
- Houldsworth v. Evans**, L. R. 3 H. L. 263. §§ 1523, 1798, 1799, 3318, 3335.
- Houriet v. Morris**, 3 Camp. 303. § 1094.
- Housatonic Bank v. Martin**, 1 Met. (Mass.) 294. §§ 5219, 5221, 5234.
- House, Ex parte**, 36 Tex. 83. § 5338.
- House v. Clinton County Court**, 67 Mo. 522. § 825.
- House v. Cooper**, 30 Barb. (N. Y.) 157. §§ 7866, 7869, 8002.
- Householder v. Kansas**, 83 Mo. 488. § 3003, 3020.
- Houseman v. Girard Mut. & C. Asso.**, 81 Pa. St. 256. §§ 5194, 5197, 5202, 6363.
- House of Lords**, 2 Clark & Fin. 331; 1 Bing. N. C. 222; 8 Bl. N. R. 690; 1 Scott, 29. §§ 6363, 6365.
- Houston v. Dyche**, Meigs (Tenn.), 76. § 2460.
- Houston v. Jefferson College**, 63 Pa. St. 428. 80, 95, 104, 316, 5441.

Houston—Huiskamp TABLE OF CASES CITED.

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- Houston v. Redwine, 85 Ga. 130. § 5777.
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- Houston v. Vicksburg & R. Co., 39 La. An. 796. § 7429.
- Houston & C. R. Co. v. Bremond, 66 Tex. 159. § 2355.
- Houston & C. R. Co. v. Ford, 53 Tex. 364. § 7426.
- Houston & C. R. Co. v. Harry, 63 Tex. 256. § 5513.
- Houston & C. R. Co. v. McKinney, 55 Tex. 176. §§ 4539, 6327.
- Houston & C. Ry. Co. v. Odum, 53 Tex. 343. §§ 612, 635.
- Houston & C. R. Co. v. Randolph, 24 Tex. 317. § 7780.
- Houston & C. R. Co. v. Shirley, 54 Tex. 125. §§ 263, 374, 6236.
- Houston & C. R. Co. v. Van Alstyne, 56 Tex. 439. § 2377.
- Hovelman v. Kansas City Horse R. Co., 79 Mo. 632. §§ 5428, 6033, 6037, 6137, 6586, 6593.
- Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 629. §§ 1986, 3774.
- Hoyer v. Barkhoof, 44 N. Y. 113. §§ 6363, 6442.
- Hovey v. Blanchard, 13 N. H. 145. §§ 5190, 5200.
- Hovey v. Magill, 2 Conn. 690. §§ 5126, 5130, 5132.
- Hovey v. McDonald, 109 U. S. 150, 157. § 6233.
- Hovey v. Ten Broeck, 3 Rob. (N. Y.) 316. §§ 2023, 2029, 3147.
- Howard's Case, L. R. 1 Ch. 561. §§ 1245, 1706, 3914.
- Howard v. Bank of England, L. R. 19 Eq. 295. § 3275.
- Howard v. Boorman, 17 Wis. 459. §§ 7617, 7618.
- Howard v. Glenn, 85 Ga. 238. §§ 1450, 3048, 3049, 3392, 3404, 3499, 3551, 3558, 3567, 3570, 3586, 3657, 3687, 3707, 3746, 3747, 3755.
- Howard v. Hatch, 29 Barb. (N. Y.) 297. § 4730.
- Howard v. Hinckley & Co. Iron Co., 64 Me. 93. §§ 7231, 7232.
- Howard v. Jones, 33 Mo. 583. §§ 1220, 1657.
- Howard v. Marine Indus. School, 78 Me. 230. § 3918.
- Howard v. Palmer, 64 Me. 86. §§ 7231, 7232.
- Howard v. Patent Ivory Man. Co., 38 Ch. Div. 156. §§ 6150, 6177, 6849.
- Howard v. Savannah, T. U. P. Charit. (Ga.) 173. § 916.
- Howard v. Williams, 2 Pick. (Mass.) 80. § 1206.
- Howard Bank v. Lester, 33 Md. 558. § 5745.
- Howard Ins. Co. v. Halsey, 8 N. Y. 271. §§ 5191, 5197.
- Howard Ins. Co. v. Hope Mutual Ins. Co., 22 Conn. 394. §§ 5327, 7728.
- Howard Mutual Loan Asso. v. McIntyre, 3 Allen (Mass.), 571. § 5249.
- Howbeach Coal Co. v. Teagler, 6 Jur. (N. s.), 275; 5 Hurl. & N. 151. §§ 1235, 1736, 3914.
- Howe, Matter of, 1 Paige (N. Y.), 123, 128. § 6141.
- Howe, Re, 1 Paige (N. Y.), 214. § 5835.
- Howe v. Barney, 45 Fed. Rep. 658. §§ 2624, 4121, 4472.
- Howe v. Best, 5 Madd. 19. § 7409.
- Howe v. Carpenter, 49 Wis. 697, 702. § 6189.
- Howe v. Deuel, 43 Barb. (N. Y.) 505. §§ 4539, 4554, 5222.
- Howe v. Fleming, 123 Ind. 262. § 7738.
- Howe v. Harding, 76 Tex. 17. § 6949.
- Howe v. Jones, 57 Iowa, 130. § 6380.
- Howe v. Newmarch, 12 Allen (Mass.), 49. § 6298.
- Howe v. Nickels, 22 Me. 175. § 3383.
- Howe v. Robinson, 20 Fla. 352. § 6730.
- Howe v. Sanford Fork & Co., 44 Fed. Rep. 231. §§ 6492, 6503.
- Howe v. Snow, 3 Allen (Mass.), 111. §§ 3785, 3794.
- Howe v. Starkweather, 17 Mass. 240. §§ 2788, 3317.
- Howe v. Synges, 15 East, 440. § 1048.
- Howe Machine Co. v. Robinson, 7 Daly (N. Y.), 399. § 7661.
- Howe Machine Co. v. Souder, 58 Ga. 64. § 6310.
- Howell v. Cassapolis, 35 Mich. 471. § 2365.
- Howell v. Chicago & E. Co., 51 Barb. (N. Y.) 378. §§ 2154, 2167, 7904.
- Howell v. Klein, 44 Ind. 290. § 3363.
- Howell v. Manglesdorf, 33 Kan. 194. §§ 3598, 3606.
- Howell v. Roberts, 29 Neb. 483. §§ 2025, 3767.
- Howell v. Western R. Co., 94 U. S. 463, 466. § 6244.
- Howland v. Myer, 3 N. Y. 290. §§ 1546, 4621, 4633, 4639, 4760, 7232, 7244.
- Howlands v. Edmunds, 24 N. Y. 307. § 1705.
- Howlett v. New York & C. R. Co., 14 Abb. N. Cas. (N. Y.) 328. § 7009.
- Hower v. Melcher, 40 Mich. 185. § 7622.
- Hoy v. Allen, 27 Iowa, 203. § 7060.
- Hoy v. Gronoble, 34 Pa. St. 9. §§ 6377, 6379.
- Hoyle v. Plattsburgh & C. R. Co., 54 N. Y. 314. §§ 4043, 4046, 4071, 4074, 6186, 7851, 7866.
- Hoyt v. Amer. Ex. Bank, 1 Duer (N. Y.), 652. § 4428.
- Hoyt v. Bridgewater Copper M. Co., 6 N. J. Eq. 253, 275. §§ 3932, 4946.
- Hoyt v. Malone, 31 N. Y. St. Rep. 739; 9 N. Y. Supp. 877. § 4480.
- Hoyt v. Quicksilver Min. Co., 17 Hun (N. Y.), 169. § 2253.
- Hoyt v. Sheldon, 3 Bosw. (N. Y.) 267. §§ 1048, 4971, 5038, 6466, 6518, 6686.
- Hoyt v. Sprague, 103 U. S. 613. §§ 278, 4454.
- Hoyt v. Stoddard, 2 Allen (Mass.), 442. § 6998.
- Hoyt v. Thompson, 5 N. Y. 320. §§ 3921, 4622, 4632, 4633, 4634, 4551, 4754, 4760, 4761, 5016, 5107, 5291, 7010, 7335, 7339, 7345.
- Hoyt v. Thompson, 19 N. Y. 207. §§ 1048, 3985, 5291, 5293, 5298, 6200, 7335.
- Hubbard v. Briggs, 31 N. Y. 518. § 5270.
- Hubbard v. Camperdown Mills, 25 S. C. 496. § 7056.
- Hubbard v. Chappel, 14 Ind. 601. §§ 406, 518, 529, 7664, 7665, 7666, 7669.
- Hubbard v. Guild, 2 Duer (N. Y.), 685. § 7036.
- Hubbard v. Hubbard, 14 Md. 355. § 6839.
- Hubbard v. New York & C. Investment Co., 14 Fed. Rep. 675. § 4002.
- Hubbard v. New York & C. R. Co., 36 Barb. (N. Y.) 286. § 6064.
- Hubbard v. Weare, 79 Iowa, 678. §§ 1334, 4144, 4145, 4147, 4250, 4870.
- Hubbell v. Dana, 9 How. Pr. (N. Y.) 424. § 7552.
- Hubbell v. Meigs, 50 N. Y. 480. § 2726.
- Hubbell v. Syracuse Iron Works, 42 Hun (N. Y.), 182; 4 N. Y. St. Rep. 690. § 6982.
- Hubbell v. Warren, 8 Allen (Mass.), 173. § 3484.
- Hubbersty v. Manchester & C. R. Co., L. R. 2 Q. B. 59. § 2332.
- Hubbert v. Borden, 6 Whart. (Pa.) 79, 91. § 5032.
- Hub Pub. Co. v. Richardson, 59 Hun (N. Y.), 626; 37 N. Y. St. Rep. 541; 13 N. Y. Supp. 665. § 4213.
- Huddersfield Canal Co. v. Buckley, 7 Term Rep. 36. § 3321, 3222.
- Hudepohl v. Liberty Hill Con. Min. & C. Co., 80 Cal. 553. § 5892.
- Hudgins v. State, 46 Ala. 208. §§ 6598, 6599.
- Hudkins v. Ward, 30 W. Va. 204. § 7045.
- Hudnal v. Wilder, 4 McCord (S. C.), 294. § 2774.
- Hudson v. Carman, 41 Me. 84. §§ 1868, 1869, 1918, 3651, 3652, 3657.
- Hudson v. Plank Road & C. Co., 4 Greene (Iowa), 152. § 1832.
- Hudson v. St. Louis & C. R. Co., 53 Mo. 525. § 7645.
- Hudson v. Thorne, 7 Paige (N. Y.), 261. § 1021.
- Hudson River & C. R. Co. v. Kay, 14 Abb. Fr. (N. s.) (N. Y.) 191. § 788.
- Hudson River Telephone Co. v. Watervliet Turnp. Co., 29 N. Y. St. Rep. 694. §§ 5689, 5692, 5942.
- Hudspeth v. Wilson, 2 Dev. (N. C.) 372. § 2455.
- Huesing v. City of Rock Island, 128 Ill. 465. § 1011.
- Huffman v. San Joaquin Co., 21 Cal. 426. § 7362.
- Hug v. Van Burkleo, 58 Mo. 202. §§ 7408, 7754.
- Hugh v. McRae, Chase Dec. (U. S.) 466. §§ 6842, 6843.
- Hughes v. Antietam Man. Co., 34 Md. 316, 324. §§ 224, 228, 237, 1185, 1322, 1394.
- Hughes v. Bank of Somerset, 5 Litt. (Ky.) 45. §§ 518, 531, 532, 1849, 1852, 1853, 4354, 5046, 6600.
- Hughes v. Craven County Commrs, 107 N. C. 598. § 2796.
- Hughes v. Farmers' & C. Asso., 20 Pa. St. 327. § 5690.
- Hughes v. First Nat. Bank, 110 Pa. St. 423. § 5303.
- Hughes v. Heiser, 1 Binu. (Pa.) 463. § 6359.
- Hughes v. McAlister, 15 Mo. 296. § 5246.
- Hughes v. Parker, 19 N. H. 181. § 730.
- Hughes v. Parker, 20 N. H. 58. §§ 701, 764, 3363, 3897.
- Hughes v. Vermont Copper Min. Co., 72 N. Y. 207. § 2233.
- Hughesdale Man. Co. v. Vanner, 12 R. I. 491. § 40.
- Huguenin v. Baseley, 14 Ves. 273. §§ 1462, 6323.
- Huguenot Bank v. Studwell, 74 N. Y. 621. § 6740.
- Huguenot Nat. Bank v. Studwell, 6 Daly (N. Y.), 13. § 3851.
- Huiskamp v. Moline Wagon Co., 121 U. S. 310. § 6951.

- Hulbert v. Hope Mut. Ins. Co., 4 How. Pr. (N. Y.) 275. § 7529.
- Hulett's Case, 2 Johns. & H. 306, 313. § 5297.
- Hull v. Burris, 90 Ill. 213. §§ 3170, 3224.
- Hull v. Glover, 126 Ill. 122. §§ 4946, 5316, 5323.
- Hull & Co. R. Co., Re, 40 Ch. Div. 119. §§ 6151, 5888.
- Hull Flax and Cotton Mill Co. v. Wellesby, 6 Hurl. & N. 38. § 1883.
- Hulse v. Wright, Wright (Ohio), 61. § 6839.
- Humber Iron Works Co., Re, L. R. 3. Eq. 122. §§ 3737, 3738.
- Humbert v. Trinity Church, 24 Wend. (N. Y.) 587. § 7837.
- Humble v. Langston, 7 Mees. & W. 517. § 3301.
- Humble v. Mitchell, 11 A. d. & E. 205. §§ 1037, 1058.
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- Humboldt Safe Deposit & Co., Estate of, 3 Pa. County Ct. 621. § 7042.
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- Hume v. Pittsburgh & C. R. Co., 8 Biss. (U. S.) 31. § 7485.
- Hume v. Winyaw & Co., 1 Car. L. J. 217. §§ 2927, 3405, 3429.
- Humes v. Missouri Pacific R. Co., 82 Mo. 221. §§ 592, 5504.
- Hummel v. Bank of Monroe, 75 Iowa, 689. § 4821.
- Humphreysville v. Sterling, 1 West. L. Monthl. 126. § 5638.
- Humphrey, Ex parte, 10 Wend. (N. Y.) 612. § 3916.
- Humphrey v. Jones, 71 Mo. 62. § 5033.
- Humphrey v. Merriam, 46 Minn. 413. § 2737.
- Humphrey v. Mooney, 1 Colo. Law Rep. 193. § 2963.
- Humphrey v. Patron's Mercantile Asso., 50 Iowa, 607. §§ 5303, 5705, 5976, 6016, 6019.
- Humphrey v. Pegues, 16 Wall. (U. S.) 244. § 5570.
- Humphrey v. St. Louis & C. R. Co., 37 Fed. Rep. 307. § 5888.
- Humphreys v. Allen, 100 Ill. 511. §§ 6257, 6258, 7168, 7181.
- Humphreys v. Atlantic Milling Co., 98 Mo. 512. § 7820.
- Humphreys v. Hopkins, 81 Cal. 551. §§ 7335, 7337, 7358, 7341.
- Humphreys v. McKissack, 140 U. S. 304. § 5096.
- Humphreys v. Mears, 1 Man. & Ry. 187. § 6363.
- Humphreys v. Mooney, 5 Colo. 282. §§ 218, 507, 696, 2976.
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- Humphreys v. Newport News & Co., 33 W. Va. 135. § 7426.
- Humphries v. Cousins, 2 C. P. Div. 239. § 6310.
- Humphries v. Johnson, 20 Ind. 190. § 6379.
- Hun v. Cary, 69 How. Pr. (N. Y.) 426; affirmed, 82 N. Y. 65. §§ 4104, 4106, 4108, 4109, 4127.
- Hundhausen v. Bond, 36 Wis. 29. § 6373.
- Hungerford's Bank v. Potsdam & C. R. Co., 10 Abb. Pr. (N. Y.) 24. § 6948.
- Hungerford Nat. Bank v. Van Nostrand, 103 Mass. 559. §§ 524, 7665.
- Hunnehan v. Fire District, 37 Vt. 40. §§ 7401, 7678.
- Hunnewell v. Duxbury, 154 Mass. 286. 4242.
- Hunnewell v. Duxbury, 157 Mass. 1. § 4146.
- Hunt's Case, 32 Beav. 387. § 1520.
- Hunt's Case, 37 L. J. (Ch.) 278. § 4031.
- Hunt v. Columbian Ins. Co., 55 Me. 290. §§ 6755, 7334, 7335.
- Hunt v. Hewitt, 71 Ex. 236. § 4428.
- Hunt v. Hunter, 29 Eng. L. & Eq. 195. § 7622.
- Hunt v. Jackson, 5 Blatchf. (U. S.) 349. § 7339.
- Hunt v. Kansas-Missouri Bridge Co., 11 Kan. 4125. §§ 219, 528, 1332, 1742, 1853.
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- Hunt v. School District No. 20, 14 Vt. 300 (1842). §§ 709, 710.
- Hunt v. State, 22 Tex. App. 398. §§ 631, 637.
- Hunt v. St. Louis & C. R. Co., 91 Mo. 255. § 6377.
- Hunt v. Van Alstyne, 25 Wend. 605. §§ 632, 4629.
- Hunter v. Burnsville Turp. Co., 56 Ind. 213. §§ 613, 5519, 5916, 5931, 5932.
- Hunter v. Chandler, 45 Mo. 452. § 4708.
- Hunter v. Field, 20 Ohio, 340. § 7590.
- Hunter v. Hudson River Iron Co., 20 Barb. (N. Y.) 493, 507. § 6321.
- Hunter v. Hunter, 50 Mo. 445, 452. § 4128.
- Hunter v. Kirk, 4 Hawks (N. C.), 277. § 3363.
- Hunter v. Parker, 7 Mees. & W. 522. § 5295.
- Hunter v. Roberts & Co., 83 Mich. 63. § 2128.
- Hunter v. Sandy Hill, 6 Hill (N. Y.) 407. § 5776.
- Hunter v. Stoneburner, 92 Ill. 75, 79. § 3363.
- Hunter v. Sun Mut. Ins. Co., 26 La. An. 13. § 3851.
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- Huntington v. Attrill, 118 N. Y. 365; affirmed, 42 Hun (N. Y.), 459. §§ 4244, 4246, 4343, 4851.
- Huntington v. Attrill, 146 U. S. 657. §§ 3050, 3052, 4166, 4241, 4242.
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- Huntington v. Savings Bank, 96 U. S. 388. §§ 682, 2928, 2952, 5638, 6710.
- Huntington v. Texas, 16 Wall. (U. S.) 402. § 6080.
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- Huntley v. Merrill, 32 Barb. (N. Y.) 626. §§ 5880, 7952, 7970.
- Huntville v. Phelps, 27 Ala. 58. §§ 849, 1040, 1041.
- Huntzinger v. Brook, 3 Grant Cas. (Pa.) 243. § 5437.
- Hurd v. Elizabeth, 41 N. J. L. 1. §§ 7337, 7339, 7341.
- Hurd v. Tallman, 60 Barb. (N. Y.) 272. §§ 1569, 2951, 3566, 3762.
- Hurlbut v. Britain, 2 Doug. (Mich.) 191. §§ 505, 506, 654, 5852.
- Hurlbut v. Carter, 21 Barb. (N. Y.) 221. §§ 6466, 6470, 6514.
- Hurlbut v. Marshall, 62 Wis. 590. §§ 3350, 6839.
- Hurlbut v. Taylor, 62 Wis. 607, 614. § 3186.
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- Hurst v. Coe, 30 W. Va. 158. §§ 6563, 6688, 6694.
- Hurst v. Meason's Estate, 4 Watts (Pa.), 346. § 1036.
- Hurst v. New York Produce Exchange, 100 N. Y. 605. §§ 849, 851, 893, 913, 922.
- Hurt v. Clarke, 56 Ala. 19. § 6951.
- Hurt v. Salisbury, 55 Mo. 310. §§ 239, 240, 417, 419, 2975.
- Hurtado v. California, 110 U. S. 516. § 5449.
- Huse v. Ames, 104 Mo. 91. § 6481.
- Huse v. Glover, 119 U. S. 542. § 8133.
- Husky v. Maples, 2 Coldw. (Tenn.) 25. § 3774.
- Huss v. Central R. & Co. Co., 66 Ala. 472. § 7841.
- Hussey v. Bank, 10 Pick. (Mass.) 415. § 2781.
- Hussey v. Gallagher, 61 Ga. 86. §§ 850, 1047.
- Hussey v. M. & M. Bank, 10 Pick. (Mass.) 415. § 2471.
- Hussey v. Norfolk & C. R. Co., 98 N. C. 34. §§ 6279, 6228, 6312.
- Huston's Appeal, 127 Pa. St. 620. §§ 1892, 4465, 7043.
- Huston v. Mitchell, 14 Serg. & R. (Pa.) 307. § 4943.
- Hutchins v. Byrnes, 9 Gray (Mass.), 367. §§ 5078, 5089, 5090, 5098, 5176.
- Hutchins v. Johnson, 12 Conn. 276. §§ 3363, 7507.
- Hutchins v. New England Coal Co., 4 Allen (Mass.) 530. §§ 691, 3046, 3062.
- Hutchins v. Olcott, 4 Vt. 549. § 1220.
- Hutchins v. Smith, 46 Barb. (N. Y.) 235. § 1337.
- Hutchins v. State Bank, 12 Met. (Mass.) 421. §§ 2331, 3231, 3217.
- Hutchinson v. Boston Gas Light Co., 122 Mass. 215. § 6358.
- Hutchinson v. Green, 91 Mo. 367. §§ 6466, 6468, 6473.
- Hutchinson v. Lawrence, 67 How. Pr. (N. Y.) 38. §§ 881, 882, 886, 914.
- Hutchinson v. Lord, 1 Wis. 286. § 6477.
- Hutchinson v. Massarene, 2 Ball & B. 49. § 4369.
- Hutchinson v. Sidney, 28 Eng. L. & Eq. 472. § 4069.
- Hutchinson v. Taylor, 6 Heisk. (Tenn.) 634. § 7371.
- Hutchinson v. Western & C. R. Co., 6 Heisk. (Tenn.) 634. § 6281.
- Hutchison v. Symons, 67 N. C. 156. § 3520.
- Hulson v. New York, 9 N. Y. 163; 5 Sandf. (N. Y.) 289. §§ 6363, 6442.
- Hutt v. Gies, 12 Mees. & W. 492. § 1736.
- Hutton v. Scarborough Hotel Co., 2 Dr. & Sm. 514. § 2244.

Hutton—Ingraham TABLE OF CASES CITED.

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Hutton v. Uphill, 2 H. L. Cas. 674, 691. §§ 421, 426, 1903.
Hutzel v. Lord, 64 Md. 534. § 3303.
Huxley v. Hartzell, 44 Mo. 370. § 2460.
Huyett v. Philadelphia & C. R. Co., 23 Pa. St. 373. §§ 6343, 6346.
Huyler v. Oregon Cattle Co., 40 N. J. Eq. 392; 42 N. J. Eq. 139. § 4416.
Hyams v. Case, 1 De Gex. F. & J. 75. § 3256.
Hyams v. Webster, L. R. 4 Q. B. 138; affirming L. R. 2 Q. B. 264; 8 Best & S. 272. § 6373.
Hyatt v. Allen, 56 N. Y. 553. §§ 2172, 2173, 2185, 2731.
Hyatt v. Esmond, 37 Barb. (N. Y.) 601. §§ 89, 5275.
Hyatt v. McMahon, 25 Barb. (N. Y.) 457. §§ 67, 88, 69, 5409, 5411.
Hyatt v. Rondout, 44 Barb. (N. Y.) 385; affirmed, 41 N. Y. 619. §§ 6363, 6442.
Hyatt v. Whipple, 37 Barb. (N. Y.) 595. §§ 89, 5275.
Hyde v. Doe, 4 Sawy. (U. S.) 133. §§ 240, 279, 5388.
Hyde v. Goodnow, 3 N. Y. 266. §§ 5861, 7952, 7970.
Hyde v. Larkin, 35 Mo. App. 365. §§ 4622, 4644, 5221, 5306, 5303, 5310.
Hyde v. Lynde, 4 N. Y. 387. §§ 3562, 6945, 7249, 7250.
Hyde v. Stone, 20 How. (U. S.) 170. § 7467.
Hyde Park v. Oakwoods Cemetery Asso., 119 Ill. 141. §§ 651, 5592.
Hyde Park Gas Co. v. Kerber, 5 Ill. App. 132. § 6827.
Hyde's Ferry Turnp. Co. v. Davidson County, 91 Tenn. 291. §§ 5399, 5400.
Hyman v. Coleman, 82 Cal. 650. §§ 1992, 2018, 3117, 3343, 3360.
Hynes v. Aydelott, 26 Ind. 431. § 586.
Hynson v. Dunn, 5 Ark. 395. § 1430.
Iasigi v. Chicago & C. R. Co., 129 Mass. 46. §§ 2500, 2549.
Iba v. Hannibal & C. R. Co., 45 Mo. 469. §§ 6286, 6578.
Ibbotson v. Elam, L. R. 1 Eq. 188. § 2208.
Iglehart v. Bierce, 36 Ill. 133. §§ 6379, 6983, 7336, 7339.
Ile's Case, Ventr. 143, 153. § 829.
Ilfacombe R. Co. v. Devon & C. R. Co., L. R. 2 Com. P. 15. §§ 3357.
Ilidge v. Goodwin, 5 Car. & P. 190. § 1476.
Illinois v. Illinois Cent. R. Co., 33 Fed. Rep. 730, 734. § 5440.
Illinois & C. Canal v. Chicago & C. R., 14 Ill. 314. §§ 5399, 5615.
Illinois & C. R. Co. v. Beers, 27 Ill. 185, 189. §§ 86, 1207.
Illinois & C. R. Co. v. Bloomington, 76 Ill. 447. § 1013.
Illinois & C. R. Co. v. Chicago & C. R. Co., 26 Fed. Rep. 477. § 7477.
Illinois & C. R. Co. v. Cook, 29 Ill. 237. § 343.
Illinois & C. R. Co. v. Downey, 83 Ill. 259. §§ 6275, 6298, 6301.
Illinois & C. R. Co. v. Hammer, 72 Ill. 347. §§ 6276, 6387.
Illinois & C. R. Co. v. Illinois, 108 U. S. 541; affirming 95 Ill. 313. § 5637.
Illinois & C. R. Co. v. Illinois, 146 U. S. 387. § 3564, 5381, 5382 5440, 5569.
Illinois & C. R. Co. v. Irvin, 72 Ill. 452. § 5574.
Illinois & C. R. Co. v. Johnson, 40 Ill. 36. § 5070.
Illinois & C. R. Co. v. Kanouse, 39 Ill. 272. § 5884.
Illinois & C. R. Co. v. Kennedy, 24 Ill. 319. §§ 7511, 7545.
Illinois & C. R. Co. v. McCullough, 59 Ill. 166. § 243.
Illinois & C. R. Co. v. McLean County, 17 Ill. 291. § 6574.
Illinois & C. R. Co. v. People, 84 Ill. 426. § 6799.
Illinois & C. R. Co. v. People, 108 U. S. 541. §§ 5530, 5539.
Illinois & C. R. Co. v. Read, 37 Ill. 484. §§ 6276, 6298, 6303.
Illinois & C. R. Co. v. Rucker, 14 Ill. 353. § 5642.
Illinois & C. R. Co. v. Thompson, 116 Ill. 159. § 7392.
Illinois & C. R. Co. v. Wade, 140 U. S. 65. § 3691.
Illinois & C. R. Co. v. Welch, 52 Ill. 183. § 6380.
Illinois & C. R. Co. v. Whipple, 22 Ill. 105. § 5854.
Illinois & C. R. Co. v. Whittemore, 43 Ill. 420, 423. § 1022.
Illinois & C. R. Co. v. Williams, 27 Ill. 48. § 7337.
Illinois & C. R. Co. v. Zimmer, 20 Ill. 654. §§ 60, 73, 77, 86, 1224.
Illinois & C. Soc. v. Baldwin, 86 Ill. 479. § 881.
Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 243. § 73.
Illinois Hospital v. Higgins, 15 Ill. 185. § 7589.
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Illion Bank v. Carver, 31 Barb. (N. Y.) 230. § 7333.
Isley v. Jewett, 2 Met. (Mass.) 168. § 3821.
Imboden v. Etowah & Battle Branch & C. Min. Co., 70 Ga. 36, 103. § 7748.
Imlay v. Ellesen, 2 East, 453. § 6211.
Imperial Bank, Re, L. R. 1 Ch. App. 339. §§ 6688.
Imperial Gas Co. v. Clarke, 7 Bing. 95. § 4423.
Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. Div. 1. §§ 3854, 7784.
Imperial Mercantile Credit Asso. v. Coleman, L. R. 6 H. L. 189; reversing L. R. 6 Ch. 558. §§ 4009, 4022, 4024, 4032.
Imperial Refining Co. v. Wyman, 38 Fed. Rep. 574. §§ 7664, 7665, 7666.
Importers' & Exchange, Re, 8 N. Y. Supp. 322. § 6692.
Importers & Grocers' Exchange, Re, 28 N. Y. St. Rep. 416. § 6686.
Importing Co. of Georgia v. Locke, 50 Ala. 332. §§ 6598, 7480.
Ince, Re, 20 L. T. (N. S.) 421. § 7738.
Ince Hall Rolling Mill Co., Re, 23 Ch. Div. 545. § 5048.
Inchbald v. Western Milgherry Coffee Co., 17 C. B. (N. S.) 133. § 6688.
Ind's Case, L. R. 7 Ch. 485. §§ 33, 3194, 3283, 3304.
Independent Ins. Co., Re, 1 Holmes (U. S.), 103. § 6670.
Independence v. Jekel, 38 Iowa, 427. § 4376.
Inderwick v. Snell, 2 Hall & T. 412; 14 Jur. 727; 19 Law J. Ch. 542; 2 Macn. & G. 216. §§ 826, 872.
Indiana v. Woram, 6 Hill (N. Y.), 33. §§ 6016, 6018, 7372.
Indiana & C. R. Co. v. Davis, 20 Ind. 6. §§ 5124, 5763.
Indiana & C. R. Co. v. Eberle, 110 Ind. 542. § 6373.
Indiana & C. R. Co. v. McKernan, 24 Ind. 62. §§ 2656, 2681.
Indiana & C. R. Co. v. Potts, 7 Ind. 681. § 622.
Indiana & C. Turnp. Road v. Phillips, Penr. & W. (Pa.) 184. §§ 67, 72, 75, 82, 1281, 1247.
Indiana Central R. Co. v. Bradley, 7 Ind. 49. § 7754.
Indianapolis v. Gaslight Co., 66 Ind. 396. § 1013.
Indianapolis v. Huegle, 115 Ind. 581. § 611.
Indianapolis & C. Mining Co. v. Herkimer, 46 Ind. 142. §§ 239, 1868, 7668, 7675.
Indianapolis & C. R. Co. v. Anthony, 43 Ind. 183. § 6277.
Indianapolis & C. R. Co. v. Holmes, 101 Ind. 352. § 1355.
Indianapolis & C. R. Co. v. Horst, 93 U. S. 291, 299. § 8029.
Indianapolis & C. R. Co. v. Hyde, 122 Ind. 188. § 4664.
Indianapolis & C. R. Co. v. Jewett, 16 Ind. 273. § 7747.
Indianapolis & C. R. Co. v. Jones, 29 Ind. 465. §§ 365, 372, 399, 406.
Indianapolis & C. R. Co. v. Kercheval, 16 Ind. 84. §§ 5433, 5470.
Indianapolis & C. R. Co. v. Morganstern, 103 Ill. 149. § 5105.
Indianapolis & C. R. Co. v. Morris, 67 Ill. 295. § 4984.
Indianapolis & C. R. Co. v. Powell, 40 Ind. 37. § 405.
Indianapolis & C. R. Co. v. Ray, 51 Ind. 269. § 7154.
Indianapolis & C. R. Co. v. Townsend, 10 Ind. 38. §§ 70, 5594.
Indianapolis Cable Street R. Co. v. Citizens' Street R. Co., 127 Ind. 369. §§ 5345, 5348, 5399, 5400.
Indianapolis Rolling-Mill Co. v. St. Louis & C. R. Co., 26 Fed. Rep. 140. § 4613.
Indianapolis Rolling Mill Co. v. St. Louis & C. R. Co., 120 U. S. 256. §§ 4622, 4637, 4972, 5300, 5301, 5318.
Indianapolis Sun Co. v. Horrell, 53 Ind. 527. § 7658.
Indianola R. Co. v. Fryer, 56 Tex. 96, 117. § 343.
Indianola R. Co. v. Fryer, 56 Tex. 609. §§ 395, 402.
Ingalls v. Cole, 47 Me. 530. §§ 2031, 3016, 3172, 3383, 3760, 3833, 3839.
Ingalls v. Morgan, 10 N. Y. 178. § 5200.
Ingersoll v. Cooper, 5 Blackf. (Ind.) 426. § 6979.
Inglish v. Great Northern R. Co., 1 Macq. 112. § 1784.
Ingraham v. Dunnell, 5 Met. (Mass.) 118. § 7777.
Ingraham v. Taylor, 58 Conn. 503. § 2707.
Ingraham v. Terry, 11 Humph. (Tenn.) 572. § 7720.

TABLE OF CASES CITED. Inhabitants—Jackson

- Inhabitants v. McCormick**, 3 N. J. L. 500. § 7597.
Inhabitants v. New York & C. R. Co., 45 N. J. Eq. 436. § 5505.
Inhabitants v. String, 10 N. J. L. 323. §§ 234, 7597.
Inhoff v. House, 36 Neb. 28. § 4689.
Inman v. Allport, 65 Ill. 540. § 7559.
Innell v. Newman, 4 Barn. & Ald. 419. § 7599.
Innervity v. Merchants' Nat. Bank, 139 Mass. 332. §§ 5204, 5205, 5209.
Inness v. Wylie, 1 Car. & K. 257. §§ 810, 846, 881, 893, 926.
Insane Hospital v. Higgins, 15 Ill. 185. § 290.
Instone v. Frankfort Bridge Co., 2 Bibb (Ky.), 576. §§ 1039, 1138, 1185, 1550, 1794, 1794, 1823, 7681.
Insurance Co. v. Brune, 96 U. S. 588. § 6211.
Insurance Co. v. Connor, 17 Pa. St. 136. § 5988.
Insurance Co. v. Dunn, 19 Wall. (U. S.) 214. §§ 4756, 7464.
Insurance Co. v. Francis, 11 Wall. (U. S.) 210. §§ 1834, 7450, 7456, 7458, 7875, 7898.
Insurance Co. v. Friedman, 74 Tex. 56. §§ 7811, 7820.
Insurance Co. v. Goodfellow, 9 Mo. 150. § 2593.
Insurance Co. v. Insurance Co., 10 Md. 517. § 5221.
Insurance Co. v. Leslie, 47 Ohio St. 409. § 6491.
Insurance Co. v. McLimans, 28 Neb. 653. §§ 7429, 7431.
Insurance Co. v. Morse, 20 Wall. (U. S.) 445. §§ 1034, 7457, 7466.
Inter-Mountain Pub. Co. v. Jack, 5 Mont. 568. §§ 1167, 1895.
International & C. Asso. v. Walker, 83 Mich. 326; 88 Mich. 62. § 2988.
International & C. R. Co. v. Brazil, 78 Tex. 314. § 6378.
International & C. R. Co. v. Bremond, 53 Tex. 96. §§ 352, 353, 354.
International & C. R. Co. v. Eckford, 71 Tex. 274. § 5355.
International & C. R. Co. v. Garcia, 70 Tex. 207. § 6387.
International & C. R. Co. v. Kuehn, 70 Tex. 582. §§ 5555, 5884.
International & C. R. Co. v. Ormond, 62 Tex. 274. § 7149.
International & C. R. Co. v. State, 75 Tex. 356. § 6807.
International & C. R. Co. v. Underwood, 67 Tex. 589. § 5880.
International Bank v. Franklin Co., 65 Mo. 105. § 5948.
International Ins. Co. v. Davenport, 57 Mo. 289. § 3729.
International Life & C. Soc. v. Commissioners, 28 Barb. (N. Y.) 318. §§ 8033, 8094, 8095.
International Life Assurance Co. v. Sweetland, 14 Abb. Pr. (N. Y.) 240. § 7891.
International Nav. Co. v. Comm., 104 Pa. St. 38. § 8104.
International Pulp & C. Co., Re, 6 Ch. Div. 556. § 6152.
International Trust Co. v. International Loan & Trust Co., 153 Mass. 271. § 7903.
International Wrecking Co. v. McMorran, 73 Mich. 467. §§ 5221, 5649.
Interstate Commerce Commission v. Brimson, 154 U. S. 447. § 5459.
Interstate Tel. Co. v. Baltimore & C. Tel. Co., 51 Fed. Rep. 49. § 5846.
Intire v. Calhoun, 27 Mo. App. 513. § 7678.
Iowa & C. R. v. Blibenes, 41 Iowa, 267. § 1354.
Iowa & C. R. Co. v. Perkins, 28 Iowa, 281. §§ 1923, 1929.
Iowa & C. R. Co. v. Soper, 39 Iowa, 116. § 592.
Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. Rep. 123. §§ 4140, 7783.
Iowa Economic Heater Co. v. American Economic Heater Co., 32 Fed. Rep. 735. § 6328.
Iowa Loan & Trust Co. v. Day, 63 Iowa, 459. § 6857.
Iowa Lumber Co. v. Foster, 49 Iowa, 25. § 2061.
Ireland v. Atchison & C. R. Co., 79 Mo. 572. § 7758.
Ireland v. Oswego & Plank Road Co., 13 N. Y. 526. § 6358.
Ireland v. Palestine & C. Turnp. Co., 19 Ohio St. 369. §§ 1271, 1298, 3032, 3038.
Irish v. Webster, 5 Me. 171. § 7590.
Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498. §§ 7769, 7989.
Iron City Bank v. Pittsburgh, 37 Pa. St. 340. § 5569.
Iron Clay Brick Man. Co., Re, 33 Am. & Eng. Corp. Cas. 277; 19 Ont. Rep. 113. §§ 4071, 4073.
Iron City Nat. Bank v. Siemens-Anderson Steel Co., 14 Fed. Rep. 150. § 7849.
Iron Cliffs Co. v. Lahais, 52 Mich. 394. § 8080.
Iron Co. v. Erie, 41 Pa. St. 341. § 5817.
Iron Mountain & C. R. Co. v. Johnson, 119 U. S. 603. § 7399.
Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505. §§ 6312, 6314.
Iron Mountain Bank v. Murdoch, 62 Mo. 70, 77. § 5301.
Iron R. Co. v. Fink, 41 Ohio St. 321. § 2425.
Irons v. Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301. §§ 6555, 7262, 7263, 7271.
Irons v. Manufacturers' Nat. Bank, 17 Fed. Rep. 308. §§ 3258, 3520, 7284, 7292.
Irons v. Manufacturers' & C. Bank, 21 Fed. Rep. 197. § 3104.
Irons v. Manufacturers' Nat. Bank, 27 Fed. Rep. 591. §§ 3284, 3771, 7292.
Irvin v. Turnp. Co., 2 Penr. & W. (Pa.) 466. §§ 84, 2247.
Irvin v. Lowry, 14 Pet. (U. S.) 293. §§ 7447, 8064.
Irvin v. Lumbermen's Bank, 2 Watts & S. (Pa.) 190. §§ 6598, 6600.
Irvin v. McKee, 23 Cal. 472. §§ 4164, 4173, 4211, 4265, 5271.
Irvin v. Stone, 6 Cush. (Mass.) 508. § 1048.
Irvin v. Turnp. Co., 2 Penr. & W. (Pa.) 466, 474. §§ 72, 74, 77, 82.
Irvin v. Union Bank of Australia, 2 App. Cas. 366. § 5701.
Irving v. Houstoun, 4 Pat. Sc. App. 521. § 2213.
Irving Bank v. Corbett, 10 Abb. N. Cas. (N. Y.) 85. § 7661.
Irving Bank v. Wetherald, 36 N. Y. 335. §§ 4815, 4816.
Irwin v. Bailey, 8 Biss. (U. S.) 523. §§ 4621, 4638, 4639.
Irwin v. Bailey, 8 Reporter. 421. § 4633.
Irwin v. Fowler, 5 Rob. (N. Y.) 482. § 1476.
Irwin v. Tabb, 17 Serg. & R. (Pa.) 419. § 6153.
Irwin v. Willmar, 110 U. S. 499, 510. § 6409.
Isaac v. Clark, 2 Bulstr. 306. § 2619.
Isaacs Case [1892], 2 Ch. 158. § 3656.
Isaac v. Third Ave. R. Co., 47 N. Y. 122. §§ 6301, 6308.
Isam v. Bennington Iron Co., 19 Vt. 230. §§ 3231, 3317, 5089, 5096.
Isam v. Buckingham, 49 N. Y. 216. § 3289.
Island City Sav. Bank v. Sachtleben, 67 Tex. 420. §§ 6547, 6548.
Ise Royal Land Corp. v. Secretary of State, 76 Mich. 162. §§ 7902, 7933.
Isom v. Mississippi & C. R. Co., 36 Miss. 300. §§ 5624, 5626.
Israel v. Jewett, 29 Iowa, 475. § 5626.
Ithaca Gas Light Co. v. Treman, 30 Hun (N. Y.), 212. § 4504.
Ives v. Citizens' Bank, 15 La. An. 83. § 2934.
Ives v. Smith, 3 N. Y. Supp. 645; affirmed 55 Hun (N. Y.), 606; 8 N. Y. Supp. 46. §§ 4473, 4480, 5306, 7904, 7907.
Iveson v. Moore, 1 Ld. Raym. 486. §§ 6373, 7781.
Ivory v. Cox, Pr. Ch. 71. § 735.
Ivy v. Gilbert, 2 P. Wms. 20. § 4369.
Jacks v. Helena, 41 Ark. 213. §§ 1296, 1317, 1344.
Jackson, Ex parte, 1 Ves. Jr. 131. § 431.
Jackson v. Bank, 9 Leigh (Va.), 240. § 7665.
Jackson v. Blodgett, 5 Cow. (N. Y.) 202. § 4190.
Jackson v. Brinkerhoff, 3 Johns. Cas. (N. Y.) 191. § 1500.
Jackson v. Brown, 5 Wend. (N. Y.) 590. §§ 3985, 5107, 6131, 6132, 6133.
Jackson v. Campbell, 5 Wend. (N. Y.) 572. §§ 4718, 5106, 5107.
Jackson v. Claw, 18 Johns. (N. Y.) 346. § 4771.
Jackson v. Cory, 8 Johns. (N. Y.) 385. § 5114.
Jackson v. Croy, 12 Johns. (N. Y.) 427. § 1568.
Jackson v. Delancey, 4 Cow. (N. Y.) 427. § 6195.
Jackson v. Donally, 3 Johns. (N. Y.) 229. § 7740.
Jackson v. Grant, 18 N. J. Eq. 145. § 2723.
Jackson v. Green, 4 Johns. (N. Y.) 181. § 6189.
Jackson v. Griswold, 4 Hill (N. Y.) 522, 523. § 3396.
Jackson v. Hartwell, 8 Johns. (N. Y.) 422. §§ 5810, 5835.
Jackson v. Hathaway, 15 Johns. (N. Y.) 447. § 5627.
Jackson v. Jackson, 16 Ohio St. 163, 168. §§ 6374, 7406.
Jackson v. Jackson, 1 Sm. & Giff. 184. § 7754.

- Jackson v. Lahee**, 114 Ill. 287. § 7060.
Jackson v. Lamphire, 3 Pet. (U. S.) 280. § 3036.
Jackson v. Leaf, 1 Jac. & Walk. 229. § 7031.
Jackson v. Leggett, 7 Wend. (N. Y.) 377. § 1942.
Jackson v. Ludeling, 21 Wall. (U. S.) 616. §§ 275, 4012, 4041, 4150, 5222.
Jackson v. McLean, 36 Fed. Rep. 213. § 4053.
Jackson v. Meek, 87 Tenn. 69, 71. §§ 2929, 3155, 3159, 3159, 3225, 3351.
Jackson v. Newark Plank-road Co., 31 N. J. L. 277. § 4455.
Jackson v. New York & Co. R. Co., 2 Hun (N. Y.), 653. § 5176.
Jackson v. North Wales, 13 Jur. 69. § 5297.
Jackson v. Parkhurst, 4 Wend. (N. Y.) 369. § 6189.
Jackson v. Phillips, 14 Allen (Mass.), 539, 579. § 7774.
Jackson v. Plumb, 8 Johns. (N. Y.) 378. § 7665.
Jackson v. Portland, 63 Me. 55. § 6343.
Jackson v. Pratt, 10 Johns. (N. Y.) 381. § 5104.
Jackson v. Roberts, 31 N. Y. 304. §§ 7233, 7235, 7247.
Jackson v. Second Ave. R. Co., 47 N. Y. 274. §§ 6301, 6308.
Jackson v. Silgo & Co. Co., 1 Lea (Tenn.), 210. § 3221.
Jackson v. State, 50 Ala. 141. § 7936.
Jackson v. Traer, 64 Iowa, 469. §§ 1142, 1579, 1595, 1673.
Jackson v. Turquand, L. R. 4 H. L. 305. §§ 1417, 310.
Jackson v. Van Slyke, 44 Barb. (N. Y.) 116, note a. § 7233.
Jackson v. Walsh, 75 Md. 304. §§ 5327, 5336, 5103, 5411, 5417.
Jackson v. Walsh, 3 Johns. (N. Y.) 2261. §§ 1071, 5032, 5039, 5095, 5107, 7737.
Jackson v. York & Co. R. Co., 43 Me. 147. §§ 6064, 6107, 6109.
Jackson Ins. Co. v. Cross, 9 Heisk. (Tenn.) 213. §§ 4836, 4840.
Jackson Marine Ins. Co., Re, 4 Sandf. Ch. (N. Y.) 559. §§ 6618, 6619.
Jackson Mining Co. v. Auditor-General, 32 Mich. 488. § 8106.
Jacksonville v. Bassett, 20 Fla. 525. § 590.
Jacksonville v. McConnell, 12 Ill. 135. § 5638.
Jacobs v. Gibson, 9 Neb. 330. § 6823.
Jacobs v. Satorius, 3 La. An. 3. § 7508.
Jacobson v. Allen, 20 Blatchf. (U. S.) 525. § 3530.
Jacobson v. Landolt, 73 Wis. 142. § 6929.
Jacobus v. Munn, 37 N. J. Eq. 48. § 4022.
Jacobus v. Mutual Benefit Life Ins. Co., 27 N. J. Eq. 605. § 7039.
Jacoby v. Laussatt, 6 Serg. & R. (Pa.) 390. § 2471.
Jacques v. Chambers, 2 Coll. 435. § 206.
Jacques v. Golightly, 2 W. Va. 1073. §§ 5714, 5743.
Jagger Iron Co. v. Walker, 76 N. Y. 521. §§ 2018, 3117.
James, Ex parte, L. R. 8 Eq. 225. § 3799.
James, Ex parte, 8 Ves. Jr. 337. § 4022, 4024.
James v. Cincinnati & Co. R. Co., 2 Disney (Ohio), 231. § 2357.
James v. Cowing, 92 N. Y. 449. §§ 6223, 6224.
James v. Dora, 2 Dick. 788. § 7026.
James v. Hamilton, 5 Thomp. & C. (N. Y.) 183; 2 Hun (N. Y.), 630. § 2732.
James v. May, L. R. 6 H. L. 328. § 3196.
James v. Pontiac & Co. Plank Road Co., 8 Mich. 91. § 7857.
James v. Rogers, 23 Ind. 451. § 5745.
James v. St. Louis R. Co., 46 Fed. Rep. 47. §§ 7451, 7890, 7892.
James v. Stratton, 32 Ill. 202. § 1034.
James v. Stull, 9 Barb. (N. Y.) 482. § 5437.
James v. Tutney, Cro. Car. 497. § 7624.
James v. Woodruff, 10 Paige (N. Y.), 541. §§ 2308, 2313, 2710.
James River & Co. Co. v. Thompson, 3 Gratt. (Va.) 270. § 5615.
James River & Co. Co. v. Turner, 9 Leigh (Va.), 313. § 5626.
Jameson v. Coldwell, 23 Or. 144. § 5650.
Jameson v. People, 16 Ill. 257, 259. §§ 512, 513.
Jamison v. Burlington & Co. R. Co., 69 Iowa, 670. § 6760.
Jamison v. Griswold, 2 Mo. App. 150. § 6013.
Janesville & Co. Co. v. Stoughton, 1 Pinney (Wis.), § 5638, 667.
Jansen v. Ostrander, 1 Cow. (N. Y.) 670, 681. §§ 8, 7133.
Jarbee v. Steamboat, 19 Mo. 141. § 7495.
Jarrard v. State, 116 Ind. 98. § 611.
Jarrett v. Kennedy, 6 C. B. 318. §§ 1460, 1462.
Jarvis v. Manhattan Beach Co., 6 N. Y. Supp. 703; 53 Hun (N. Y.), 362. §§ 1495, 2352, 4144.
Jarvis v. Mayor & Co. of New York, 2 N. Y. Leg. Obs. 386. § 820.
Jarvis v. Rogers, 13 Mass. 105. § 2636.
Jarvis v. Rogers, 15 Mass. 369. §§ 24, 0, 2636.
Jarvis v. Wilson, 46 Conn. 90. § 5154.
Jasper County v. Ballou, 103 U. S. 745. § 590.
Jassey v. Horn, 64 Ill. 379. § 3780.
Jay's Case, 1 Vent. 302. § 810.
Jay v. Long Island R. Co., 2 Daly (N. Y.), 401. § 7426.
Jay Bridge Corp. v. Woodman, 31 Me. 573. § 1783.
Jaycox, Re, 12 Blatchf. (U. S.) 209; 13 Blatchf. (U. S.) 70. § 4126.
Jecker v. Montgomery, 18 How. (U. S.) 110. § 1011.
Jefferson v. Burford (Ky.), 13 Ky. L. Rep. 607. § 2595.
Jefferson Branch Bank v. Skelly, 1 Black (U. S.), 436. § 5570.
Jefferson City v. Opel, 67 Mo. 394. § 3615.
Jefferson County v. Lewis, 20 Fla. 980. § 7756.
Jefferson Nat. Bank v. Texas Investment Co., 74 Tex. 421. § 5686.
Jeffersonville v. Louisville Ferry Co., 27 Ind. 100; 3 Ind. 19. § 6358.
Jeffersonville v. Patterson, 26 Ind. 15. §§ 6111, 6113.
Jeffersonville & Co. R. Co. v. Hendricks, 41 Ind. 43. § 405.
Jeffersonville & Co. R. Co. v. Rogers, 38 Ind. 116. § 6298.
Jeffersonville R. Co. v. Gabbert, 25 Ind. 431. § 5411.
Jeffersonville R. Co. v. Rogers, 28 Ind. 1. § 6383.
Jeffery v. Butler Paper Co., 37 Ill. App. 96. § 6506.
Jeffries v. McLean, 12 Mo. 538. § 7595.
Jeffries v. Wright, 51 Mo. 215. § 7507.
Jeffries Neck Pasture v. Ipswich, 153 Mass. 42. §§ 7366, 7693, 7697.
Jeffrys v. Gurr, 2 Barn. & Ald. 833. § 7058.
Jeffs v. York, 4 Oush. (Mass.) 371; 10 Oush. (Mass.) 392. §§ 2993, 5028, 5126.
Jelly v. Paradise Reduction Co., 15 N. Y. Civ. Proc. 86; 1 N. Y. Supp. 111. § 6854.
Jemison v. Citizens' Sav. Bank, 122 N. Y. 135; affirming 44 Hun (N. Y.), 412. §§ 5833, 5948.
Jemison v. Planters & Co. Bank, 17 Ala. 751. § 7761.
Jemison v. Planters & Co. Bank, 23 Ala. 168. § 5410.
Jenkins v. Andover, 103 Mass. 94. §§ 1115, 1117.
Jenkins v. Armour, 6 Biss. (U. S.) 312. § 1658.
Jenkins v. California Stage Co., 22 Cal. 537. §§ 7423, 7434.
Jenkins v. Hutchinson, 13 Ad. & El. (N. s.) 744. §§ 2939, 5028.
Jenkins v. Long, 19 Ind. 28. § 1430.
Jenkins v. Morris, 16 Mees. & W. 877. §§ 5126, 5171.
Jenkins v. Union Turnp. Co., 1 Gaines Cas. (N. Y.) 86. §§ 1039, 1216.
Jenner's Case, 7 Ch. Div. 132. § 4154.
Jennery v. Olmstead, 105 N. Y. 654. § 4389.
Jenny v. Delesdernier, 20 Me. 183. § 4943.
Jennings, Ex parte, 6 Cow. (N. Y.) 518. § 5601.
Jennings v. Baddeley, 3 Kay & J. 78. § 4547.
Jennings v. Bank of California, 79 Cal. 323. §§ 2322, 2333, 2337, 2594, 2626, 3243, 3245, 3248, 3250.
Jennings v. Broughton, 22 L. J. (Ch.) 635; 17 Jur. 905; 19 Eng. L. & Eq. 420. § 1335.
Jensen v. Union Pacific R. Co., 6 Utah, 253. § 5452.
Jermain v. Lake Shore & Co. R. Co., 91 N. Y. 483. §§ 2173, 2187.
Jermain v. Langdon, 8 Paige (N. Y.), 41. § 3405.
Jermain v. Worth, 5 Denio (N. Y.), 542. §§ 131, 7740.
Jerman v. Benton, 79 Mo. 149. §§ 3003, 3007, 3811.
Jerome v. McCarter, 94 U. S. 734. § 7171.
Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315. § 7771.
Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 212. § 1222.
Jersey City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq. 427. § 501.
Jersey City Gas Light Co. v. United Gas Imp. Co., 46 Fed. Rep. 264. § 2893.
Jervis v. Wolferstan, L. R. 18 Eq. 18. § 3324.
Jessamine v. Swigert, 3 S. W. Rep. 13. § 1131.
Jessell v. Bath, L. R. 2 Eq. 267. § 6332.
Jessopp's Case, 2 De Gex & J. 638. §§ 1515, 2054, 3255, 3256.
Jessup v. Bridge, 11 Iowa, 572. § 6149.
Jessup v. Hulse, 29 Barb. (N. Y.) 539. § 6177.

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Jester v. Spurgeon, 27 Mo. App. 477. § 1850.
Jesup v. Illinois & C. R. Co., 43 Fed. Rep. 483. §§ 4003, 4059, 4061, 4494, 4495, 7842.
Jetter v. New York & C. R. Co., 2 Keyes (N. Y.), 154. § 6362.
Jewell v. Grand Lodge, 41 Minn. 405. § 532.
Jewell v. Rock River Paper Co., 101 Ill. 57. §§ 1153, 1238, 1513, 1579, 1582, 1846, 3264.
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Jewett v. Miller, 10 N. Y. 402. § 7014.
Jewett v. Valley R. Co., 34 Ohio St. 601. §§ 1287, 1291, 1405, 1542.
Jewett v. Warren, 12 Mass. 300. § 2622.
Job v. Job, 6 Ch. Div. 562. § 2663.
Johannesburg Hotel Co., Re, 1 Ch. 119. §§ 1594, 1615.
Johansen v. Chaplin, Montreal L. Rep. 6 Q. B. 111. §§ 5721, 5722.
John v. Farmers' Bank, 2 Blackf. (Ind.) 367. §§ 501, 518, 529, 531, 1973, 5275, 5598, 6600.
John & Cherry Streets, Re, 19 Wend. (N. Y.) 659, 675. § 5627.
Johns v. Battin, 30 Pa. St. 84. § 5295.
Johns v. Johns, 1 Ohio St. 350. §§ 1066, 3231, 3317.
Johns v. State, 19 Ind. 421. § 323.
Johnson Ex parte, 31 Eng. L. & Eq. 430. §§ 4002, 4559.
Johnson v. Albany & C. R. Co., 40 How. Pr. (N. Y.) 192. §§ 1769, 2357.
Johnson v. Americus, 46 Ga. 80. § 7755.
Johnson v. Ames, 11 Pick. (Mass.) 172. § 7096.
Johnson v. Barber, 10 Ill. 425. § 6298.
Johnson v. Belden, 2 Kans. (N. Y.) 433; affirmed, 47 N. Y. 130. § 6363.
Johnson v. Bentley, 16 Ohio, 97. §§ 6598, 6600.
Johnson v. Brooks, 93 N. Y. 337. § 2728.
Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207. §§ 4971, 5091, 5098, 5106, 6601.
Johnson v. Catlin, 27 Vt. 87. § 7593.
Johnson v. Churewell, 1 Head (Tenn.), 146. § 4327.
Johnson v. Comm., 7 Dana (Ky.), 338. § 2828.
Johnson v. Corser, 34 Minn. 355. §§ 417, 436.
Johnson v. Cottingham Iron & C. Co., 8 Mo. App. 575. §§ 4003, 4559.
Johnson v. Crawfordville & C. R. Co., 11 Ind. 280. §§ 239, 1369, 1393, 1394, 1395, 1748, 1749, 1973.
Johnson v. Donnell, 15 Ill. 97. § 6243.
Johnson v. Evans, 7 Man. & G. 240. § 1084.
Johnson v. Farnum, 56 Ga. 144. § 6839.
Johnson v. Fischer, 30 Minn. 173. §§ 3020, 3467.
Johnson v. Gallagher, 3 DeGex, F. & J. 494. § 3275.
Johnson v. Georgia & C. R. Co., 81 Ga. 725. §§ 1345, 1350, 1354.
Johnson v. Gibson, 78 Ind. 282. § 7673.
Johnson v. Goslett, 18 C. B. (N. s.) 569. § 1205.
Johnson v. Goslett, 18 C. B. 728; 3 C. B. (N. s.) 569; 37 Eng. L. & Eq. 308. § 4359.
Johnson v. Griffin & Co., 55 Ga. 691. § 5720.
Johnson v. Hanover Nat. Bank, 88 Ala. 271. §§ 7671, 7672, 7675.
Johnson v. Higgins, 3 Met. (Ky.) 566. § 611.
Johnson v. Houghton, 19 Ind. 259. § 7184.
Johnson v. Imboden, 4 La. An. 178. § 7342.
Johnson v. Johnson, 70 Mich. 65. § 7738.
Johnson v. Johnson, 15 Jur. 714. § 2199.
Johnson v. Joliet & C. R. Co., 23 Ill. 202. § 588.
Johnson v. Jones, 2 Neb. 126. § 3363.
Johnson v. Kemp, 11 How. Pr. (N. Y.) 186. § 7659.
Johnson v. Kessler, 76 Iowa, 411. §§ 246, 1342.
Johnson v. Lullman, 15 Mo. App. 55; 88 Mo. 567. §§ 1535, 1583, 1634, 2934.
Johnson v. Lyttles Iron Agency, 5 Ch. Div. 687. § 1716, 1777.
Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504. § 6932.
Johnson v. Parker, 4 Bush (Ky.), 149. § 7337.
Johnson v. People, 4 Denio (N. Y.), 364. § 7713.
Johnson v. Philadelphia, 60 Pa. St. 445. § 1028.
Johnson v. Robinson, 20 Minn. 170. § 3531.
Johnson v. Shrewsbury & C. R. Co., 3 DeGex, M. & G. 914. §§ 5358, 5553.
Johnson v. Smith, 21 Conn. 627, 634. §§ 5028, 5126, 5132.
Johnson v. Somerville Dyeing Co., 15 Gray (Mass.), 216. § 3741.
Johnson v. Stark County, 24 Ill. 75. §§ 1118, 6064.
Johnson v. State, 88 Ala. 176. § 5338.
Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565; 65 Mo. 539, 542. § 6310.
Johnson v. Underhill, 52 N. Y. 203. §§ 2252, 2389, 3221, 3283, 3308.
Johnson v. Union Switch & C. Co., 129 N. Y. 653; 29 N. E. Rep. 964; affirming 13 N. Y. Supp. 612. § 4656.
Johnson v. Utica Water Works Co., 67 Barb. (N. Y.) 415. § 5589.
Johnson v. Wabash & C. Plank Road Co., 16 Ind. 389. §§ 1150, 1511, 1516, 1542, 1544.
Johnson v. Weed, 3 Johns. (N. Y.), 310. § 1220.
Johnson v. Wells County Commrs, 107 Ind. 15. § 540.
Johnston v. Berry, 3 Ill. App. 256, 259. § 5299.
Johnston v. Crawley, 25 Ga. 316. §§ 512, 5070.
Johnston v. Elizabeth Building & Loan Assn., 101 Pa. St. 394. § 4924.
Johnston v. Ewing Female University, 35 Ill. 518. §§ 1158, 1170.
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Johnston v. Jones, 23 N. J. Eq. 216. §§ 3878, 4525.
Johnston v. Keener, 23 Ill. App. 220. § 6995.
Johnston v. Laffin, 103 U. S. 800; affirming 5 Dill (U. S.) 65. §§ 2054, 2389, 2409, 2411, 2589, 3221, 3223, 3231, 3260, 3261, 3276, 3278, 4677.
Johnston v. Macon, 62 Ga. 645. § 1028.
Johnston v. Shortridge, 93 Mo. 227. § 5204.
Johnston v. Southwestern & Bank, 3 Strobb. Eq. (S. C.) 263. §§ 1232, 3063, 3485, 3684.
Johnston v. Spicer, 107 N. Y. 185. § 617.
Johnston v. Trade Ins. Co., 132 Mass. 432. § 8003, 8004.
Joint-Stock Discount Co.'s Case, 36 L. J. Eq. 150. §§ 4426, 4427.
Joint-Stock Discount Co.'s Claim, L. R. 7 Ch. 646. § 3771.
Joint-Stock Discount Co. v. Brown, L. R. 8 Eq. 381; L. R. 3 Eq. 139. §§ 469, 2054, 2057, 4019, 4093.
Joliet Electric Light Power Co. v. Ingalls, 23 Ill. App. 45. §§ 4622, 4630, 7361.
Joliet Iron v. Scioto Fire Brick Co., 82 Ill. 548 § 2664.
Jones Ex parte, 27 L. J. (Ch.) 665. § 3194.
Jones, Re, 41 Ch. Div. 159. § 3791.
Jones v. Arkansas Agricultural & C. Co., 38 Ark. 17. § 4071.
Jones v. Avery, 50 Mich. 326. § 3150.
Jones v. Baker, 7 Cow. (N. Y.) 445. § 4582.
Jones v. Bank, Breese (Ill.), 124. § 7645.
Jones v. Bank of Tennessee, 8 B. Mon. (Ky.) 122. §§ 518, 520, 5275, 5761, 7669.
Jones v. Barlow, 62 N. Y. 202; 6 Jones & Sp. (N. Y.) 142. §§ 2018, 3396, 4187, 4196, 4222, 4226, 4227, 4233, 4363.
Jones v. Canada Central R. Co., 46 Up. Can. Q. B. 250. § 274.
Jones v. Cincinnati Type Foundry Co., 14 Ind. 89. §§ 518, 529, 5151, 7665, 7669.
Jones v. Clayton, 4 Maule & S. 349. § 3072.
Jones v. Commercial Bank, 5 How. (Miss.) 43. §§ 3363, 7507.
Jones v. Cox, 7 Mo. 173. § 7495.
Jones v. Dana, 24 Barb. (N. Y.) 395, 399. §§ 2991, 7689.
Jones v. Davis, 35 Ohio St. 474, 474. §§ 2810, 2811.
Jones v. Dougherty, 10 Ga. 273. § 6835.
Jones v. Dorman, 4 Ad. & El. (N. s.) 235. § 5028.
Jones v. Festiniog R. Co., L. R. 3 Q. B. 733. §§ 6313, 6345.
Jones v. Florence & C. University, 46 Ala. 626. §§ 1178, 7734.
Jones v. Galena & C. R. Co., 16 Iowa, 6. § 5504.
Jones v. Georgia & C. Co., 66 Ga. 558. § 5384.
Jones v. Gorham, 2 Mass. 375. § 6898.
Jones v. Graves, 20 Iowa, 596. § 6880.
Jones v. Green, 1 Wall. (U. S.) 330. §§ 3355, 3363, 6559, 6563.
Jones v. Guaranty & C. Co., 101 U. S. 622. §§ 5030, 6153, 7964.
Jones v. Habersham, 107 U. S. 174. § 7964.
Jones v. Harrison, 2 Exch. 52. § 447.
Jones v. Hart, 2 Saik. 441. § 6298.
Jones v. Hawkins, 17 Ind. 550. §§ 4621, 4659, 4660, 4718, 4795.
Jones v. Horner, 60 Pa. St. 214. § 5122.
Jones v. Hughes, 5 Exch. 104. § 780.
Jones v. Hutchinson, 43 Ala. 721. §§ 634, 636.

- Jones v. Inness**, 32 Kan. 177. § 4943.
Jones v. Jarman, 34 Ark. 323. § 3429.
Jones v. Johnson, 60 Ga. 260. §§ 6823, 6887.
Jones v. Johnson, 10 Bush (Ky.), 649. §§ 4471, 4472, 4499, 4565, 4578.
Jones v. Johnson, 3 Watts & S. (Pa.) 276. § 1220.
Jones v. Jones, 1 Bland Ch. (Md.) 443. § 6931.
Jones v. Kokomo Building Assn., 77 Ind. 340. § 518.
Jones v. Latham, 70 Ala. 164. § 2421.
Jones v. Macon & Co. R. Co., 39 Ga. 138. § 7784.
Jones v. Milton T. Co., 7 Ind. 547. § 712.
Jones v. Morrison, 31 Minn. 140. §§ 2064, 2094, 2173, 4381, 4382, 4389, 4683, 5183.
Jones v. Norwich Trans. Co., 50 Barb. (N. Y.) 193. § 7629.
Jones v. Oceanic Steam Nav. Co., 11 Blatchf. (U. S.) 406. § 7469.
Jones v. Planters' Bank, 9 Heisk. (Tenn.) 455. §§ 4920, 5223.
Jones v. Pope, 1 Saund. 37. §§ 1989, 4362.
Jones v. Pullen, 66 Ala. 306. § 85.
Jones v. Railroad Co., 79 Mo. 92. § 5817.
Jones v. Railroad Co., 14 W. Va. 514. § 5815.
Jones v. Richardson, 10 Met. (Mass.) 481. § 6141.
Jones v. Robinson, 11 Ark. 504. § 7738.
Jones v. Ryde, 5 Taunt. 488. § 2741.
Jones v. Scott, 10 Kan. 33. § 2556.
Jones v. Scottish Accident Ins. Co., 17 Q. B. Div. 421; 55 L. T. Rep. (N. S.) 218. § 7990.
Jones v. Shawhan, 4 Watts & S. (Pa.) 257. §§ 3145, 3147.
Jones v. Sisson, 6 Gray (Mass.), 288. § 3046.
Jones v. Smith, 3 Gray (Mass.), 500. §§ 7950, 7953.
Jones v. Smith, 33 Miss. 216. § 6226.
Jones v. Smith, 2 Ves. 378. § 2619.
Jones v. St. Louis & C. Packet Co., 43 Mo. App. 399. § 6360.
Jones v. Taylor, 30 Vt. 42. § 6200.
Jones v. Terre Haute & C. R. Co., 57 N. Y. 196. §§ 2094, 2167, 2173, 2940.
Jones v. Terre Haute & C. R. Co., 17 How. Pr. (N. Y.) 629; 29 Barb. (N. Y.) 353. §§ 1138, 2172, 2175, 2182, 2359.
Jones v. Thompson, 12 Cal. 191. § 1084.
Jones v. Tracy, 75 Pa. St. 417. § 8075.
Jones v. Tuberville, 2 Ves. 11. § 1449.
Jones v. Wesleyan University, 46 Ala. 626. § 5046.
Jones v. Williamson, 5 Coldw. (Tenn.) 371. § 4943.
Jones v. Wills Valley R. Co., 30 Ga. 43. § 5626.
Jones v. Wilson, 54 Ala. 50. § 6218.
Jones v. Wiltberger, 42 Ga. 575. §§ 3500, 3502, 3713, 3717, 3795, 3838.
Jones v. Winchester, 6 N. H. 497. § 8073.
Jones v. Woolley, 2 Idaho, 790. § 2011.
Jones v. Yates, 9 Barn. & C. 532. § 6569.
Jones & Co. v. Comte, 69 St. 137. § 5569.
Jones, Lloyd & Co. R. Co., 41 Ch. Div. 159. § 3792.
Jonesboro v. Cairo & C. R. Co., 110 U. S. 192. § 611.
Jordan v. Alabama Great Southern R. Co., 74 Ala. 85. §§ 6276, 6312.
Jordan v. Bowman, 28 Mo. App. 608. § 7547.
Jordan v. Hayne, 36 Iowa, 9, 15. § 825.
Jordan v. National Shoe & C. Bank, 74 N. Y. 467. § 7302.
Jordan v. Overseers, 4 Ohio, 294. § 5498.
Jordan v. School District, 38 Me. 164. § 718.
Jordan v. Wapello Circ. Co., 69 Iowa, 177. § 634.
Jordan v. Woodward, 40 Me. 317. § 5607.
Jordan v. Young, 87 Me. 276. § 8096.
Jordan & C. Plank Road Co. v. Morley, 23 N. Y. 552. § 5930.
Josey v. Wilmington & C. R. Co., 12 Rio h. L. (S. O.) 134. §§ 5029, 5104, 5106.
Joelin v. Stokes, 38 N. J. Eq. 31. § 480.
Joslyn v. Pacific Mail Steamship Co., 12 Abb. Pr. (N. Y.) (N. S.) 329. §§ 67, 5396.
Joslyn v. St. Paul Distilling Co., 44 Minn. 183. §§ 2350, 2412, 2593.
Jourdan v. Long Island R. Co., 115 N. Y. 380. §§ 5106, 5289, 5303.
Jourdan v. Long Island R. Co., 42 Hun (N. Y.), 657; 6 N. Y. St. Rep. 89. § 7007.
Journay v. Gibson, 56 Pa. St. 57. § 590.
Joy v. Jackson & Co. R. Co., 11 Mich. 155. §§ 72, 599, 6134, 6140.
Joy v. Manion, 28 Mo. App. 55. §§ 490, 1185, 1582, 6321.
Joyce v. Williams, 14 Wend. (N. Y.) 141. § 5740.
Joyner v. Miller, 55 Miss. 203. § 3363.
Judah v. American Live Stock Ins. Co., 4 Ind. 333. §§ 40, 518, 712, 1710, 5682, 7696.
Judge v. Fiske, 2 Spears L. (S. C.) 436. § 1220.
Judson v. Cook, 11 Barb. (N. Y.) 644. § 2519.
Judson v. Reardon, 16 Minn. 431. §§ 1013, 1017.
Judson v. Rossie Galena Co., 9 Paige (N. Y.), 598. §§ 3173, 3417, 3420, 3442, 3446, 4206, 6558, 6560, 6561.
Julian v. Ball, 26 Ind. 220. § 3248.
Jump v. McClurg, 35 Mo. 196. § 7552.
Junction R. Co. v. Cleary, 13 Ind. 161. §§ 6064, 6107.
Junction R. Co. v. Reeve, 15 Ind. 236. §§ 1328, 1332, 1335, 1577, 3905, 3915.
Junkins v. Doughty Falls & C. School District, 39 Me. 220.
Justice v. Stroup, 4 Phila. (Pa.) 348. § 6082.
Justices v. Turnpike Co., 11 B. Mon. (Ky.) 143. § 1118.
Justices & v. Griffin & C. Plank Road Co., 9 Ga. 475. § 5345.
Kahn v. Bank of St. Joseph, 70 Mo. 262. §§ 2447, 3237, 3239.
Kahn v. Hamilton, 2 Utah, 115. § 6264.
Kahn v. Smith, 80 N. Y. 453; reversing 11 Hun, 552. §§ 7156, 7234.
Kaiser v. Lawrence Sav. Bank, 55 Iowa, 104. §§ 218, 226, 239, 417, 2969, 2975, 2976, 2978.
Kalamazoo & Man. Co. v. McAlister, 36 Mich. 327. § 4924.
Kalamazoo Novelty Co. v. Macalister, 40 Mich. 84. § 4891.
Kaministiquy v. Northeastern R. Co., 25 S. C. 53. § 5452.
Kanaga v. Taylor, 7 Ohio St. 134. § 7337.
Kanawha Coal Co. v. Kanawha & C. Coal Co., 7 Blatchf. (U. S.) 391. § 513.
Kane v. Baltimore, 15 Md. 240. § 5610.
Kane v. Black, 7 Johns. Ch. (N. Y.) 90. § 7839.
Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90. §§ 3774, 4672.
Kane v. Fond du Lac, 40 Wis. 495. § 7754.
Kane v. McCown, 55 Mo. 181. § 1934.
Kane v. People, 8 Wend. (N. Y.) 203. §§ 4372, 5936, 6756.
Kankakee Coal Co. v. Illinois Central R. Co., 17 Ill. App. 614. § 5549.
Kankakee R. Co. v. Horan, 131 Ill. 288. § 7773.
Kankakee Woolen Mill Co. v. Kampo, 38 Mo. App. 229. §§ 6492, 6503.
Kansas & C. Construction Co. v. Topeka & C. R. Co., 135 Mass. 34. § 8011.
Kansas & C. R. Co. v. Kessler, 18 Kan. 523. § 6276.
Kansas & C. R. Co. v. Little, 19 Kan. 267. § 6276.
Kansas & C. R. Co. v. Smith, 40 Kan. 192. § 401.
Kansas City v. Hannibal & C. R. Co., 77 Mo. 180, 185. § 5092.
Kansas City & C. R. Co. v. Alderman, 47 Mo. 349. §§ 1975, 5394.
Kansas City & C. R. Co. v. Bolson, 36 Kan. 534. § 7646.
Kansas City & C. R. Co. v. Daughtry, 138 U. S. 298. §§ 8019, 8042.
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Kansas City Hotel Co. v. Hunt, 57 Mo. 126. § 2085.
Kansas City Hotel Co. v. Sauer, 65 Mo. 279. §§ 1979, 6663, 6664, 6739.
Kansas Home Ins. Co. v. Wilder, 43 Kan. 731. § 5860.
Kansas Indians, The, 5 Wall. (U. S.) 737. § 669.
Kansas Ins. Co. v. Craft, 18 Kan. 283. § 5854.
Kansas Lumber Co. v. Central Bank, 34 Kan. 635. § 6277.
Kansas Pacific R. Co. v. Atchison & C. R. Co., 112 U. S. 414. §§ 681, 7477.
Kansas Pacific R. Co. v. Little, 19 Kan. 267. § 6350.
Kansas Pacific R. Co. v. Mower, 16 Kan. 573. §§ 5472, 5504, 6352.
Kansas Pacific R. Co. v. Yanz, 16 Kan. 533. §§ 599, 6357.
Kappel v. Ohaari Zedek Congregation, 19 Hun (N. Y.), 364. § 5987.
Karchoer v. Supreme Lodge, 137 Mass. 368. §§ 912, 914, 920.
Karle v. Kansas City & C. R. Co., 55 Mo. 476. § 6352.
Karnes v. Rochester & C. R. Co., 4 Abb. Pr. (N. Y.) 107. §§ 2128, 2185, 3092, 4009, 7573.
Karp v. Citizens' Nat. Bank, 76 Mich. 679. § 7810.
Karuth's Case, L. R. 20 Eq. 606. §§ 1260, 4154.

- Kaskaskia Bridge Co. v. Shannon, 1 Gilm. (Ill.) 15. § 5124.
- Katama Land Co. v. Holley, 129 Mass. 540. § 1872.
- Katama Land Co. v. Jernegan, 126 Mass. 155. §§ 1187, 1277.
- Kattensroth v. Astor Bank, 2 Duer (N. Y.), 632. § 8881.
- Katzenberger v. Aberdeen, 121 U. S. 172. § 590.
- Kauffman v. Kennedy, 25 Fed. Rep. 785. § 7556.
- Kavanagh's Will, 125 N. Y. 418. § 5829.
- Kaye v. Cunningham, 5 Mad. 408. § 7027.
- Kayser v. Bremer, 16 Mo. 88. § 518.
- Keaggy v. Hite, 42 Ill. 99. § 2479.
- Kean v. Central R. Co., 9 N. J. Eq. 401. § 4013.
- Kean v. Colt, 5 N. J. Eq. 365. § 5826.
- Kean v. Davis, 20 N. J. L. 425. § 5138.
- Kean v. Davis, 21 N. J. L. 683. §§ 5126, 5131, 5138.
- Kean v. Johnson, 9 N. J. Eq. 407. §§ 72, 75, 76, 343, 4443, 4517, 4520, 4566, 4578, 4585.
- Keane v. Bartholow, 4 Mo. App. 507. § 8070.
- Keane v. Roberts, 4 Mad. Ch. 177. § 2631.
- Kearney v. Andrews, 10 N. J. Eq. 70. §§ 1011, 1052, 8853.
- Kearny v. Butties, 1 Ohio St. 362. § 3115.
- Keaseley v. Codd, 2 Car. & P. 408. § 2926.
- Keating v. Stone & Co., 83 Tex. 467. § 2793.
- Keber v. Mercantile Co., 4 Mo. App. 195. § 6314.
- Keeler v. Fassett, 21 Vt. 539. § 2455.
- Keeler v. Frost, 22 Barb. (N. Y.) 400. § 3905.
- Keen v. Breckenridge, 96 Ind. 69. § 7128.
- Keene's Executors Case, 3 De Gex, M. & G. 272. § 3323.
- Keene v. Lizardi, 5 La. 431; 6 La. 315. § 6298.
- Keene v. Van Renth, 48 Md. 184. §§ 56, 501.
- Keeny v. Globe Mill Co., 39 Conn. 145. § 2544.
- Keep v. Sanderson, 2 Win. 42. § 6477.
- Keep v. Sanderson, 12 Win. 352, 363. § 6477.
- Keeton v. Keeton, 20 Mo. 530, 541. § 4128.
- Kehlenbeck v. Logeman, 10 Daly (N. Y.), 447. §§ 949, 1021, 5988.
- Kehler v. Jack Man. Co., 55 Ga. 639. § 6840.
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- Kehlor v. Lademan, 11 Mo. App. 550. §§ 1562, 1566, 1895, 1668, 1871, 1872, 3925, 6663.
- Kehr v. Smith, 20 Wall. (U. S.) 34. § 2390.
- Keim v. Home & Co. Ins. Co., 42 Mo. 35, 41. § 5022.
- Keim v. Union & Co. R. Co., 30 Mo. 314. § 6352.
- Keith v. Clark, 97 U. S. 454. §§ 5380, 5377, 5440.
- Keith v. Goodwin, 31 Vt. 268. § 5753.
- Keith & Co. Coal Co. v. Bingham, 97 Mo. 196. §§ 5113, 7642.
- Keithsburg v. Frick, 34 Ill. 405. §§ 590, 1118, 5262.
- Keithsburg & Co. R. Co. v. Henry, 79 Ill. 290. § 5826.
- Kelk's Case, L. R. 9 Eq. 107. §§ 1550, 1552, 1763, 1792, 1795, 1799.
- Keller v. Eureka Brick Co., 43 Mo. App. 84. §§ 1494, 2044.
- Keller v. Johnson, 11 Ind. 337. §§ 1317, 1336, 1345, 1430.
- Keller v. Leib, 1 Penn. & W. (Pa.) 220, 223. § 4011.
- Keller v. Tracy, 11 Iowa, 530. § 5005.
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- Kelley v. Newburyport & Co. Horse R. Co., 141 Mass. 496. §§ 5303, 5306, 5314, 5317, 5327.
- Kelley v. Woman's Pub. Co., 4 N. Y. Supp. 99. § 7632.
- Kellogg v. Stockwell, 75 Ill. 68. § 2620.
- Kellogg v. Larkin, 3 Chand. (Wis.) 133. § 7958.
- Kellogg v. Schuyler, 2 Denio (N. Y.), 73. § 3112.
- Kellogg v. Slauson, 11 N. Y. 302. § 6477.
- Kellogg v. Union Co., 12 Conn. 7. §§ 5530, 6598.
- Kelly v. Calhoun, 95 U. S. 710. § 5091.
- Kelly v. Crapo, 45 N. Y. 86. § 7339, 7342.
- Kelly v. Green Bay & Co. R. Co., 10 Biss. (U. S.) 151. § 6259.
- Kelly v. Neshamie Min. Co., 7 N. J. Eq. 579. § 7060.
- Kelly v. Wright, 65 Wis. 235. § 4943.
- Kelner v. Baxter, L. R. 2 O. P. 174. §§ 416, 424.
- Kelsey v. Fermentation Co., 3 N. Y. Supp. 723. § 4427.
- Kelsey v. National Bank, 69 Pa. St. 426. §§ 4496, 5239.
- Kelsey v. Northern Light Oil Co., 54 Barb. (N. Y.) 111. §§ 1341, 1394, 1408.
- Kelsey v. Pfaunder Process Fermentation Co., 41 Hun (N. Y.), 20. § 4408.
- Kelsey v. Pfaunder Process Fermentation Co., 45 Hun (N. Y.), 10; 19 Abb. N. Cas. (N. Y.) 427; 9 N. Y. St. Rep. 563. §§ 6619, 6639, 6663.
- Kelsey v. Pfaunder Process Fermentation Co., 3 N. Y. Supp. 723. § 4408.
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- Kelso v. Kelly, 1 Daly (N. Y.), 419. § 7754.
- Kelton v. Phillips, 3 Met. (Mass.) 61. §§ 3020, 3207, 3210, 4345.
- Kemper v. Louisville, 14 Bush (Ky.), 87. § 7756.
- Kempson v. Saunders, 4 Bing. 5; 12 Moore, 44. § 440.
- Kendall, Ex parte, 17 Ves. 514. § 3374.
- Kendall v. Albion, 73 Iowa, 241. § 7756.
- Kendall v. Bishop, 76 Mich. 634. §§ 6492, 6495, 6507, 6534.
- Kendall v. Hamilton, 4 App. Cas. 504, 514. § 3205.
- Kendall v. McFarland, 4 Or. 292, 328. § 7759.
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- Kendrick v. Diamond Creek Consolidated Gold Min. Co., 94 Cal. 137. § 7428.
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- Kennard v. Cass County, 3 Dill. (U. S.) 147. § 6107.
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- Kennedy v. Gibson, 8 Wall. (U. S.) 498. §§ 673, 3386, 3416, 3419, 3642, 3495, 3561, 3567, 3752, 6973, 6978, 6980, 7288, 7270, 7279, 7280, 7283, 7284, 7285, 7286, 7287, 7288, 7291, 7303, 7437.
- Kennedy v. Gouveia, 3 Dowl. & Ry. 503. § 5023.
- Kennedy v. Green, 3 Mylne & K. 699. §§ 5190, 5209, 5213, 5226, 6325.
- Kennedy v. Hibernia & Co. Soc., 38 Cal. 151. §§ 7503, 7513, 7808, 7809.
- Kennedy v. Indianapolis & Co. R. Co., 3 Fed. Rep. 97; 2 Flipp. (U. S.) 704. § 7128.
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- Kennedy v. Panama & Co. Mail Co., L. R. 2 Q. B. 579. §§ 1390, 6321.
- Kennedy v. St. Louis & Co. R. Co., 62 Ill. 395. §§ 8097, 8125.
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- Ker's Case, 4 App. Cas. 549, 598, §§ 3198, 3199.
- Kerbs v. Ewing, 22 Fed. Rep. 693, § 6534.
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- Kerrison v. Cole, 8 East, 231, 236, § 1048.
- Kerrison v. Sparrow, Coop. Cas. 305, § 7774.
- Kerrison v. Stewart, 93 U. S. 155, §§ 6126, 6876.
- Kersell v. Marshall, 1 Com. B. (N. s.) 241, § 3064.
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- Kerstetter, Appeal of, 149 Pa. St. 148, §§ 6503, 6529.
- Kerwhacker v. Cleveland & C. R. Co., 3 Ohio St. 172, § 6340.
- Kessel v. Butler, 35 N. Y. 612, §§ 6373, 6374.
- Kessel v. Zeiser, 102 N. Y. 114, § 4708.
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- Ketchum v. Bank of Commerce, 19 N. Y. 511, § 2644.
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- Key v. Barnham, 6 Har. & J. (Md.) 418, § 5038.
- Key City, The, 14 Wall. 653, §§ 376, 6096.
- Keyport & C. Steamboat Co. v. Farmers Transportation Co., 18 N. J. Eq. 13, § 5794.
- Keys v. Harwood, 2 C. B. 905, § 379.
- Keyser v. District, 35 N. H. 477, §§ 3914, 5046.
- Keyser v. Hitz, 133 U. S. 138, 149, §§ 2377, 3103, 3104, 3192, 3198, 3211, 3275, 3302, 3305, 3306.
- Keyser v. Hitz, 2 Mackey (D. C.), 473, 513, §§ 3683, 3998.
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- Keystone Bridge Co. v. McCluney, 8 Mo. App. 496, §§ 1691, 2536, 2934.
- Khuts's Case, 3 De. Cex. & S. 210, § 1098.
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- Kibbey v. Jones, 7 Bush (Ky.), 243, § 3187.
- Kickland v. Menasha Wooden Ware Co., 63 Wis. 34, §§ 4899, 5174.
- Kidd v. Rawlinson, 2 Bos. & P. 59, § 2617.
- Kidder v. Hunt, 1 Pick. (Mass.) 328, § 5182.
- Kidderminster v. Hardwick, L. R. 9 Ex. 13, § 5297.
- Kidwelly Canal Co. v. Baby, 2 Price, 93, § 1511.
- Kiernan v. Chicago & C. R. Co., 123 Ill. 188, § 5625.
- Kiersted v. Orange & C. R. Co., 69 N. Y. 343; 25 Am. Rep. 199, §§ 5088, 5137.
- Kilbourn v. Thompson, 103 U. S. 168, § 6700.
- Kiley v. Forsee, 57 Mo. 390, 396, §§ 3884, 5057.
- Kilgore v. Bulkley, 14 Conn. 362, § 5760.
- Kilgore v. Smith, 122 Pa. St. 48, § 7897.
- Killbuck Private Road, 77 Pa. St. 39, § 5596.
- Kille v. Reading Iron Works, 134 Pa. St. 225, § 5437.
- Killian v. Hoffman, 6 Bradw. (Ill.) 200, § 2679.
- Killingworth v. Portland Trust Co., 18 Or. 351, § 5834.
- Kilmer v. Hobart, 58 How. Pr. (N. Y.) 452, § 7334.
- Kilpatrick v. Penrose F. & C. Co., 49 Pa. St. 118, §§ 4380, 4382.
- Kileby v. Williams, 5 Barn. & Ald. 815, § 4814.
- Kimball v. Atchison & C. R. Co., 46 Fed. Rep. 888, § 5651.
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- Kimball v. Comstock, 14 Gray (Mass.), 508, § 4146.
- Kimball v. Corn Exchange Nat. Bank, 1 Ill. App. 209, § 2228.
- Kimball v. Goodburn, 32 Mich. 10, § 6843.
- Kimball v. Rosendale, 42 Wis. 407, §§ 590, 594.
- Kimball v. Union Water Co., 44 Cal. 173, § 2445.
- Kimber v. Barber, L. R. 8 Ch. 56, §§ 457, 458, 4022, 4024.
- Kimbro v. Bank of Fulton, 49 Ga. 419, § 2019.
- Kimmel v. Stoner, 18 Pa. St. 155, §§ 4464, 4474.
- Kimmell v. Geeting, 2 Grant Cas. (Pa.) 125, §§ 4040, 4043.
- Kincaid's Appeal, 66 Pa. St. 411, § 5486.
- Kincaid's Case, L. R. 2 Ch. 428, §§ 1438, 1444, 1446.
- Kincaid v. Dornelle, 59 N. Y. 548, §§ 531, 3343, 3367, 3368, 3403, 6744.
- Kinealy v. St. Louis & C. R. Co., 69 Mo. 656, § 7406.
- Kinion v. Kansas City & C. R. Co., 39 Mo. App. 382, §§ 398, 403.
- King's Bench, 3 Barn. & Adol. 77, §§ 6363, 6365.
- King's Case, L. R. 2 Ch. 714, 719, 731, §§ 1550, 1792, 1794.
- King's Case, L. R. 6 Ch. 196, §§ 3203, 3204, 3211, 3250, 3255, 3256.
- King's Case, 1 Keb. 517, § 763.
- King v. Banks, 61 Ga. 20, § 617.
- King v. Barnes, 113 N. Y. 476; 51 Hun (N. Y.), 550; affirmed, 113 N. Y. 655; 23 N. Y. St. Rep. 263, § 6536.
- King v. Bellinger, 4 T. R. 810, § 726.
- King v. Brown, 2 Hill (N. Y.), 485, § 5182.
- King v. Cutts, 24 Wis. 627, §§ 6977, 6979.
- King v. Davis, 16 N. Y. Supp. 427, § 4670.
- King v. Davenport, 98 Ill. 305, § 5485.
- King v. Donnelly, 5 Paige (N. Y.), 46, § 6485.
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- King v. Elliott, 5 Smedes & M. (Miss.) 428, §§ 1606, 1987, 7068.
- King v. Goodwin, 130 Ill. 102, § 6945.
- King v. Hamilton, 16 Ill. 190, § 7096.
- King v. Howard, 27 Mo. 21, 25, § 7408, 7754.
- King v. Insurance Co., 58 Tex. 669, §§ 2656, 2672.
- King v. Iowa & C. R. Co., 34 Iowa, 458, § 6343.
- King v. Marshall, 33 Beav. 550, §§ 6150, 6151.
- King v. Merchants' Exch. Co., 5 N. Y. 547, § 6189.
- King v. Miller, 6 T. R. 268, § 726.
- King v. Moore, 6 Ala. 160, §§ 6931, 6934.
- King v. Ohio & C. R. Co., 9 Biss. (U. S.) 278, § 6246.
- King v. Pasmore, 3 T. R. 199, § 6658.
- King v. Paterson & C. R. Co., 29 N. J. L. 82, §§ 2126, 2128, 2142, 2143.
- King v. Randlett, 33 Cal. 318, 321, § 7612.
- King v. Rossett, 2 You. & J. 33, § 1506.
- King v. Rundie, 15 Barb. (N. Y.) 139, 150, § 5783.
- King v. Sea Ins. Co., 26 Wend. (N. Y.) 62, § 6623.
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- King's Lynn v. Pemberton, 1 Swanst. 243, § 7783.
- Kingsman v. Glover, 3 Rich. L. (S. C.) 27, § 255.
- Kings County Elevated R. Co., Re, 41 Hun (N. Y.), 429, § 6986.
- Kingsbury v. Ledyard, 2 Watts & S. 41, § 738.
- Kingsford v. Merry, 11 Exch. 577, § 1441.
- Kingsley v. Bath Bank, 31 Hun (N. Y.), 329, § 6537.
- Kingsley v. Davis, 104 Mass. 178, § 3205.
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- Kingsman v. Kingsman, 2 Vern. 559, § 2623.
- Kingsman v. Long, 4 Doug. 9, § 1829.
- Kiukler v. Junica, 84 Tex. 116, § 4144.
- Kinney v. Crocker, 18 Wis. 74, §§ 6897, 7128.
- Kinney v. Knoebel, 51 Ill. 112, § 6551.
- Kinney v. Paine, 68 Miss. 258, § 7097.
- Kinsela v. Cataract City Bank, 18 N. J. Eq. 158, §§ 4355, 4358, 6494, 7101.
- Kinsley v. Rice, 10 Gray (Mass.), 325, § 4327.

- Kinsman Street R. Co. v. Broadway & C. R. Co., 38 Ohio St. 239. § 5615.
- Kintrea, *Ex parte*, L. R. 5 Ch. 95. § 3256.
- Kinzle v. Chicago, 3 Ill. 187. §§ 5060, 5078, 5079, 5638.
- Kip v. Bank, 10 Johns. (N. Y.) 63. §§ 7084, 7092.
- Kip v. Paterson, 26 N. J. L. 238. §§ 1021, 1024, 1028.
- Kipling v. Todd, 3 C. P. Div. 350. § 1519.
- Kirby v. Boylston Market Assn., 14 Gray (Mass.) 249. § 6373.
- Kirk v. Bell, 16 Ad. & El. (N. S.) 290. §§ 3914, 4754, 5724.
- Kirk v. Bromley Union, 2 Phil. 640. § 5397.
- Kirk v. Nowill, 1 T. R. 118. §§ 849, 1037, 1038.
- Kirkham v. Russell, 76 Va. 956. § 1021.
- Kirkland v. Kille, 99 N. Y. 390. §§ 4182, 4228.
- Kirkpatrick's Will, 22 N. J. Eq. 463. § 5837.
- Kirkpatrick v. Keota United Presbyterian Church, 63 Iowa, 372. § 500.
- Kirkpatrick v. White, 4 Wash. C. C. (U. S.) 595. § 7447.
- Kirksey v. Florida & C. Plank Road Co., 7 Fla. 23. §§ 1356, 5942.
- Kirtland v. Hotchkiss, 42 Conn. 426. §§ 2823, 2848.
- Kirtland v. Purdy University, 7 Lea (Tenn.), 243. § 4494.
- Kisch v. Central Railroad of Venezuela, 34 L. J. (Ch.) 545. § 1392.
- Kishacoquillas & C. Turnp. Co. v. M'Conaby, 16 Serg. & R. (Pa.) 140; 1 Penn. & W. (Pa.) 426. § 6598.
- Kissinger v. Hanselman, 33 Ind. 80. § 5595.
- Kisterbock's Appeal, 127 Pa. St. 601. §§ 1493, 1494, 2322, 2350, 2573, 2595, 2596.
- Kitchen v. Cape Girardeau & C. R. Co., 59 Mo. 514. §§ 4591, 5642, 5643, 5832.
- Kitchen v. Conklin, 51 How. Pr. (N. Y.) 303. § 7256.
- Kitchen v. St. Louis & C. R. Co., 69 Mo. 224. §§ 271, 275, 331, 3395, 4041, 5298, 6182, 6222, 6225, 6226, 6220.
- Kittredge v. Kellogg Bridge Co., 8 Abb. N. Cas. (N. Y.) 168. § 6638.
- Kittredge v. Peaslee, 3 Allen (Mass.), 235. § 7403.
- Kittredge v. Claremont Bank, 1 Woodb. & M. (U. S.) 244. § 7626.
- Klaus, *Re*, 67 Wis. 401. §§ 230, 2310, 2494, 3233.
- Kleckner v. County of Lehigh, 6 Whart. (Pa.) 66. § 7545.
- Klein v. Alton & C. R. Co., 13 Ill. 514. §§ 1138, 1224, 1226, 1611, 1577.
- Klein v. Isaacs, 8 Mo. App. 568. § 5815.
- Klopp v. Lebanon Bank, 46 Pa. St. 88. § 3248.
- Klopp v. Moore, 6 Kan. 27. §§ 50, 6, 5035.
- Klostermann v. Loos, 58 Mo. 290. §§ 5030, 5126, 6132, 5144, 6171.
- Kluht's Case, 3 De Gex & S. 210. § 3275.
- Knapp v. Grant, 27 Wis. 147. § 590.
- Knapp v. Joy, 9 Mo. App. 47, 575. § 532.
- Knapp & Co. v. National Mut. F. Ins. Co., 30 Fed. Rep. 607. § 8027.
- Knapp & Co. v. Strand, 4 Wash. (U. S.) 686. §§ 7699, 7707, 7708, 7712, 8025.
- Knatchbull v. Fearnhead, 3 Mylne & C. 122. §§ 3327, 3331.
- Knaust, *Re*, 101 N. Y. 188. § 611.
- Knebell v. White, 2 Young & C. 15. § 4482.
- Knecht v. United States Sav. Inst., 2 Mo. App. 563. § 6954.
- Kneeder v. Norristown, 100 Pa. St. 368. § 1022.
- Kneeland v. American Loan & Co., 136 U. S. 89. §§ 5903, 7168, 7206, 7299, 7211.
- Kneeland v. Gilman, 24 Wis. 39. § 5258.
- Kneeland v. Luce, 141 U. S. 491. §§ 6824, 6876, 7183.
- Knickerbocker Bank, *Re*, 19 Barb. (N. Y.) 602. § 6889.
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- Knickerbocker & C. Ins. Co. v. Ecclesine, 11 Abb. Pr. (N. S.) (N. Y.) 385; 42 How. Pr. (N. Y.) 201. § 7383.
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- Knickerbocker v. Wilcox, 83 Mich. 200. § 7738.
- Knight's Case, L. R. 2 Ch. 321. §§ 1550, 1792, 1794.
- Knight's Estate, 48 Phila. Leg. Int. 288. § 5829.
- Knight v. Barber, 16 Mees. & W. 68. § 1068.
- Knight v. Carrollton R. Co., 9 La. An. 284. §§ 5642, 5643.
- Knight v. Flatrock & C. Co., 45 Ind. 134. § 7578.
- Knight v. Frost, 14 Mo. App. 331. §§ 3609, 3611, 3621.
- Knight v. Hunt, 5 Bing. 429; 3 M. & P. 18. § 1402.
- Knight v. Lang, 4 E. D. Smith (N. Y.), 381; 2 Abb. Pr. (N. S.) (N. Y.) 381. §§ 4983, 4987, 5126, 5133.
- Knight v. Norris, 13 Minn. 473, 475. § 3145.
- Knight v. Old National Bank, 3 Cliff. (U. S.) 429. §§ 1032, 2319.
- Knight v. Plymouth, 1 Dick. 120; 3 Atk. 430. § 6972.
- Knight v. Southern Pac. R. Co., 41 Tex. 406. § 5543.
- Knight v. Wells, Lutw. 508. § 788.
- Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439. § 4554.
- Knoll v. Harvey, 19 Wis. 99. § 2730.
- Knoll v. New York & C. E. Co., 121 Pa. St. 487. § 5825.
- Knopp v. Bohmrich, 49 N. J. Eq. 82. §§ 4042, 4479, 4500.
- Knorr's Appeal, 39 Pa. St. 93. § 655.
- Knorr v. Home Ins. Co., 25 Wis. 143. §§ 12, 7463.
- Knott v. Cunningham, 2 Sneed (Tenn.), 204. § 6292.
- Knott v. Southern Life Ins. Co., 2 Woods (U. S.), 479. § 8022.
- Knowles v. Lord, 4 Whart. (Pa.) 500. §§ 3363, 7507.
- Knowles v. Norfolk Southern R. Co., 102 N. C. 59, 66. § 6390.
- Knowles v. Topeka, 33 Kan. 692. § 599.
- Knowles v. Beatty, 1 McLean (U. S.), 41. § 5718.
- Knowles v. Board of Education, 33 Kan. 692. § 588.
- Knowles v. Duffy, 40 Hun. (N. Y.), 495. § 4153.
- Knowles v. Gaslight & C. Co., 19 Wall. (U. S.) 58. § 3363.
- Knowlton v. Ackley, 8 Cush. (Mass.) 93, 97. §§ 3020, 3342, 3345, 3423, 3466, 6655, 6732.
- Knowlton v. Congress & C. Co., 57 N. Y. 518. § 1772.
- Knowlton v. Congress Spring Co., 14 Blatchf. (U. S.) 364. §§ 1183, 1771, 1782, 2081.
- Knox v. Baldwin, 80 N. Y. 610. §§ 3398, 4225, 4360.
- Knox v. Childersburg Land Co., 86 Ala. 180. §§ 1172, 1610, 3685.
- Knox v. Exchange Bank, 12 Wall. (U. S.) 379, 383. § 5425.
- Knox v. Nichols, 14 Ohio St. 260. § 1118.
- Knox v. Protection Ins. Co., 9 Conn. 430. §§ 7790, 8069.
- Knox v. Schepler, 2 Hill (S. C.), 595. § 1084.
- Knox v. Summers, 3 Oranch. (U. S.) 496. § 7552.
- Knox v. Summers, 4 Yeates (Pa.), 477. § 1084.
- Knox County v. Aspinwall, 21 How. (U. S.) 539. §§ 1118, 6064, 6107, 6109, 6111.
- Knox County v. Aspinwall, 24 How. (U. S.) 376. § 1118.
- Knox County v. Harshman, 133 U. S. 152. § 7524.
- Knox County v. Wallace, 21 How. (U. S.) 547. § 1118.
- Knoxville v. Knoxville & C. R. Co., 22 Fed. Rep. 758. § 5431.
- Knoxville & C. R. Co. v. Hicks, 9 Bax. (Tenn.) 442. § 5569.
- Kobogum v. Jackson Iron Co., 76 Mich. 498. §§ 1996, 2363.
- Koch v. Lay, 38 Mo. 147. § 1206.
- Koch v. National & C. Bldg. Assn., 35 Ill. App. 465; affirmed, 137 Ill. 497. §§ 4622, 4647.
- Koehler, *Ex parte*, 23 Fed. Rep. 529. §§ 5535, 5548.
- Koehler v. Black River & C. R. Co., 2 Black (U. S.), 715. §§ 4009, 4012, 4015, 4016, 4022, 4060, 5106.
- Koenig v. Chicago & C. Co., 27 Neb. 699. § 7932.
- Koestebender v. Peirce, 41 Iowa, 204. § 5626.
- Kohl v. Lilienthal, 81 Cal. 378. §§ 1536, 2163, 5627, 6688.
- Kohl v. United States, 91 U. S. 367. § 672.
- Kohn v. Lucas, 17 Mo. App. 29. § 3615.
- Kohne v. Ins. Co. of North America, 1 Wash. C. C. (U. S.) § 6024.
- Kolff v. St. Paul Fuel Exch., 48 Minn. 215. § 5990.
- Koons v. Jeffersonville Bank, 89 Ind. 178. § 2381.
- Koontz v. Kaufman, 31 Mo. App. 397. § 7740.
- Korn v. Mutual Assurance Soc., 6 Cranch (U. S.), 192. §§ 5987, 5988.
- Kortright v. Buffalo Com. Bank, 20 Wend. (N. Y.) 91; 22 Wend. 348. §§ 2368, 2445, 2447, 2462, 2463, 2589, 4796, 7392.
- Koshkonong v. Burton, 104 U. S. 668, 677. § 6111.
- Kraft v. Coykendall, 7 N. Y. Supp. 140; 26 N. Y. St. Rep. 79. § 2375.
- Kraft v. Coykendall, 34 Hun (N. Y.), 285. § 4331.
- Kraft v. Freeman Printing & C. Assn., 87 N. Y. 628. § 4891.
- Kraft-Holmes Grocer Co. v. Crow, 36 Mo. App. 288. §§ 1604, 4152.

Kramer—Lancaster TABLE OF CASES CITED.

- Kramer v. Arthurs, 7 Pa. St. 165. § 2164.
 Kramer v. Cleveland & Co. R. Co., 5 Ohio St. 140, 145. § 5626.
 Krauser v. Ruckel, 17 Hun (N. Y.), 463. § 3147.
 Krebs v. Carlisle Bank, 2 Wall. Jr. (U. S.) 33. §§ 2145, 7042.
 Kreher v. Mason, 33 Mo. App. 292. § 2455.
 Krider v. Western College, 31 Iowa, 547. §§ 6134, 5185.
 Kritzer v. Woodson, 19 Mo. 327. §§ 3017, 3052, 4164, 4276, 4277, 4325, 4472.
 Kroeger v. Pitcairn, 101 Pa. St. 311. § 4981.
 Kronberg v. Elder, 18 Kan. 150, 152. § 7334.
 Kruger v. Western Fire Ins. Co., 72 Cal. 91. § 5265.
 Krulvitz v. Eastern R. Co., 140 Mass. 573. §§ 6298, 6312.
 Krutz v. Paola Town Co., 20 Kan. 397. §§ 11, 218, 505, 530, 2375, 7720.
 Kruse v. Dusenbury (General Term of New York City Court), 1 City Ct. Rep. Supp. (N. Y.) 87. § 7896.
 Kuback, Ex parte, 85 Cal. 274. § 5493.
 Kuhn v. McAllister, 1 Utah T. 273; affirmed, 96 U. S. 87. §§ 2450, 2453.
 Kuhns v. Westmoreland Bank, 2 Watts (Pa.), 136. § 3249.
 Kuper's Assignee's Case, 3 De Gex & S. 413. § 3208.
 Kupfer v. Augusta, 12 Mass. 185. § 3918.
 Kupfer v. South Parish, 12 Mass. 185. §§ 3906, 3914, 3953, 4959.
 Kuypers v. Reformed Dutch Church, 6 Paige (N. Y.), 570, 574. § 5783.
 Kyle v. Fayetteville, 75 N. C. 445. §§ 2850, 2866.
 Kyle v. Montgomery, 73 Ga. 337. § 2414.
 Kynaston v. Mayor of Shrewsbury, 2 Strange, 1051. § 703.
 Laberee v. Carleton, 53 Me. 211. § 5815.
 Labouchere v. Earl of Wharcliffe, 13 Ch. Div. 346. §§ 881, 884, 891, 893, 894, 897, 910, 1763.
 Labouchere v. Tupperill, Moore P. C. C. 198. § 3330.
 Lacey v. Central Nat. Bank, 4 Neb. 179. § 4758.
 Lackland v. Garesche, 56 Mo. 267. § 7829.
 Lackland v. North Missouri R. Co., 31 Mo. 180. § 6374.
 Lacombe v. Milliken, 36 La. An. 397. § 6947.
 La Crosse & Co. R. Co. v. Vanderpool, 11 Wis. 119. § 7852.
 Lacy v. Dubuque Lumber Co., 43 Iowa, 510. § 5169.
 Ladd v. Cartwright, 7 Or. 329, 333. §§ 3087, 3471.
 Ladd v. Dudley, 45 N. H. 61. § 3187.
 Ladd v. Harvey, 21 N. H. 514. § 6882.
 Ladd v. Hildebrandt, 27 Wis. 135. § 5311.
 Ladd v. Methodist Episcopal Church, 1 Mich. (N. P.) 47. § 7658.
 Ladies' Benevolent Soc. v. Benevolent Soc., 2 Tenn. Ch. 77. § 5794.
 Lady Bryan Co., Re, 1 Sawy. (U. S.) 349. § 4010.
 Lady Bryan Min. Co., Re, 2 Abb. (U. S.) 527. § 7374.
 Lady Northumberland's Case, 2 Mod. 182; Loft. 214. § 5338.
 Ladywell Mining Co. v. Brookes, 35 Ch. Div. 400. §§ 415, 461, 4036.
 La Farge v. La Farge Ins. Co., 14 How. Pr. (N. Y.) 26. § 7738.
 La Farge Ins. Co. v. Bell, 22 Barb. (N. Y.) 54. §§ 5197, 5206, 5207, 6221.
 Lafayette v. Jenners, 10 Ind. 70, 80. § 594.
 Lafayette & Co. Bank v. St. Louis Stoneware Co., 4 Mo. App. 276. § 6064.
 Lafayette & Co. R. Co. v. Ohseney, 87 Ill. 446; 68 Ill. 570. §§ 4386, 4387.
 Lafayette & Co. R. Co. v. Eelman, 30 Ind. 83. § 4785.
 Lafayette Bank v. State Bank, 4 McLean (U. S.), 208. §§ 4748, 4789, 4790, 4804.
 Lafayette Co. v. Neely, 21 Fed. Rep. 738. §§ 4505, 4595.
 Lafayette Ins. Co. v. French, 18 How. (U. S.) 404. §§ 292, 293, 4588, 7458, 7466, 7875, 7887, 7998, 8028.
 La Fayette Ins. Co. v. Rogers, 30 Barb. (N. Y.) 491. § 7658.
 Lafayette Plank-Road Co. v. New Albany & Co. R. Co., 13 Ind. 90. §§ 5399, 5615.
 Lafayette Sav. Bank v. St. Louis & Co., 2 Mo. App. 299. §§ 5740, 5759.
 Lafferty's Estate, Re, 2 Pa. Dist. Rep. 215. §§ 3871, 8875.
 Laffin v. Travelers' Ins. Co., 121 N. Y. 713. §§ 8025, 8027.
 Ladin & Co. Powder Co. v. Sinsheimer, 46 Md. 315. § 2991.
 Lafond v. Deems, 81 N. Y. 507. §§ 912, 1034, 1047, 6603.
 La Grange & Co. Plank Road Co. v. Mays, 29 Mo. 64. §§ 1313, 1400, 1401.
 La Grange & Co. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420. §§ 2502, 6586, 6596, 6602, 6651, 6670, 6681.
 La Grange Mill Co. v. Bennetwitz, 28 Minn. 62. § 7617.
 Lail v. Mt. Sterling & Co., 13 Bush (Ky.), 32. §§ 1332, 1738.
 Laing v. Burley, 101 Ill. 591. §§ 2820, 3301, 3302.
 Laing v. Reed, L. R. 5 Ch. 4. § 5699.
 Laird v. Birkenhead R'y Co., Johns. 500. § 5297.
 Lake v. Florida, 18 Fla. 501. § 594.
 Lake v. Munford, 4 Smedes & M. (Miss.) 312. § 3177.
 Lake v. Virginia & Co. R. Co., 7 Nev. 294. §§ 5319, 5401.
 Lake County v. Graham, 130 U. S. 674. § 5262.
 Lake County v. Sulphur Bank Quicksilver Mining Co., 68 Cal. 14. § 4861.
 Lake Ontario & Co. R. Co. v. Curtiss, 80 N. Y. 219. § 1164.
 Lake Ontario & Co. R. Co. v. Mason, 16 N. Y. 451. §§ 247, 1138, 1170, 1185, 1224, 1577.
 Lake Ontario Nat. Bank v. Onondaga Co. Bank, 7 Hun (N. Y.), 549. §§ 6682, 6688.
 Lake Shore & Co. R. Co. v. Chicago & Co. R. Co., 97 Ill. 506. § 5615.
 Lake Shore & Co. R. Co. v. Cincinnati & Co. R. Co., 30 Ohio St. 604. §§ 5470, 5505.
 Lake Shore & Co. R. Co. v. Hunt, 39 Mich. 469. §§ 4946, 7503, 7810, 8019.
 Lake Shore & Co. R. Co. v. People, 46 Mich. 193. § 370.
 Lake Shore & Co. R. Co. v. Prentice, 147 U. S. 101. §§ 6383, 6387, 6389.
 Lake Shore Nat. Bank v. Butler Colliery Co., 51 Hun (N. Y.), 63. § 4962.
 Lakeside Ditch Co. v. Crane, 80 Cal. 181. §§ 504, 7695.
 Lake Superior Bldg. Co. v. Thompson, 33 Mich. 293. §§ 7665, 7695.
 Lake Superior Co. v. Morrison, 22 Can. O. P. 224. § 249.
 Lake Superior Iron Co. v. Brown, 44 Fed. Rep. 539. §§ 6854, 7720.
 Lake Superior Iron Co. v. Drexel, 90 N. Y. 87. §§ 1564, 1629.
 Lake View v. Rose Hill Cemetery, 70 Ill. 191. § 5478.
 Lake Wynola Assn., 3 Pa. County Ct. 626. § 205.
 Lallande v. Ingram, 19 La. An. 364. § 2615.
 Lamar v. Browne, 92 U. S. 187. § 1094.
 Lamar Ins. Co. v. Gulick, 102 Ill. 41. §§ 3493, 3494, 3499.
 Lamar Ins. Co. v. Hildreth, 55 Iowa, 248. § 6962.
 Lamar Ins. Co. v. Moore, 84 Ill. 575. §§ 3437, 7231, 7232, 7237, 7247.
 Lamb v. Bowser, 7 Biss. (U. S.) 315. § 7937.
 Lamb v. Ocell, 25 W. Va. 288, 294. §§ 4793, 6504.
 Lamb v. Lady Polk, 9 Car. & P. 629. § 4930.
 Lamb v. Lamb, 13 Nat. Bank. Reg. 17. §§ 7950, 7953.
 Lamb v. Laughlin, 25 W. Va. 300. § 6504.
 Lamb v. Palk, 9 Car. & P. 629. § 6283.
 Lamb v. Pannell, 25 W. Va. 298. § 4783.
 Lamb v. Pannell, 28 W. Va. 663. § 6504.
 Lambert's Case, Carth. 170. § 836.
 Lambert v. Addison, 46 L. T. (N. S.) 20. §§ 862, 881, 910, 4393.
 Lambert v. Heath, 15 Mees. & W. 486. § 2742.
 Lambreth v. Clarke, 10 Heisk. (Tenn.) 32. § 5232.
 Lamert v. Lidwell, 62 Mo. 188. § 643.
 Lamont v. French, 26 Wis. 37. § 5154.
 L'Amoureux v. Vischer, 2 N. Y. 278. § 5273.
 Lamphear v. Buckingham, 33 Conn. 237. § 7159.
 Lamprell v. Ballerica Union, 3 Ex. 283. § 5297.
 Lampriere v. Pasley, 2 T. R. 485. § 2356.
 Lampson v. Arnold, 19 Iowa, 479, 487. § 6507.
 Lamson & Co. Man. Co. v. Russell, 112 Mass. 387. §§ 5146, 7591.
 Lancashire & Co. R. Co. v. Northwestern R. Co., 2 Kay & J. 293. § 105.
 Lancashire Cotton Spinning Co., Re, 35 Ch. Div. 656. § 3122.
 Lancashire Co. v. Greatorex, 14 L. T. (N. S.) 290. § 4435.
 Lancaster's Case, L. R. 14 Eq. 72, note. § 7238.
 Lancaster v. Choate, 5 Allen (Mass.), 530. § 4216.

TABLE OF CASES CITED. Lancaster—Lawson

- Lancaster v. Collins**, 7 Fed. Rep. 338. § 5218.
Lancaster v. Elliott, 28 Mo. App. 88. § 1544.
Lancaster v. Kennebec Log Driving Co., 62 Me. 272. § 5604.
Lancaster v. Lancaster County Bank, 2 Nat. Bk. Cas. 415. § 2879.
Lancaster Avenue Imp. Co. v. Rhoads, 116 Pa. St. 377. §§ 5937, 6348, 6349.
Lancaster County v. Oheraw & Co. R. Co., 28 S. C. 134, 135. §§ 4613, 4617.
Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47. § 5951.
Lancaster Starch Co. v. Moore, 62 N. H. 671. § 1964.
Land v. Coffman, 50 Mo. 243. §§ 5792, 5795, 5799, 6035, 7365, 7406.
Land Co. v. Aldrich, 86 Ill. 504. § 1172.
Land Credit Co. v. Fermoy, L. R. 5 Ch. 763; reversing L. R. 3 Eq. 7. §§ 469, 4034, 4095.
Land Grant & Co. v. Coffey County, 6 Kan. 245.
Lander v. Bechtel, 55 Wis. 593. § 2460.
Lander v. Castro, 43 Cal. 497. § 5149.
Lander v. School District, 33 Me. 239. § 718.
Landes v. Globe Planter Man. Co., 73 Ga. 176. § 4498. § 7896.
Landis v. Saxton, 105 Mo. 486. § 6739.
Landis v. Western Pa. R. Co., 133 Pa. St. 579. § 6247.
Landman v. Entwistle, 7 Exch. 632; 21 L. J. (Exch.) 208. §§ 416, 421.
Landowners' & Co. v. Ashford, 16 Ch. Div. 411. § 5697.
Lane's Appeal, 105 Pa. St. 49. §§ 3095, 3578, 3580, 6570, 6838.
Lane's Case, 1 De Gex, J. & S. 504. § 1519.
Lane v. Baker, 2 Grant Cas. (Pa.) 424. §§ 3112, 4182.
Lane v. Bank, 9 Heisk. (Tenn.) 419. §§ 694, 4009, 4607.
Lane v. Brainerd, 30 Conn. 565, 577. §§ 789, 1337, 1354, 1853, 1884, 1896, 1933, 3920, 3938, 6479.
Lane v. Ootton, 12 Mod. 489; 1 Ld. Raym. 646. §§ 4096, 6363.
Lane v. Harris, 16 Ga. 217, 234. §§ 3092, 3093, 3351, 3363, 3440, 3500, 3502, 3713, 3714.
Lane v. Morris, 8 Ga. 468, 475. §§ 3015, 3016, 3046, 3092, 3293, 3363, 3380, 3440, 3459, 3560, 3761.
Lane v. Morris, 10 Ga. 162. §§ 1989, 3081, 3136, 3543, 4362.
Lane v. Nickerson, 99 Ill. 284. § 6469.
Lane v. School District, 10 Met. (Mass.) 462. §§ 3504, 7579.
Lane v. Seaboard & Co. R. Co., 5 Jones L. (N. C.) 25. § 7614.
Lane County v. Oregon, 7 Wall. (U. S.) 71, 77. § 8095.
Lanfear v. Mayor, 4 La. 97. § 1017.
Lang v. Smyth, 7 Bing. 284. § 6064.
Langan v. Franchlyn, 20 N. Y. Supp. 404. §§ 3862, 4079.
Langan v. Iowa & Co. Construction Co., 49 Iowa, 317. §§ 2979, 2980, 3090.
Langdon v. Branch, 37 Fed. Rep. 449. §§ 332, 2071, 4672, 6405, 7783.
Langdon v. Castleton, 30 Vt. 285. § 4866.
Langdon v. Hillside Coal & Co., 41 Fed. Rep. 609. §§ 1080, 4485, 4489.
Langdon v. Lockett, 6 Ala. 727. §§ 6898, 7812.
Langdon v. Vermont & Co. R. Co., 53 Vt. 228. §§ 6159, 6889.
Langdon v. Vermont & Co. R. Co., 54 Vt. 593. §§ 6883, 7168.
Langforth Bridge Case, Cro. Car. 365. § 6413.
Langhorne v. Robinson, 20 Gratt. (Va.) 661; 5 Call (Va.), 139. § 1118.
Langley v. Boston & Co. R. Co., 10 Gray (Mass.), 103. § 5884.
Langridge v. Levy, 2 Mees. & W. 519. §§ 1472, 1477.
Langston v. South Carolina R. Co., 2 S. C. 248. §§ 6107, 6121, 6064.
Langsdale v. Bonton, 12 Ind. 467. §§ 943, 7747.
Langton v. Waite, L. R. 6 Eq. 165. §§ 2651, 2653, 2689.
Langton v. Horton, 1 Hare, 549. §§ 6141, 6145.
Langton v. Hughes, 1 Maule & S. 583. § 7959.
Langworthy v. Little, 12 Cush. (Mass.) 109. § 6200.
Langworthy v. New York & Co. R. Co., 2 E. D. Smith (N. Y.), 195. § 7415.
Lanier v. Bank, 11 Wall. (U. S.) 369, 377. §§ 2338, 2590, 2593.
Lankershim Ranch & Co. v. Herberger, 82 Cal. 600. § 2335.
Lankester's Case, L. R. 6 Ch. 905, note. § 3258.
Lannan v. Smith, 7 Gray (Mass.), 150. § 5327.
Lanned v. Albany Gas Light Co., 44 N. Y. 459. affirming 46 Barb. (N. Y.) 264. § 6358.
Lansing v. Gaine, 2 Johns. (N. Y.) 300. § 5740.
Lansing v. Goelet, 9 Cow. (N. Y.) 346. § 1787.
Lansing v. Smith, 8 Cow. (N. Y.) 146. §§ 6342, 6370.
Lansing v. Smith, 4 Wend. (N. Y.) 9. §§ 5432, 5521, 5530, 6373.
Lansing v. Woodworth, 1 Sandf. Oh. (N. Y.) 43. § 6153.
Lanzetti, Succession of, 9 La. An. 329. § 611.
L'Apostre v. Le Platrier, 1 P. Wms. 320. § 7084.
Larco v. Clements, 36 Cal. 132. § 7681.
Larkin v. Suglinaw County, 11 Mich. 8. § 7362.
Larkin v. Will, 12 Mo. App. 135. §§ 2023, 3339.
Larkin v. Wilson, 106 Mass. 120. §§ 7998, 8069.
Larking, Ex parte, 4 Ch. Div. 566. § 4040.
Larned v. Beal, 65 N. H. 184. § 5651.
Larned v. Burlington, 4 Wall. (U. S.) 275. § 1118.
Larrabee v. Baldwin, 35 Cal. 155. §§ 3001, 3003, 4005, 3092, 3093, 3173, 3402, 3713, 3796, 3816, 3206.
Larson v. Dayton, 52 Iowa, 597. §§ 3823, 3827.
Lartigue v. Peet, 5 Rob. (La.) 91. § 5298.
Lasher v. Stimson, 145 Pa. St. 30. §§ 4298, 7896, 7960.
Latimer v. Batson, 4 Barn. & C. 652. § 2617.
Latimer v. Eddy, 46 N. Y. 61. §§ 4539, 4054, 5222.
Latimer v. Union Pac. R. Co., 43 Mo. 165. § 7529.
Lathrop v. Commercial Bank, 8 Dana (Ky.), 114. §§ 4891, 4896, 5176, 5770, 5771, 5784, 7913, 7915.
Lathrop v. Kneeland, 46 Barb. (N. Y.) 432. §§ 1251, 1885.
Lathrop v. Mills, 19 Cal. 513. § 658.
Lathrop v. Singer, 39 Barb. (N. Y.) 396. §§ 3112, 4182.
Lathrop v. Union Pac. R. Co., 1 MacArthur (U. S.) 234. §§ 7363, 7991.
Latrobe v. Western Tel. Co., 74 Md. 232. § 6743.
Lauman v. Lebanon Valley & Co. R. Co., 30 Pa. St. 42. §§ 72, 75, 324, 345, 349, 1549, 4533, 5359, 6678.
Laurel Fork & Co. R. Co. v. West Virginia Transp. Co., 25 W. Va. 324. §§ 5530, 5537.
Laurel Run Building Asso. v. Sperring, 106 Pa. St. 334. § 1547.
Lavalle v. People, 68 Ill. 252. §§ 771, 6790, 6792.
Lavery v. Burr, 1 Wend. (N. Y.) 529. § 5740.
Law v. Cross, 1 Black (U. S.), 533. § 5300.
Law v. Ford, 2 Paige (N. Y.) 310. § 7060.
Law v. Hodgson, 2 Camp. 147; 11 East, 300. § 7959.
Law v. London Indisputable Pol. Co., 1 Kay & J. 223. § 5537.
Law v. Madison & Co. Turnp. Co., 30 Ind. 77. § 5575.
Lawes' Case, 1 De Gex, M. & G. 421. § 1523.
Law Guarantee & Co. v. Bank of England, 24 Q. B. Div. 406. § 2445.
Lawler v. Androscoogin R. Co., 62 Me. 463. § 6349.
Lawler v. Baring Boom Co., 56 Me. 443. § 5604.
Lawler v. Burt, 7 Ohio St. 340. §§ 3018, 3052, 4167, 4361.
Lawler v. Walker, 18 Ohio, 151. § 4361.
Lawless v. Anglo-Egyptian Co., L. R. 4 Q. B. 462. § 6310.
Lawrence's Case, L. R. 2 Ch. 412. §§ 1438, 1444, 1446.
Lawrence v. Ballou, 50 Cal. 258. § 7993.
Lawrence v. Fox, 20 N. Y. 263. § 381.
Lawrence v. Gebhard, 41 Barb. (N. Y.) 575. §§ 3989, 4875, 4965, 5758.
Lawrence v. Great Northern R. Co., 16 Ad. & El. (N. S.) 643. § 6343.
Lawrence v. Greenwich Fire Ins. Co., 1 Paige (N. Y.), 587. § 6878.
Lawrence v. Holmes, 45 Fed. Rep. 357. § 5221.
Lawrence v. Kitteridge, 21 Conn. 577. § 5829.
Lawrence v. Lane, 4 Gilm. (Ill.) 354. § 4896.
Lawrence v. Maxwell, 53 N. Y. 19. §§ 2181, 2650.
Lawrence v. McCalmont, 2 How. (U. S.) 427. § 2681.
Lawrence v. McCready, 6 Bosw. (N. Y.) 329. § 7233.
Lawrence v. Morgan's Louisiana & Co. Steamship Co., 39 La. An. 429. § 5365.
Lawrence v. Nelson, 21 N. Y. 158. §§ 2957, 3786, 3787, 3797, 3804.
Lawrence v. Smith, 57 Iowa, 701. § 5880.
Lawrence v. Taylor, 5 Hill (N. Y.), 107. §§ 5077, 5295.
Lawrence v. Tucker, 23 How. (U. S.) 14. § 6153.
Lawrence v. Turner, 7 Mees. & W. 5190.
Lawrence v. Wynn, 5 Mees. & W. 355. § 1815.
Lawrenceville Cement Co. v. Parker, 15 N. Y. Supp. 577. § 4759.
Lawson v. Milwaukee & Co. R. Co., 30 Wis. 597. § 591.

- Lawton v. Commissioners, 2 Caines (N. Y.), 179. § 761.
- Lawton v. Sager, 11 Barb. (N. Y.) 351. § 1253.
- Lawton v. South Carolina R. Co., 2 S. C. 248. § 6114.
- Lawyer v. Chipperley, 7 Paige (N. Y.), 281. §§ 927, 4554.
- Lawyer v. Rosebrook, 48 Hun (N. Y.) 453; 16 N. Y. St. Rep. 316. §§ 3392, 3396.
- Lay v. Austin, 25 Fla. 933. §§ 5080, 5086.
- Lazard v. Ovey, L. R. 3 Q. B. 415. § 5921.
- Lazarus v. Shearer, 2 Ala. 718. §§ 5126, 5131, 5156.
- Lazear v. National Union Bank, 52 Md. 78. §§ 5638, 5950, 6036.
- Lea v. American & Canal Co., 3 Abb. Pr. (N. S.) (N. Y.) 1. §§ 512, 6755, 6759.
- Lea v. Hernandez, 10 Tex. 137. § 6753.
- Lea v. Maxwell, 1 Head (Penn.), 365. § 7507.
- Leabo v. Goode, 67 Mo. 126. §§ 1220, 1657.
- Leach v. Blow, 8 Smedes & M. (Miss.) 221. § 5152.
- Leach v. Fobes, 11 Gray (Mass.), 56. § 2728.
- Leach v. Kelsey, 7 Barb. (N. Y.) 466. § 6569.
- Leadbitter v. Farrow, 5 Maule & S. 345. §§ 5126, 5137, 5152.
- Leadville Coal Co. v. McCreery, 141 U. S. 475. §§ 6855, 7030.
- Leasure v. Union Mut. Life Ins. Co., 91 Pa. St. 491. § 7990.
- Leathers v. Janney, 41 La. An. 1120. §§ 2070, 4079, 6041, 6544, 6547.
- Leathers v. Shipbuilders Bank, 40 Me. 386. § 6893.
- Leathly v. Webster, Sayer, 252. § 1036.
- Leavenworth v. Booth, 15 Kan. 627. § 1028.
- Leavenworth v. Rankin, 2 Kan. 357. § 5105.
- Leavenworth & Co. R. Co. v. Rice, 10 Kan. 426, 437. § 6276.
- Leavenworth County Comm'rs v. Chicago & C. R. Co., 134 U. S. 688; affirming 25 Fed. Rep. 219. §§ 4059, 4061, 4085.
- Leavitt v. Blatchford, 5 Barb. (N. Y.) 9. §§ 3954, 4653, 4760, 5641, 6703.
- Leavitt v. Blatchford, 17 N. Y. 521. §§ 5045, 6703.
- Leavitt v. Beers, Hill & Denio, Supp. (N. Y.) 221. § 4684.
- Leavitt v. Connecticut Peat Co., 6 Blatchf. (U. S.) 139. §§ 4622, 4638.
- Leavitt v. Fisher, 4 Duer (N. Y.), 1. §§ 2304, 2389, 2496, 4659.
- Leavitt v. Oxford & Co. Silver Min. Co., 3 Utah, 265. §§ 3970, 4001, 4042.
- Leavitt v. Palmer, 3 N. Y. 19. §§ 1393, 1568, 3954, 4760, 6950.
- Leavitt v. Tylee, 1 Sandf. Ch. (N. Y.) 207. §§ 3675, 4760, 6483, 6703.
- Leavitt v. Yeates, 4 Edw. Ch. (N. Y.) 134. §§ 3968, 3998, 4016, 6703, 6950.
- Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313, 318. §§ 5104, 5770, 5771, 5772, 5775, 5795, 5799, 6033, 7913, 7918, 7964.
- Lebanon v. Olcott, 1 N. H. 339. § 6343.
- Lebanon & Co. Gravel Road Co. v. Adair, 85 Ind. 244. § 3898.
- Lebanon School District v. Lebanon Female Seminary (Pa. St.), 12 Atl. Rep. 857. § 5384.
- Le Blanc, Matter of, 4 Abb. N. Cas. (N. Y.) 221. § 2131.
- Le Blanc, Re, 75 N. Y. 598. § 2141.
- Le Blanc, Re, 14 Hun, 8. § 7984.
- Le Bret v. Papillon, 4 East, 502. § 7135.
- Lechmere Bank v. Boynton, 11 Cush. (Mass.) 369. §§ 8, 43.
- Le Claire v. Davenport, 13 Iowa, 210. § 1028.
- Leclou v. Police Jury, 20 La. An. 308. §§ 5592, 5600.
- Le Conte v. Buffalo, 33 N. Y. 333. § 5641.
- Le Croy v. Eastman, 10 Mod. 499. § 2642.
- Leddel v. Starr, 19 N. J. Eq. 159, 164. §§ 6844, 6883.
- Ledwick, Re, 8 Irish Eq. 561. § 693.
- Lee's Case, Carth. 169; 3 Mod. 332; 3 Lev. 309; Skin. 290; 1 Show. 217, 251, 261. § 829.
- Lee v. Barkhamsted, 46 Conn. 213. § 5939.
- Lee v. Bullard, 3 La. An. 462. § 1084.
- Lee v. Citizens' Nat. Bank, 2 Cin. (Ohio) 298. § 2995.
- Lee v. Dearborn, 4 Allen (Mass.), 164. § 3599.
- Lee v. Deerfield, 3 N. H. 290. § 3944.
- Lee v. Flemingsburg, 7 Dana (Ky.), 28. §§ 5045, 5046, 5176.
- Lee v. Fontaine, 10 Ala. 755. §§ 1220, 5298.
- Lee v. Imbrie, 13 Or. 610. §§ 1582, 3176.
- Lee v. Neuchatel Asphalt Co., 41 Ch. Div. 1. §§ 1585, 2130, 2153.
- Lee v. Pittsburgh Coal Co., 16 Alb. L. J. 33; 56 How. Pr. (N. Y.) 373. §§ 4652, 4661, 5298.
- Lee v. Sandy Hill, 40 N. Y. 442. § 6276.
- Lee v. Sturgeon, 46 Ohio St. 153, 161. §§ 2810, 2823, 2824, 2825.
- Lee v. Tabor, 8 Mo. 322. § 7820.
- Lee & Co. Bank, Matter of, 21 N. Y. 9. §§ 3719, 4171, 5403, 5439.
- Lee County v. Rogers, 7 Wall. (U. S.) 181. §§ 1118, 1119.
- Leech v. Harris, 2 Brewst. (Pa.) 571, 577. §§ 856, 859, 864, 910, 913, 914.
- Leeds & Co. v. Hustler, 1 Barn. & C. 424. § 5661.
- Leeds & Co. R. Co. v. Fearnley, 4 Exch. 26. § 1095.
- Leeds Banking Co., L. R. 1 Ch. 150. 1751.
- Leeds Banking Co., Re, 1 L. R. Ch. App. 561. § 3945.
- Leefe, Re, 2 Barb. Ch. (N. Y.) 39. §§ 3920, 7755.
- Leeke's Case, L. R. 6 Ch. 469. §§ 1261, 4154.
- Lee Lin v. Terre Haute & C. R. Co., 10 Mo. App. 125. § 327.
- Lefevre v. Detroit, 2 Mich. 588. § 5575.
- Leffingwell v. Elliott, 8 Pick. (Mass.) 455. § 5794.
- Leffingwell v. Warren, 2 Black (U. S.), 599. § 5426.
- Leffman v. Flanagan, 5 Phila. (Pa.) 155, 161. §§ 1462, 1483, 1486, 1570, 4138, 4153.
- Leftwick v. Hamilton, 9 Heisk. (Tenn.) 310. § 3363.
- Legal Tender Case, 110 U. S. 421. § 670.
- Leggett v. Bank of Sing Sing, 24 N. Y. 283. §§ 2334, 3238, 3239, 3247.
- Leggett v. New Jersey Man. & Co. Co., 1 N. J. Eq. 541. §§ 3954, 4607, 4620, 4622, 4761, 4874, 4878, 4951, 5105, 5106, 5107, 5286, 5642, 5773, 6131, 6132, 6133, 6137, 6175, 6542.
- Legrand v. Hampden Sidney College, 5 Munf. (Va.) 324. §§ 16, 5045, 5046, 5049, 5062, 7589.
- Lehigh Ave. R. Co., Appeal of (Pa.), 24 Week. Notes Cas. 530. § 1061.
- Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rawle (Pa.), 9. §§ 501, 531, 5668, 6598, 6655.
- Lehigh Coal & Nav. Co. v. Central New Jersey R. Co., 43 Hun (N. Y.), 546; 7 N. Y. St. Rep. 270. § 6839.
- Lehigh Coal & Nav. Co. v. Central R. Co., 29 N. J. Eq. 282. § 7092.
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- Lehigh Coal & Nav. Co. v. Central R. Co., 35 N. J. Eq. 426, 427; 41 N. J. Eq. 167. §§ 6941, 6943, 6705.
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Lenawee County Savings Bank v. Adrian, 66 Mich. 273. §§ 2814, 2831.
Le Neve v. Le Neve, 3 Lead. Cas. Eq. 21, note; 3 Atk. 646. §§ 3395, 5212, 5221.
Lennox v. New York, 55 N. Y. 361. § 590.
Lenox v. Harrison, 88 Mo. 491. § 1933.
Lenox v. Roberts, 2 Wheat. (U. S.) 373. § 6467.
Lent v. Padelford, 10 Mass. 230. § 3383.
Lenthilhon v. Moffat, 1 Edw. Ch. (N. Y.) 451. § 3494.
Leo v. Union Pac. R. Co., 17 Fed. Rep. 273. § 6133.
Leo v. Union Pac. R. Co., 19 Fed. Rep. 283. § 4494.
Leominster Canal Co. v. Shrewsbury & C. Ry. Co., 3 Kay & J. 654. § 5297.
Leonard v. Brooklyn, 71 N. Y. 498. § 7758.
Leonard v. Darlington, 6 Cal. 123. § 3960.
Leonard v. Lent, 43 Wis. 83. § 3913.
Leonard v. New Bedford, 16 Gray (Mass.), 292. § 6094.
Leonard v. Storrs, 31 Ala. 498. § 6979.
Leonardsville Bank v. Willard, 25 N. Y. 574. §§ 220, 241, 1870, 7589.
Lerner v. Johns, 9 Allen (Mass.), 419, 421. § 5032.
Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657. § 2141.
Lessasser v. Kennedy, 38 La. An. 539. §§ 3255, 3258, 3265.
Lesh v. Wabash Nav. Co., 14 Ill. 85. § 6303.
Lesley v. Rosson, 39 Miss. 368. § 4558.
Leslie v. Lorillard, 110 N. Y. 519. §§ 6032, 6405.
Leslie v. Lorillard, 40 Hun (N. Y.), 392. §§ 4520, 4532.
Lestapius v. Ingraham, 5 Pa. St. 71. § 6023.
Lester v. Howard Bank, 33 Md. 558. §§ 4019, 5650, 5714.
Lester v. Webb, 1 Allen (Mass.), 34. §§ 4698, 4729.
Lether v. Norton, 5 Ill. 675. § 2617.
Lethbridge v. Adams, L. R. 13 Eq. 547. § 4103.
Le Texier v. Anspach, 15 Ves. 159, 164. § 7410.
Leuke v. Tredway, 45 Mo. App. 507. §§ 3422, 3123, 3429, 3444, 3468, 3531, 3540.
Leuffler v. Pennsylvania & C. R. Co., 11 Phila. (Pa.) 548. § 4985.
Levering v. Mayor, 7 Humph. (Tenn.) 553. §§ 5053, 5104, 5106.
Levert v. Planters' & C. Bank, 8 Port. (Ala.) 104. § 5743.
Levi v. Ayers, 3 App. Cas. 842. §§ 3209, 3722, 3723, 3724.
Levick's Case, 40 L. J. (Ch.) 180. §§ 1190, 1543.
Leviness v. Post, 6 Daly (N. Y.), 321. §§ 4930, 6283.
Levisse v. Shreveport City R. Co., 27 La. An. 641. §§ 4632, 4684.
Levisse v. Delp, 9 Baxt. (Tenn.) 415. § 5404.
Levita's Case, L. R. 3 Ch. 36. § 1190.
Levy v. Brown, 56 Miss. 83. § 4943.
Levy v. Cohen, 18 N. Y. Supp. 155. § 4408.
Levy v. Fitzpatrick, 15 Pet. (U. S.) 167, 171. § 8064.
Le Warne v. Meyer, 38 Fed. Rep. 191. §§ 1566, 1582, 4463.
Lewey's Island R. Co. v. Bolton, 48 Me. 451. §§ 246, 1726, 1769, 1778, 1779, 1780, 1788, 1789.
Lewis, Re, L. R. 6 Ch. 818. § 2320.
Lewis v. Albemarle & Raleigh R. Co., 95 N. C. 179. §§ 4688, 4854.
Lewis v. Armstrong, 8 Abb. N. Cas. (N. Y.) 335. § 4188.
Lewis v. Bank of Kentucky, 12 Ohio, 132. §§ 7385, 7655.
Lewis v. Brackenridge, 1 Blackf. (Ind.) 220. § 5381.
Lewis v. Brainerd, 53 Vt. 510. §§ 4407, 4702.
Lewis v. Chickasaw County, 50 Iowa, 234. § 7758.
Lewis v. Clarendon, 6 Reporter, 689. §§ 365, 366.
Lewis v. Coates, 93 Mo. 170. § 2756.
Lewis v. Commissioners, 12 Kan. 186, 217. § 5298.
Lewis v. Eastern Bank, 32 Me. 90. § 3994.
Lewis v. Foster, 1 N. H. 61. § 4168.
Lewis v. Glenn, 84 Va. 947. §§ 2003, 3395, 3404, 3419, 3537, 3567, 3568, 3570, 6476, 6489, 7522.
Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106. §§ 2618, 2668.
Lewis v. Jeffries, 86 Pa. St. 340. § 5703.
Lewis v. Jones, 4 Barn. & C. 506. §§ 1568, 3796.
Lewis v. Madocks, 8 Ves. 150, 157. § 6434.
Lewis v. McElvain, 16 Ohio, 347. § 506.
Lewis v. Meier, 14 Fed. Rep. 511. § 6092.
Lewis v. Nicholson, 18 Ad. & El. (N. Y.) 503. § 5028.
Lewis v. Oliver, 4 Abb. Pr. (N. Y.) 121. §§ 766, 794.
Lewis v. Robertson, 13 Smedes & M. (Miss.) 558. §§ 1063, 1377, 1573, 1895, 2954, 3551.
Lewis v. Ryders, 13 Abb. Pr. (N. Y.) 1. § 3173.
Lewis v. Shreveport, 108 U. S. 282. § 5288.
Lewis v. Shreveport, 3 Woods (U. S.), 205. § 590.
Lewis v. South Pac. Coast R. Co., 66 Cal. 209. § 7428.
Lewis v. St. Charles County, 5 Mo. App. 225. § 3095; 13 Mo. App. 48, 52. § 3095.
Lewis v. Stevenson, 2 Hall (N. Y.), 63. § 2619.
Lewis v. United States, 92 U. S. 618. § 2656.
Lewis v. Varnum, 12 Abb. Pr. 304. § 2668.
Lewis & C. Road Co. v. Thomas (Ky.), 3 S. W. Rep. 907. §§ 5703, 5942.
Lewiston v. Procter, 27 Ill. 414. §§ 7669, 7675.
Lexington v. Butler, 14 Wall. (U. S.) 282. §§ 6107, 6111, 6115.
Lexington v. Clark, 2 Vent. 223. § 1048.
Lexington v. Headley, 5 Bush (Ky.), 503. § 3927.
Lexington v. McConnell, 3 A. K. Marsh. (Ky.) 224. § 7659.
Lexington & Insurance Co. v. Page, 17 B. Mon. (Ky.) 412. §§ 2135, 2136, 4295, 6496.
Lexington & C. R. Co. v. Bridges, 7 B. Mon. (Ky.) 555. §§ 1570, 1803, 4153.
Lexington & C. R. Co. v. Chandler, 13 Met. (Mass.) 315. §§ 52, 1550, 1755, 1796, 1938, 3993.
Lexington & C. R. Co. v. Staples, 5 Gray (Mass.), 520. §§ 1779, 1788.
Lexington Life & C. Co. v. Richardson, 17 B. Mon. (Ky.) 412. § 6494.
Lexington Man. Co. v. Dorr, 2 Litt. (Ky.) 256. § 7421.
Lexington & C. Turnp. Road Co. v. Redd, 2 B. Mon. (Ky.) 30. § 5916.
Lhonneux v. Hong Kong & C. Bank Corp., 33 Ch. Div. 446. § 7590.
Libbey v. Hodgdon, 9 N. Y. 394. §§ 4583, 7360, 7977, 7989, 8069.
Libby v. Rosekrans, 55 Barb. (N. Y.) 217. §§ 4121, 6946, 7010, 7162.
Libby v. Tobey, 82 Me. 397. §§ 1605, 1616, 2930, 3013, 3099, 3172, 3925.
Libby v. Union Nat. Bank, 99 Ill. 622. §§ 4620, 4623, 4626.
Liberian Exodus Jointstock S. S. Co. v. Rodgers, 21 S. C. 27. § 7665.
Liberty & C. College v. Watkins, 70 Mo. 13. § 3038.
License Case, 5 How. (U. S.) 504. § 5482.
Licensed Victuallers & C. Assn., Re, 42 Ch. Div. 1. § 1194.
Lacey v. Lacey, 7 Pa. St. 251. § 2390.
Lickbarrow v. Mason, 6 East, 25. § 2619.
Lickbarrow v. Mason, 2 T. T. 63, 75. § 6333.
Liddy v. St. Louis R. Co., 40 Mo. 506. § 6352.
Lidleton v. Mayor of Exeter, Comb. 422. § 838.
Liebbe v. Knapp, 79 Mo. 22, 28. §§ 1605, 1615, 1618, 1623, 1648, 1649, 1672, 5645.
Liebscher v. Kraus, 74 Wis. 387. § 4962.
Lies v. Stubbs, 6 Watts (Pa.), 43. § 1568.
Life & C. Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. (N. Y.) 31. §§ 4622, 4644, 4932, 5030, 5712, 6040, 6615.
Life Association of America, Matter of, 91 Mo. 177. §§ 7076, 7077.
Life Association of America, v. Assessors, 49 Mo. 512. § 5569.
Life Association v. Fassett, 102 Ill. 315. §§ 6555, 6755.
Life Association v. Goode, 71 Tex. 90. § 7720.
Life Association v. Levy, 33 La. An. 1203. § 5350.
Liggett v. Glenn, 51 Fed. Rep. 351; 47 Fed. Rep. 472. §§ 3637, 3658.
Liggett v. Ladd, 17 Or. 89. § 5921.
Liggett v. Ladd, 23 Or. 26. § 5809.
Light v. Leininger, 8 Pa. St. 403. § 6964.
Light v. Everett Fire Ins. Co., 5 Bosw. (N. Y.) 715. §§ 7658, 7666.
Lightbody v. North America Ins. Co., 23 Wend. (N. Y.) 18. § 5024.
Lightfoot v. Tennant, 1 Bos. & Pul 551. § 7942.
Lighthall Man. Co., Re, 47 Hun (N. Y.) 258. § 740.
Lightner v. Boston & C. R. Co., 1 Low. (U. S.) 333. §§ 365, 403.
Lightner v. Brooks, 2 Cliff. (U. S.) 287. §§ 4140, 4993.
Lightner v. Kimball, 1 Low. (U. S.) 211. § 4140.
Lightner v. Steinagle, 33 Ill. 510. § 6934.
Lill v. Neafie, 31 Ill. 101. § 693.
Lillard v. McFee, 4 Bibb (Ky.), 165. § 2774.
Lillard v. Porter, 2 Head (Tenn.), 177. §§ 3504, 7792.

- Lillard v. Whitaker, 3 Bibb (Ky.), 92. § 2479.
 Lilly v. Tobben, 103 Mo. 477. § 4600.
 Lima v. Cemetery Association, 42 Ohio St. 123. 2823.
 Limerick & Co. Turnp. Co's Appeal, 80 Pa. St. 425. §§ 5909.
 Lime Rock Bank v. Hewett, 50 Me. 267. § 5753.
 Lime Rock Bank v. Macomber, 29 Mo. 564. §§ 3994, 4866, 4881, 4885, 5176.
 Limpus v. London & Co. Omnibus Co., 1 Hurlst. & C. 526; 32 L. J. Ex. 34. §§ 4930, 6283.
 Limpus v. North Gen. Omnibus Co., 30 L. J. (Q. B.) 149. § 4303.
 Lincoln v. Crandall, 21 Wend. (N. Y.) 101. § 5074.
 Lincoln v. Fitch, 42 Me. 456. §§ 6917, 6948.
 Lincoln v. Hilbus, 36 Mo. 149. § 7559.
 Lincoln v. Rows, 51 Mo. 575. § 1097.
 Lincoln v. State, 36 Ind. 163. § 1140.
 Lincoln v. St. Louis & C. R. Co., 75 Mo. 27. § 7623.
 Lincoln & Co. Bank v. Richardson, 1 Me. 79. §§ 52, 3968, 5266.
 Lincoln Ave. & Co. v. Daum, 79 Ill. 299. §§ 5915, 5916.
 Lincoln Building Asso. v. Graham, 7 Neb. 173. §§ 533, 590.
 Lincoln Nat. Bank v. Portland, 82 Me. 99. § 7783.
 Lindauer v. Delaware & Co. Ins. Co., 13 Ark. 461. § 7983.
 Lindauer v. Hay, 61 Iowa 664. § 1500.
 Lindell v. Benton, 6 Mo. 361. §§ 6651, 6723, 7720, 7804.
 Linder v. Carpenter, 62 Ill. 309. §§ 4020, 7828.
 Linder v. Smith, 46 Ill. 523, 527. § 5092.
 Lindsay v. Gladstone, L. R. 9 Eq. 132. § 4426.
 Lindsay v. Griffin, 22 Ala. 629. § 6298.
 Lindsay v. Hyatt, 4 Edw. Ch. (N. Y.) 97. §§ 1986, 1989, 2010, 2033.
 Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221. § 469.
 Lindsey v. Attorney-General, 33 Miss. 508. § 766.
 Lindsey v. Great North. Ry. Co., 10 Hare, 575. § 5297.
 Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245. § 7958.
 Lindsey v. Simmonds, 2 Abb. Fr. (N. S.) 69. §§ 2030, 3351, 3362.
 Lindus v. Melrose, 2 Hurlst. & N. 293; 3 Hurlst. & N. 177. §§ 5034, 5126, 5147, 5148, 5153.
 Linford v. Provincial Horse Ins. Co., 34 Beav. 291. § 4978.
 Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252. § 4881.
 Lingke v. Wilkinson, 57 N. Y. 445, 455. § 4060.
 Lingle v. Nat. Ins. Co., 45 Mo. 109. §§ 1971, 3797, 4040, 4041.
 Linley v. Taylor, 1 Giff. 67; 2 De Gex, F. & J. 84. § 1067.
 Linn v. State Bank, 1 Scam. (Ill.) 87. § 5761.
 Linsley v. Bushnell, 15 Conn. 225. § 6373.
 Lionberger v. Baker, 14 Mo. App. 353; affirmed, 88 Mo. 447, 455. § 2775.
 Lionberger v. Broadway Sav. Bank, 10 Mo. App. 499. §§ 3417, 3419, 3553, 3620, 3686, 6466, 6469.
 Lionberger v. Rowse, 43 Mo. 67. § 7000.
 Lionberger v. Rowse, 9 Wall. (U. S.) 468; 43 Mo. 67. §§ 2854, 2857, 2874, 2915.
 Lotard v. Graves, 3 Caines (N. Y.), 236. § 3821.
 Lippincott v. Shaw Carriage Co., 25 Fed. Rep. 577. §§ 5651, 6041, 6492, 6494, 6503.
 Lippitt v. American Wood Paper Co., 15 R. I. 141. §§ 2392, 2771, 2798.
 Liprot v. Holmes, 1 Kelly, 381. § 2454.
 Liquidation of British Nat. Life Assur. Asso., Ex parte, 8 Ch. Div. 679. § 5719.
 List v. Com., 118 Pa. St. 322. § 7940.
 Lister v. Log Cabin C. Asso., 38 Md. 115. § 6848.
 Litchfield's Case, L. R. 1 Ex. 231. § 3563.
 Litchfield v. Ballou, 114 U. S. 190. §§ 5262, 5705, 7318.
 Litchfield v. Dyer, 46 Me. 31. § 6753.
 Litchfield v. White, 3 Sandf. (N. Y.) 545. § 4139.
 Litchfield Bank v. Church, 29 Conn. 137. §§ 446, 1313, 1399, 1400, 1401, 1427, 6334, 7665, 7710.
 Litchfield Bank v. Peck, 29 Conn. 384. §§ 1401, 6334.
 Litchfield Iron Co. v. Bennett, 7 Cow. (N. Y.) 234. § 4887.
 Litter v. Ozokerite Min. Co., 7 Utah, 487. § 7650.
 Little v. Bowers, 46 N. J. L. 300. § 57.
 Little v. Dusenberry, 46 N. J. L. 614. § 7159.
 Little v. Giles, 118 U. S. 596. § 7474.
 Little v. Ingram, 16 Ga. 194, 198. § 7552.
 Little v. Little, 131 Mass. 367.. § 2850.
 Little v. Little, 5 Mo. 227. § 7552.
 Little v. Merrill, 10 Pick. (Mass.) 543. §§ 710, 718.
 Little v. O'Brien, 9 Mass. 423. §§ 1971, 5975, 7593.
 Little v. Phoenix Ins. Co., 123 Mass. 380. § 4858.
 Little v. Virginia & Water Co., 9 Nev. 317. §§ 7615, 7661, 7679.
 Little Bobtail Gold Min. Co. v. Lightbourne, 10 Colo. 429. § 7538.
 Little Miami R. Co. v. Naylor, 2 Ohio St. 235. §§ 6374, 7406.
 Little Miami R. Co. v. Stevens, 20 Ohio, 415. §§ 6278, 6350.
 Little Pittsburgh & Co. Min. Co. v. Little Chief & Co. Min. Co., 11 Colo. 223. § 7085.
 Little Rock & Co. R. Co. v. Hanniford, 49 Ark. 291. § 592.
 Little Rock & Co. R. Co. v. Huntingdon, 120 U. S. 160. § 6231.
 Little Rock & Co. R. Co. v. Little Rock, Mississippi River & Co. R. Co., 36 Ark. 663, 684. §§ 400, 475, 5220, 5247.
 Little Rock & Co. R. Co. v. Page, 35 Ark. 304. § 4070.
 Little Rock & Co. R. Co. v. Perry, 37 Ark. 164; 44 Ark. 383. § 5321.
 Littlejohn, Ex parte, 3 Mont. D. & De G. 182. § 1048.
 Littleton v. Blackburn, 33 L. T. (N. S.) 611; 45 L. J. (N. S.) 219. § 867.
 Littleton v. Richardson, 34 N. H. 179. § 4376.
 Littleton Sav. Bank v. Osceola Land Co., 76 Iowa, 660. § 7758.
 Littletown Man. Co. v. Parker, 14 N. H. 543. §§ 1724, 1732.
 Littlewort v. Davis, 50 Miss. 403. §§ 5975, 5977.
 Livermore v. Camden, 31 N. J. L. 507. § 23.
 Livermore v. Jamaica, 23 Vt. 361. § 5626.
 Livermore v. Jenckes, 21 How. (U. S.) 126. § 7347.
 Liverpool v. Chorley Water Works, 2 De Gex, M. & G. 852. §§ 6030, 6031, 6034.
 Liverpool & Co. Ins. Co. v. Assessors, 44 La. An. 760. §§ 8095, 8099.
 Liverpool & Co. Steam Co. v. Phenix Ins. Co., 129 U. S. 397. § 5998.
 Liverpool Borough Bank v. Walker, De Gex & J. 24. § 3330.
 Liverpool Household Stores Asso., Re, 8 Rail. & Corp. L.J. 227; 62 L. T. (N. S.) 873; 59 L. J. Chan. 616. §§ 3923, 4106.
 Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566. §§ 2, 3, 4, 5, 6, 14, 2925, 5656, 7876, 7880, 7898.
 Liverpool Waterworks v. Atkinson, 6 East, 507. § 4904.
 Livesey v. Omaha Hotel Co., 5 Neb. 50. § 246.
 Live Stock Asso. v. Levy, 3 N. Y. St. Rep. 514. § 4497.
 Livingston v. Albany, 41 Ga. 22. § 1013.
 Livingston v. Bank of New York, 5 Abb. Pr. (N. Y.) 338; 26 Barb. (N. Y.) 304. § 6642.
 Livingston v. Clinton, cited in 3 Johns. Cas. (N. Y.) 263. § 7593.
 Livingston v. Hastie, 2 Caines (N. Y.), 246. § 5740.
 Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573. §§ 14, 67.
 Livingston v. Moore, 7 Pet. (U. S.) 469, 551. §§ 6342, 6371.
 Livingston v. New York, 8 Wend. (N. Y.) 85. §§ 5595, 5628.
 Livingston v. Pettigrew, 7 Lans. (N. Y.) 505. § 7158.
 Livingston v. Roosevelt, 4 Johns. (N. Y.) 251. § 3008.
 Livingston v. van Ingen, 9 Johns. (N. Y.) 507. § 7776.
 Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155. § 284.
 Livingstone v. Temperance Colonization Soc., 17 Ont. App. 379. § 1553.
 Lloyd v. Archbowl, 2 Taunt. 324. § 3438.
 Lloyd v. Ashby, 2 Car. & P. 138. § 5126.
 Lloyd v. Loaring, 6 Ves. 773. §§ 914, 924, 3485, 5167, 7666.
 Lloyd v. New York, 5 N. Y. 369. § 28.
 Lloyd v. West Branch Bank, 15 Pa. St. 172. §§ 4765, 5951.
 Loan Asso. v. Stonemetz, 29 Pa. St. 534. §§ 4330, 4381, 4382.
 Loan Asso. v. Topeka, 20 Wall. (U. S.) 665. §§ 91, 1115, 1116, 1117, 3014, 5458, 5590.
 Loaners Bank v. Jacoby, 10 Hun (N. Y.), 143. § 518.
 Local Board of Health v. Rochester & Co. Road Commrs, L. R. 1 Q. B. 24. § 5942.
 Look v. Johnson, 36 Me. 464. §§ 8076, 8077.
 Look v. Venables, 27 Beav. 598. § 2206.
 Locke v. Concord R. Co., 60 N. H. 552. § 5543.

- Locke v. Lane, 35 Fed. Rep. 289. § 5039.
 Locke v. Stearns, 1 Metc. (Mass.) 560. § 1475.
 Lockhart v. Lichtenbaler, 46 Pa. St. 151. § 1476.
 Lockhart v. Little Rock & Co. R. Co., 40 Fed. Rep. 631. § 6292.
 Lockhart v. Troy, 48 Ala. 579. §§ 590, 611, 613.
 Lockhart v. Van Alstyne, 31 Mich. 76. §§ 2127, 2275, 4201.
 Lockport v. Gaylord, 61 Ill. 275. § 614.
 Lockwood v. Barnes, 3 Hill (N. Y.), 128. § 5018.
 Lockwood v. Ewer, 2 Atk. 303. § 2656.
 Lockwood v. Mechanic Nat. Bank, 9 R. I. Bank, 9 R. I. 303, 333. §§ 715, 726, 789, 943, 1032, 2594, 3236, 3932.
 Lockwood v. Smith, 5 Day (Conn.), 309. § 4920.
 Lockwood v. St. Louis, 24 Mo. 20. § 5575.
 Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536. § 3906.
 Lodge v. Railroad Co., 1 Leg. Gaz. Rep. (Pa.) 131. § 4002.
 Loeschig v. Bridge, 42 N. Y. 421, 429; affirming 19 Abb. Pr. (N. Y.) 181; 3 Rob. (N. Y.) 342. § 6477.
 Logan v. Earl of Courtown, 13 Beav. 22. §§ 4518, 4519, 4566.
 Logan v. McAllister, 2 Del. Ch. 176. § 61.
 Logan v. Pyne, 43 Iowa, 524. § 1028.
 Logan v. Vernon & Co. R. Co., 90 Ind. 552. § 831.
 Logwood v. Huntsville Bank, Minor (Ala.), 23. §§ 27, 7760.
 Logwood v. Planters' & Bank, Minor (Ala.), 23. § 5060.
 Lohman v. N. Y. & Erie R. Co., 2 Sandf. (N. Y.) 39. §§ 1156, 1245, 1418, 1554, 1605.
 London & Co., City of, & Co. Rep. 241; 3 Leon. 265. §§ 849, 1036, 1038.
 London v. Lynn, 1 H. Black. 206. § 7740.
 London v. Tyrrell, 5 Jur. (n. s.) 924. §§ 458.
 London, City of v. Vanacker, Carth. 480. §§ 948, 955, 1010, 1021, 1044.
 London & Co. Ass. Co. v. Redgrave, 4 C. B. (n. s.) 524. § 1736.
 London & Co. Bank, Re, 13 Ch. Div. 581. §§ 1097, 3204, 3211.
 London & Co. Bank v. Henry, L. R. 7 Eq. 334. § 3277.
 London & Co. Banking Co., Re, 34 Beav. 332. §§ 2320, 2326.
 London & Co. Coal Co., 5 Ch. Div. 525. § 1521.
 London & Co. Discount Co., Re, L. R. 1 Eq. 277. § 6638.
 London & Co. R. Co. v. Cooper, 2 Eng. R. Cas. 312. § 7763.
 London & Co. R. Co. v. Fairclough, 2 Man. & Gr. 674. §§ 1765, 1777, 1784.
 London & Co. R. Co. v. McMichael, 5 Exch. 114. § 1095.
 London & Co. R. Co. v. Winter, Craig & P. 57. § 5297.
 London & Co. Society v. Hagerstown Bank, 36 Pa. St. 498, 503. § 5298.
 London & Colonial Co., Re, L. R. 7 Eq. 550. § 3786.
 London & County Bank v. London & River Plate Bank, 20 Q. B. Div. 232. § 2591.
 London & Provincial Consolidated Coal Co., Re, 5 Ch. Div. 525. §§ 1190, 1533.
 London Dock Co. v. Sinnamon, 8 El. & Bl. 347. § 5059.
 London Financial Asso. v. Wrexham & Co. R. Co., L. R. 19 Eq. 566. § 274.
 London Foundry & Co. v. Clarke, 20 Q. B. Div. 576; 87 L. J. (Q. B.) 291; 69 L. T. (n. s.) 93; 36 Week. Rep. 489. § 2738.
 London Gas Light & Co. v. Nichols, 2 Car. & P. 365. §§ 5059, 7381.
 London Gaslight Co. v. Spottiswoode, 14 Beav. 264. § 4582.
 London India Rubber Co., Re, L. R. 5 Eq. 519, 525. §§ 2122, 2278.
 London India Rubber Co., Re, L. R. 1 Ch. 329. § 6688.
 London Speaker Printing Co., Re, 16 Ont. App. 508. § 3697.
 London Tobacco Pipe Makers' Co. v. Woodroffe, 7 Barn. & C. 838. §§ 52, 687, 1037, 1044, 1045.
 Long v. Bank of Yanceyville, 65 N. C. 354. § 6726.
 Long v. Citizens' Bank, 8 Utah, 104. § 4970.
 Long v. Colburn, 11 Mass. 97. §§ 5028, 5127, 5137, 5146, 5147, 7592.
 Long v. Farmers' Bank, 1 Pa. Law Jour. Rep. 284. § 5475.
 Long v. Fuller, 68 Pa. St. 170. § 5598.
 Long v. Georgia & Co. R. Co., 91 Ala. 519. § 6023.
 Long v. Iamkin, 9 Oush. (Mass.) 361. § 2454.
 Long v. Long, 79 Mo. 645. § 7942.
 Long v. Madison Hemp and Flax Co., 1 A. K. Marsh. (Ky.) 105. § 5046.
 Long v. State, 73 Md. 527. § 5483.
 Long v. Taxing District, 7 Lea (Tenn.), 134. § 1024.
 Long v. Yanceyville Bank, 90 N. C. 405. § 2019.
 Long v. Yonge, 2 Sim. 369. § 4555.
 Long Island Ferry Co. v. Terbell, 48 N. Y. 427. § 4704.
 Long Island R. Co., Matter of, 19 Wend. (N. Y.) 37. §§ 709, 732, 748, 765, 781, 849, 853, 1038, 1052.
 Long Island R. Co. v. Bennett, 10 Hun (N. Y.), 93. § 5626.
 Longley v. Little, 26 Me. 162. §§ 2013, 3023, 3033, 3170, 3682.
 Longley v. Longley Stage Co., 23 Me. 39. §§ 289, 4087, 4459.
 Longmont Supply Ditch Co. v. Coffman, 11 Col. 551. § 3938.
 Longshore Printing & Co. v. Howell, 26 Or. 527. § 7732.
 Longstreth v. Philadelphia & Co. R. Co., 11 W. N. Cas. (Pa.) 809. § 7949.
 Longworth v. Evansville, 32 Ind. 322. § 588.
 Lonkey v. Succor Mill Co., 10 Nev. 17. § 4646.
 Looker v. Peckwell, 38 N. J. L. 253. § 6141.
 Looker v. Wrigley, 9 Q. B. Div. 397. § 5899.
 Loomis v. Eagle Bank, 1 Disney (Ohio), 285. §§ 4919, 4920, 5208, 5221.
 Loomis v. Newhall, 15 Pick. (Mass.) 159. § 1048.
 Loomis v. Stave, 72 Ill. 623. § 2672.
 Loomis v. Tift, 15 Barb. (N. Y.) 541. § 3375.
 Loon, The, 7 Blatchf. (U. S.) 244. § 6352.
 Loque v. Louisiana Levee Co., 37 La. S. 441. § 6361.
 Lord v. Chadbourne, 42 Me. 429. § 5437.
 Lord v. Brooks, 52 N. H. 72. § 2199.
 Lord v. Copper Miners' Co., 18 L. J. (Ch.) 65. § 355.
 Lord v. Copper Miners' Co., 1 Hall & Tw. 85, 99; 2 Phill. Ch. 740. §§ 388, 4483, 4518.
 Lord v. Devendorf, 54 Wis. 491. § 6477.
 Lord v. Essex Bldg. Asso., 37 Md. 320. §§ 507, 508.
 Lord v. Steamship Co., 102 U. S. 541. § 8119.
 Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547. §§ 6163, 6172.
 Lord Belhaven's Case, 3 De Gex, J. & S. 41; 11 Jur. (n. s.) 572. § 1553.
 Lord Bruce's Case, 2 Str. 819. §§ 802, 808.
 Lord Claud Hamilton's Case, L. R. 3 Ch. 548. §§ 1260, 4039.
 Lord St. Leonards in Spackman v. Evans, L. R. 3 H. L. 193. § 3429.
 Lorillard v. Clyde, 85 N. Y. 394. § 7861.
 Loring v. Brodie, 134 Mass. 453. § 5209.
 Loring v. Marsh, 2 Cliff. (U. S.) 322. § 6211.
 Loring v. Salisbury Mills, 125 Mass. 138. §§ 2468, 2486, 2534, 2541, 2795, 4930.
 Loring v. Small, 50 Iowa, 271. § 7758.
 Lorman v. Phenix Ins. Co., 33 Mich. 65. § 7810.
 Lormer v. Bain, 14 Neb. 178. § 2656.
 Los Angeles v. Los Angeles City Water Co., 61 Cal. 65. § 5440.
 Loscombe v. Russell, 4 Sim. 8. § 4482.
 Losee v. Buchanan, 61 Barb. (N. Y.) 86; 51 N. Y. 476; affirming 42 How. Pr. (N. Y.) 385. § 6288.
 Losee v. Bullard, 79 N. Y. 404. § 4228, 4233.
 Losee v. McCarty, 5 Utah, 528. § 8020.
 Lothrop v. Stedman, 42 Conn. 583. §§ 67, 92, 5409, 5412, 5414, 5419, 6859.
 Lothrop v. Stedman, 13 Blatchf. (U. S.) 134. §§ 67, 5408, 5421, 5585, 6859.
 Loubat v. Leroy, 40 Hun. 546; 15 Abb. N. C. (N. Y.) 14; 65 How. Pr. (N. Y.) 138. §§ 708, 750, 861, 883, 893, 897, 911, 912, 1047, 3920, 4394.
 Loudon v. Coleman, 59 Ga. 653. § 7759.
 Loudon v. King, 22 Mo. 336. § 3615.
 Loughbridge v. Harris, 42 Ga. 500. §§ 5589, 5607.
 Loughheed v. Dykeman's Baptist Church, 58 Hun (N. Y.), 364; 12 N. Y. Supp. 207. § 5801.
 Louis Cook Man. Co. v. Randall, 62 Iowa, 244. § 5962.
 Louisiana v. Jumel, 107 U. S. 711. § 7780.
 Louisiana v. New Orleans, 109 La. An. 285. § 5450.
 Louisiana v. Wood, 102 U. S. 294. §§ 5705, 583, 6004, 6005.
 Louisiana & Co. Plank Road Co. v. Pickett, 25 Mo. 535. § 5595.
 Louisiana Nat. Bank v. Laveille, 52 Mo. 380. § 6332.
 Louisiana Paper Co. v. Waples, 3 Woods (U. S.), 34. § 1709.

- Louisiana State Bank v. New Orleans Nav. Co., 3 La. An. 294, § 5633.
- Louisiana State Bank v. Senecal, 13 La. 525. §§ 5197, 5208, 5228, 5229.
- Louisville v. Bank of United States, 3 B. Mon. (Ky.) 138. § 6722.
- Louisville v. Kean, 13 B. Mon. (Ky.) 9. § 7832.
- Louisville v. University of Louisville, 15 B. Mon. (Ky.) 642. §§ 16, 25, 67, 5382, 5383, 5384, 5417.
- Louisville & C. R. Co. v. Boney, 117 Ind. 501. §§ 365, 405.
- Louisville & C. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866. § 6350.
- Louisville & C. R. Co. v. Burke, 6 Coldw. (Tenn.) 45. § 5470.
- Louisville & C. R. Co. v. Caldwell, 98 Ind. 215. § 5730.
- Louisville & C. R. Co. v. Cauble, 46 Ind. 277. §§ 7123, 7154.
- Louisville & C. R. Co. v. Chappell, Rice (S. C.) 383. § 5600.
- Louisville & C. R. Co. v. Collins, 2 Duv. (Ky.) 114. §§ 6276, 6350.
- Louisville & C. R. Co. v. Com., 10 Bush (Ky.), 43. § 5572.
- Louisville & C. R. Co. v. Com., 13 Bush (Ky.), 388. §§ 6425, 6428.
- Louisville & C. R. Co. v. Connor, 9 Heisk. (Tenn.) 21. § 6352.
- Louisville & C. R. Co. v. Davidson, 1 Sneed, Tenn.) 637. §§ 643, 1113.
- Louisville & C. R. Co. v. Flanagan, 113 Ind. 483. §§ 5900, 6016, 6017, 6025.
- Louisville & C. R. Co. v. Garrett, 9 Lea (Tenn.), 438. § 6383.
- Louisville & C. R. Co. v. Glazebrook, 1 Bush (Ky.), 325. § 5628.
- Louisville & C. R. Co. v. Guinan, 11 Lea (Tenn.), 98. §§ 6377, 6381, 6383, 6388.
- Louisville & C. R. Co. v. Ide, 114 U. S. 52. § 7474.
- Louisville & C. R. Co. v. Letson, 2 How. (U. S.) 497. §§ 1834, 3504, 6860, 7447, 7448, 7455, 7456, 7465.
- Louisville & C. R. Co. v. Palmes, 109 U. S. 244. § 5545.
- Louisville & C. R. Co. v. Railroad Commission, 19 Fed. Rep. 679. §§ 5500, 7613.
- Louisville & C. R. Co. v. Saucier (Miss.), 1 South. Rep. 511. § 7426.
- Louisville & C. R. Co. v. State, 3 Head (Tenn.), 523. §§ 6419, 6424, 6429.
- Louisville & C. R. Co. v. Taylor, 68 Miss. 361. § 5574.
- Louisville & C. R. Co. v. Tennessee R. Commission, 19 Fed. Rep. 679. § 5540.
- Louisville & C. R. Co. v. Wangelin, 132 U. S. 599. § 7474.
- Louisville & C. R. Co. v. Wilson, 138 U. S. 501. § 7055.
- Louisville & C. Turnp. Co. v. Ballard, 2 Met. (Ky.) 165. §§ 610, 620, 5392, 7847.
- Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683. §§ 647, 648, 5398.
- Louisville Industrial School v. Louisville, 88 Ky. 584. § 7760.
- Louisville Underwriters, Re. 134 U. S. 488. § 8022.
- Louisville Water Co. v. Hamilton, 81 Ky. 517. § 6537.
- Love v. Fairfield, 13 Mo. 300. § 6469.
- Love v. Sierra Nevada & Co., 32 Cal. 639. § 5074.
- Lovegrove v. Brown, 60 Me. 592. § 2032.
- Lovejoy v. Albee, 33 Me. 414. §§ 8069, 8073.
- Lovejoy v. Middlesex R. Co., 128 Mass. 480. § 4899.
- Loveland v. Garner, 71 Cal. 541. § 4234.
- Lovett v. Adams, 3 Wend. (N. Y.) 380. § 5034.
- Lovett v. Cornwell, 6 Wend. 369. § 3375.
- Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67. §§ 788, 3878, 5252.
- Lovett v. Steam Saw Mill Assn., 6 Paige (N. Y.), 54. §§ 5064, 5089, 5091, 5105, 5106.
- Low v. Buchanan, 94 Ill. 76. §§ 3434, 3460.
- Low v. California & Co., 52 Cal. 53. § 5724.
- Low v. Central Pac. R. Co., 52 Cal. 53. § 5568.
- Low v. Commissioners, R. M. Charit. (Ga.) 302. § 781.
- Low v. Connecticut & C. R. Co., 45 N. H. 370. §§ 480, 483, 484, 485, 486, 489, 518, 5303, 5321.
- Low v. Galena & C. R. Co., 18 Ill. 324. § 5600.
- Low v. Marysville, 5 Cal. 214. §§ 602, 5342.
- Low v. Pew, 103 Mass. 347. § 6141.
- Low v. Rees Printing Co., 41 Neb. 127. § 5494.
- Lowber v. Mayor, 5 Abb. Pr. (N. Y.) 268; 7 Abb. Pr. (N. Y.) 248. § 3519.
- Lowe's Case, L. R. 9 Eq. 589. § 3288.
- Lowe v. Blank, 3 Madd. 277. § 7413.
- Lowe v. Edgefield & C. R. Co., 1 Head (Tenn.), 659. § 1544.
- Lowe v. London & C. R. Co., 18 Ad. & El. (N. s.) 632. § 5058.
- Lowe v. Lowe, 40 Iowa, 220. § 3363.
- Lowe v. Railroad Co., 1 Head (Tenn.), 659. § 1335.
- Lowell v. Boston & C. R. Co., 23 Pick. (Mass.) 24. §§ 4376, 6276.
- Lowell v. Doe, 44 Minn. 144. § 6823.
- Lowell v. Morse, 1 Met. (Mass.) 473. § 7592.
- Lowell v. Short, 4 Cush. (Mass.) 275. § 4376.
- Lowell v. Spaulding, 4 Oush. (Mass.) 277. § 4376.
- Lowell v. Street Commrs, 106 Mass. 540. § 3112.
- Lowell & Sav. Bank v. Winchester, 8 Allen (Mass.), 109. § 4922.
- Lowery v. Comm. Bank, Taney, 310. § 4701.
- Lowery v. Dreyer, 18 Tex. 786. § 5295.
- Lowndes v. Garnet & C. Mining Co., 33 L. J. Ch. 418. §§ 4015, 5702.
- Lowrey v. Brooklyn & C. R. Co., 4 Abb. N. Cas. (N. Y.) 32. § 5235.
- Lowry v. Bourdieu, Doug. 452, 471. §§ 1717, 1772.
- Lowry v. Commercial & C. Bank, Taney (U. S.), 310. §§ 2468, 2486, 2487, 2488, 2528, 2532, 2567, 2599, 4830.
- Lowry v. Fisher, 2 Bush (Ky.), 70. § 3187.
- Lowry v. Hall, 2 Watts & S. (Pa.) 129, 131. § 7347.
- Lowry v. Imman, 46 N. Y. 119. §§ 950, 2928, 3120, 3321, 3422, 3469, 3818.
- Lowry v. Imman, 2 Sweeny (N. Y.), 117. § 5691.
- Lowry v. Parsons, 52 Ga. 356. §§ 3406, 3823, 3831.
- Lowther v. Carlton, 2 Atk. 242. § 5194.
- Lowther v. Kelly, 8 Mod. 116. § 5074.
- Luard's Case, 1 de Gex, F. & J. 533. §§ 1098, 3275.
- Lubbock v. Bank of South America (1892), 2 Ch. 198. § 2159.
- Luby v. Hudson River R. Co., 17 N. Y. 131. § 4785.
- Lucas v. Bank, 2 Stew. (Ala.) 147. §§ 508, 7665, 7696, 7702, 7797.
- Lucas v. Bank, 2 Stew. (Ala.) 280, 321. §§ 5205, 5208.
- Lucas v. Beach, 1 Man. & G. 417. §§ 421, 429.
- Lucas v. Commissioners of Tippecanoe County, 44 Ind. 524. § 1127.
- Lucas v. De la Cour, 1 Mau. & Sel. 249. § 3488.
- Lucas v. Pitney, 27 N. J. L. 221. §§ 5045, 5730, 5734, 5741, 5754, 5755.
- Lucas v. San Francisco, 7 Cal. 463. §§ 944, 7749.
- Lucas v. White Line Transfer Co., 70 Iowa, 541. §§ 5721, 5722, 5970, 6009.
- Lucas v. Market Savings Bank v. Goldsoll, 8 Mo. App. 598. §§ 1853, 6661.
- Luckett v. Townsend, 3 Tex. 119. § 2619.
- Luckombe v. Ashton, 2 Fos. & Fin. 705. § 5167.
- Ludlow v. Charlton, 6 Mees. & W. 815. §§ 5038, 5297.
- Ludlow v. Clinton Line R. Co., 1 Flipp. (U. S.) 25. § 7850.
- Ludlow v. Dutch & C. R. Co., 21 Beav. 43. § 1806.
- Ludlow v. Hurd, 1 Disney (Ohio), 552. §§ 6142, 6194.
- Ludlow v. Hurd, 6 Am. Law Reg. 493. § 7853.
- Ludlow v. Johnston, 3 Ohio, 553. § 5680.
- Ludlow v. Simond, 2 Caines Cas. (N. Y.) 1. § 4558.
- Ludowski v. Benevolent Soc., 29 Mo. App. 337. § 926.
- Luehrmann v. Furniture Co., 21 Mo. App. 503. § 1402.
- Lufkin v. Haskell, 3 Pick. (Mass.) 356. § 3394.
- Lunn v. Robertson, 6 Wall. (U. S.) 277. § 4453.
- Lumbard v. Aldrich, 6 N. H. 269. § 5111.
- Lumbard v. Aldrich, 8 N. H. 31. §§ 4951, 7735, 7913, 7915.
- Lumbard v. Stearns, 4 Cush. (Mass.) 60. §§ 5610, 6611, 6631.
- Lumber Co. v. Ward, 30 W. Va. 43. §§ 531, 6598, 6600, 6733, 7642, 7720.
- Lumpkin v. Jones, 1 Ga. 27. § 3294.
- Lumsden's Case, L. R. 4 Ch. 31. §§ 1095, 3271, 3271, 3274.
- Lumsden v. Buchanan, 4 Macq. 950. § 3194.
- Lund's Case, 28 Beav. 465. § 3255.
- Lund v. Blanchard, 4 Harv. 9. § 4565.
- Lund v. Wheaton Roller Mill Co., 50 Minn. 36. § 2412.
- Lundy Granite Co., Re, L. R. 6 Ch. 462. §§ 3122, 6998.
- Lungrun v. Pennell, 10 Weekl. Note of Cas. 297. § 460.
- Lungstrass v. German Ins. Co., 57 Mo. 107. §§ 4882, 4973.
- Lunn v. Thornton, 1 O. B. 379. § 6141.

- Luse v. Isthmus Transit R. Co., 6 Or. 125. §§ 4622, 4623, 4634, 5016, 5035.
- Lutheran Church v. Maschop, 10 N. J. Eq. 57. § 911.
- Lutheran Evangelical Church v. Gristgau, 34 Wis. 328, 336. § 911.
- Luttrell's Case, 4 Coke Rep. 87. § 256.
- Luttrell v. Hazen, 3 Sneed (Tenn.). 20. § 6303.
- Lyceum v. Ellis, 30 N. Y. St. Rep. 242; 8 N. Y. Supp. 867. §§ 5315, 6173.
- Lycoming Fire Ins. Co. v. Langley, 62 Md. 196. §§ 7339, 7340.
- Lycoming Fire Ins. Co. v. Wright 55 Vt. 526. §§ 7339, 7340, 7950, 7953, 7965.
- Lyde v. Mynn, 1 Myline & K. 683. § 6145.
- Lydne & Co. v. Bird, 33 Ch. Div. 83. §§ 457, 462, 463.
- Lyman v. Bank of U. S., 12 How. (U. S.) 225; affirming 1 Blatchf. (U. S.) 297. § 4098.
- Lyman v. Bonney, 101 Mass. 562. § 7570.
- Lyman v. Bonney, 118 Mass. 222. § 4151.
- Lyman v. Boston & C. R. Co., 4 Cush. (Mass.) 288. § 5470.
- Lyman v. Central Vermont R. Co., 59 Vt. 167. § 7159.
- Lyman v. White River Bridge Co., 2 Aik. (Vt.) 255. §§ 6276, 6305, 6341, 7394.
- Lyme Regis v. Henley, 3 Barn. & Adol. 77. §§ 6424, 6442.
- Lynch, Ex parte, 25 S. C. 193. § 7056.
- Lynch v. First Nat. Bank, 107 N. Y. 179. § 7098.
- Lynch v. Johnson, 48 N. Y. 27. § 3519.
- Lynch v. Mechanics Bank, 13 Johns. (N. Y.) 127. § 7495.
- Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486. § 6328.
- Lynch v. Merchants' Nat. Bank, 22 W. Va., 554. § 3054.
- Lynch v. Metropolitan & C. R. Co., 24 Hun (N. Y.), 506. § 6313.
- Lynch v. Nurdin, 1 Q. B. 29. § 1476.
- Loyd v. Lynchburgh Nat. Bank, 86 Va. 690. § 7099.
- Lyndeborough v. Massachusetts Glass Co., 111 Mass. 315. §§ 4887, 4896, 5961.
- Lyndon v. Gorham, 1 Gall. (U. S.) 367. § 1034.
- Lyndon Mill Co. v. Lyndon Literary & Co. Inst., 63 Vt. 581. §§ 4613, 4617, 4619, 4622, 4641, 4662, 4672, 5184, 5212, 5258, 5287, 5306.
- Lyne v. Bank of Kentucky, 5 J. J. Marsn. (Ky.), 645, 659. §§ 5189, 5213, 5230.
- Lyng v. Michigan, 135 U. S. 161. §§ 7879, 8105.
- Lynn v. Freemansburg & Co. Assol., 117 Pa. St. 1. §§ 849, 1042, 1043.
- Lynda v. Turner, Cowp. 86. § 6365.
- Lynne Regis, Case of, 10 Coke Rep. 122. §§ 7597, 7609.
- Lyons Case, 35 Beav. 676. § 1738.
- Lyon v. American Screw Co., 16 R. I. 472. §§ 4406, 4412, 4413, 4417, 4420, 4421.
- Lyon v. Ewings, 17 Wis. 61. § 1654.
- Lyon v. Hunt, 11 Ala. 275. § 7774.
- Lyon v. Jerome, 26 Wend. (N. Y.) 485. §§ 3944, 3945.
- Lyon v. Lorient, 3 Ala. 151. §§ 7506, 7807.
- Lyon v. Robbins, 46 Ill. 276. § 3519.
- Lyon v. State Bank, 1 Stew. (Ala.) 442, 467. § 632.
- Lyon v. Williams, 5 Gray (Mass.), 567. § 6087.
- Lyons v. National Bank, 19 Blatchf. (U. S.) 279. § 7754.
- Lyons v. Orange & C. R. Co., 32 Md. 18. §§ 53, 67, 97, 98.
- Lyons v. Van Gorder, 77 Iowa, 600. § 7738.
- Lysaght v. Clark & Co. (1891), 1 Q. B. 552. § 7990.
- Lyster's Case, L. R. 4 Ex. 233. §§ 1706, 1766, 1792, 3938.
- Lyster v. Dollard, 1 Ves. Jr. 431; 3 Bro. C. C. 478. § 2771.
- Lytie v. Lansing, 147 U. S. 59. § 6234.
- Lytleton v. Blackburn, 33 L. T. (N. S.) 741. § 858.
- Maas v. Missouri & C. R. Co., 11 Hun (N. Y.), 8. § 5017.
- Mabey v. Adams, 3 Bosw. (N. Y.) 346. §§ 1476, 4144, 4211, 4325, 6703.
- Macaulay v. Bromell & Co. Printing Co., 67 How. Pr. (N. Y.) 252. § 7626.
- Macaulay v. Bromell & Co. Printing Co., 14 Abb. N. Cas. (N. Y.) 316. § 7632.
- Macaulay v. New York, 67 N. Y. 602. § 28.
- Macaulay v. Robinson, 18 La. An. 619. §§ 1550, 1732, 1794.
- Macbean v. Irvine, 4 Bibb (Ky.), 17. § 5046.
- Macbean v. Morrison, 1 A. K. Marsh. (Ky.) 545. § 5126, 5133.
- Macbeath v. Haldimand, 1 T. R. 172, 181. § 5135.
- Macbride v. Lindsay, 9 Hare, 574. §§ 4565, 4566.
- Macconn v. Indiana & C. R. Co., 9 Ind. 262. § 1241.
- Macdonald v. Trojan Button Fastener Co., 31 N. Y. St. Rep. 374; 9 N. Y. Supp. 383. § 5962.
- MacDonough v. Templeman, 1 Har. & J. (Md.) 156. § 5137.
- MacDougall v. Gardiner, 1 Ch. Div. 13, 21. §§ 4483, 4508.
- MacDougall v. Jersey Imperial Hotel Co., 2 Hem. & M. 528. § 1736.
- Macdonald & Plank Road Co. v. Lapham, 13 Barb. (N. Y.) 312, 318. §§ 73, 1270, 1306, 1332, 1577.
- Macdonald & Plank Road Co. v. Snediker, 13 Barb. (N. Y.) 317. §§ 1306, 1307, 1344.
- Macgregor v. Dover & C. R. Co., 18 Ad. & El. (N. S.) 618. § 5355.
- MacGregor v. East India Co., 2 Sim. 452. § 7409.
- MacNeill v. Nevinson, 2 Ld. Raym. 1355. §§ 718, 719.
- Macchia Hotel Co. v. Coyle, 35 Me. 405. § 1208.
- Machinists' Nat. Bank v. Field, 126 Mass. 345. §§ 2577, 2595.
- Mack's Appeal (Pa.), 7 Atl. Rep. 481. § 1337.
- Mack v. De Bardeleben Coal & Co., 90 Ala. 396. §§ 3874, 4504, 4503, 4510.
- Mackall v. Chesapeake & C. Canal Co., 94 U. S. 30. § 6598.
- Mackay v. Bloodgood, 9 Johns. (N. Y.) 285. § 5295.
- Mackay v. Commercial Bank, L. R. 5 P. C. 394. §§ 1462, 1475, 4763, 4781, 5226, 5229, 6303, 6321.
- Mackay v. St. Mary's Church, 15 R. I. 121. § 5122.
- Mackenzie, Ex parte, L. R. 7 Eq. 240. §§ 3786, 3500.
- Mackenzie v. Board of School Trustees, 72 Ind. 189. § 7658.
- Mackereth v. Glasgow & C. R. Co., L. R. 8 Ex. 149. §§ 7450, 8000, 8033.
- Mackey v. Adair, 99 Pa. St. 143. § 4943.
- Mackintosh v. Flint & C. R. Co., 32 Fed. Rep. 350. § 4533.
- Macklem v. Bacon, 57 Mich. 334. §§ 7233, 7245.
- Mackley's Case, 1 Ch. Div. 247. §§ 1190, 1251, 1885.
- MacLae v. Sutherland, 3 El. & Bl. 1. §§ 5126, 5153, 5698, 5700.
- MacLaurry v. Hart, 10 N. Y. Supp. 125. § 4528.
- MacLay v. Harvey, 90 Ill. 525. § 1328.
- Macon v. First Nat. Bank, 59 Ga. 648. § 2865, 2883.
- Macon & C. R. Co. v. Davis, 13 Ga. 68. § 5659.
- Macon & C. R. Co. v. Georgia R. Co., 63 Ga. 103. §§ 5990, 5995.
- Macon & C. R. Co. v. Mayes, 49 Ga. 355. §§ 5880, 5884, 6293.
- Macon & C. R. Co. v. Parker, 9 Ga. 377. §§ 6220, 6570.
- Macon & C. R. Co. v. Vason, 52 Ga. 326. § 2003.
- Macon & C. R. Co. v. Vason, 57 Ga. 314. §§ 1545, 1632, 1747, 1756, 1784, 1895.
- Mactier v. Frith, 6 Wend. (N. Y.) 103. § 4978.
- Maddox v. Graham, 2 Met. (Ky.) 56. §§ 1118, 4906, 6107.
- Maddux v. Bevan, 39 Md. 485. § 5298.
- Maderra's Appeal, 4 Atl. Rep. 908. § 2390.
- Madison v. Chinn, 3 J. J. Marsh. 230. § 2728.
- Madison & C. Plank Road Co. v. Reynolds, 3 Wis. 287. §§ 5915, 5916.
- Madison & C. Plank Road Co. v. Watertown & Plank Road Co., 5 Wis. 173. §§ 5641, 5941.
- Madison & C. Plank Road Co. v. Watertown & Plank Road Co., 7 Wis. 59. §§ 5721, 5722, 5975, 5977.
- Madison & C. R. Co. v. Norwich Saving Soc., 24 Ind. 477. §§ 3968, 4874, 4932, 5724, 5737, 5740, 5867, 6054.
- Madison & C. R. Co. v. Stevens, 6 Ind. 379. § 1311.
- Madison & C. Co. v. Stevens, 10 Ind. 2. § 1253.
- Madison & C. R. Co. v. Whitenack, 8 Ind. 217. §§ 620, 5504.
- Madison Avenue Baptist Church v. Baptist Church, 5 Rob. (N. Y.) 649. § 725.
- Madison Ave. Baptist Church v. Baptist Church, 30 How. Pr. (N. Y.) 471; 1 Abb. Pr. (N. S.) (N. Y.) 227; 3 Rob. (N. Y.) 595. § 6016.
- Madison Ave. Baptist Church v. Baptist Church, 2 Abb. Pr. (N. S.) (N. Y.) 254; 32 How. Pr. (N. Y.) 335. § 3961.
- Madison College v. Burke, 6 Ala. 494. § 7599.
- Madison Co. Bank v. Suman, 79 Mo. 527. § 7507.

Madison—Mansfield TABLE OF CASES CITED.

- Madison Ins. Co. v. Griffin**, 3 Ind. 277. §§ 4632, 4646, 5108, 7754.
Madrid Bank v. Bayley, L. R. 2 Q. B. 37. § 4121.
Madrid Bank v. Pally, L. R. 7 Eq. 443. §§ 4022, 4024, 4031.
Magdalena Steam Nav. Co., Re, Johns, (Eng.) 690. § 5702.
Magdalena Steam Nav. Co. v. Martin, 3 El. & El. 94. § 1093.
Magee v. Badger, 30 Barb. (N. Y.) 246. §§ 1234, 1657, 1660, 2256.
Mages v. Holland, 27 N. J. L. 86. § 6391.
Magee v. Mokelumne Hill & Co., 5 Cal. 253. §§ 5730, 5731.
Magee v. Union Pac. R. Co., 2 Sawy. (U. S.) 447. § 7475.
Magie v. German Evangelical Dutch Church, 13 N. J. Eq. 77. § 5815.
Magill v. Hinsdale, 6 Conn. 464. §§ 5033, 5085, 5132.
Magill v. Kauffman, 4 Serg. & R. (Pa.) 317. §§ 4634, 4777, 4917, 5045, 5175.
Magill v. Parsons, 4 Conn. 317. § 7899.
Magruder v. Colston, 44 Md. 349. §§ 3192, 3283.
Maguire's Case, 3 De Gex & S. 31. § 3371.
Maguire v. Allen, 1 Ball & B. 75. § 6878.
Magwood v. Railroad Bank, 5 S. C. 379. §§ 2528, 2534, 4930.
Mahan v. Union Depot & C. R. Co., 34 Minn. 29. § 6352.
Mahany v. Kephart, 15 W. Va. 609, 625. §§ 7817, 8063, 8073.
Mahasky & Co. v. Des Moines Valley R. Co., 28 Iowa, 437. § 5261.
Maher v. Carman, 38 N. Y. 25. § 2993.
Maher v. Chicago, 33 Ill. 266. § 5262.
Maher v. Overton, 9 La. 115. § 5137.
Mahomet v. Quackenbush, 117 U. S. 503. §§ 610, 614.
Mahon v. New York Cent. R. Co., 24 N. Y. 658. § 5937.
Mahon v. Wood, 44 Cal. 462. §§ 1170, 1173.
Mahone v. Manchester & C. R. Corp., 111 Mass. 72. §§ 4617, 4619, 4622, 7462, 7469.
Mahone v. Southern Tel. Co., 33 Fed. Rep. 702. § 7055.
Mahoney v. Atlantic & C. R. Co., 63 Me. 68. §§ 5380, 5384, 5385, 5386.
Mahoney v. Bank, 4 Ark. 630. §§ 505, 7669, 7705.
Mahoney v. Spring Valley Water Works, 52 Cal. 159, 161. §§ 5593, 5592.
Mahoney Min. Co. v. Bennett, 5 Sawy. (U. S.) 141. § 4044.
Mahorner v. Hooe, 9 Smedes & M. (Miss.) 247. § 7337.
Maiders v. Culver, 1 Duval (Ky.) 161. § 6569.
Main v. Casserly, 67 Cal. 137. §§ 6016, 6018.
Main v. Mills, 6 Biss. (U. S.) 98. §§ 2136, 2951.
Main v. North Eastern R. Co., 12 Rich. L. (S. C.) 82. § 6276.
Maine & C. Ins. Co. v. Neal, 50 Me. 301. § 1545.
Maine Mut. Ins. Co. v. Blunt, 64 Me. 95. § 7231.
Maine Stage Co. v. Longley, 14 Me. 444. § 5176.
Mais, Re, 16 Jur., pt. 1, 608. § 693.
Maisch v. Saving Fund, 5 Phila. (Pa.) 30. §§ 1570, 4133, 4153.
Maitland's Case, 3 Giff. 28. §§ 423, 1260, 1908, 4154.
Maize v. State, 4 Ind. 342. § 843.
Making v. Idoxon (1891), 1 Ch. 133. § 6849.
Malcolm v. Montgomery, 2 Molloy, 500. §§ 6835, 6882.
Malden v. Miller, 1 Barn. & Ald. 699. § 7613.
Malecek v. Tower Grove & C. R. Co., 57 Mo. 17, 19. §§ 4915, 6287, 6298, 6307, 6383, 6387.
Mallet v. Simpson, 94 N. C. 37. §§ 1593, 5770, 5771.
Mallinckrodt Chemical Works v. Belleville Glass Co., 34 Ill. App. 404. §§ 2597, 2925.
Mallory v. Austin, 7 Barb. (N. Y.) 626. § 5915.
Mallory v. Hanaur Oil Works, 86 Tenn. 598. §§ 5338, 5999, 6001, 6403, 6410, 6413.
Mallory v. Mallory-Wheeler Co., 61 Conn. 131. §§ 4381, 5301.
Mallory v. Mallett, 6 Jones Eq. 345. §§ 3341, 3361, 6718, 6729.
Malone v. Crescent City Mill & C. Co., 77 Cal. 33. § 7617.
Malone v. Hathaway, 64 N. Y. 5. § 6350.
Malone v. Marriott, 64 Ala. 436. § 6213.
Malone v. Samuel, 3 A. K. Marsh. (Ky.) 350. § 7507.
Malone v. Toledo, 34 Ohio St. 511. § 5638.
Maltby v. North Western & C. R. Co., 16 Md. 422. §§ 1839, 1865.
Maltby v. Reading & C. R. Co., 53 Pa. St. 140. § 2914.
Malts v. American Express Co., 1 Flipp. C. C. (U. S.) 611. § 7448.
Manahan v. Varnum, 11 Gray (Mass.), 405. § 5794.
Manby v. Grahnam Life Assurance Society, 29 Beav. 439. §§ 914, 916.
Manby v. Long, 2 Lev. 107. §§ 4893, 5045, 7661, 7673.
Manchester & C. R. Co., Re, 14 Ch. Div. 645. § 6838.
Manchester & C. R. v. Concord Railroad (N. H.), 20 Atl. Rep. 383. §§ 6015, 6016, 6019.
Manchester & C. R. v. Fisk, 33 N. H. 397. § 3945.
Manderson v. Commercial Bank, 23 Pa. St. 379. § 3948.
Manderson v. Commercial Bank, 23 Pa. St. 679. § 4519.
Mandeville v. Reynolds, 63 N. Y. 528. § 4943.
Mandeville v. Welch, 5 Wheat. (U. S.) 377. § 6469.
Mandion v. Fireman's Ins. Co., 11 Rob. (La.) 177. § 3255.
Mandlebaum v. North A. M. Co., 4 Mich. 465. §§ 2595, 4465.
Mangles v. Grand Collier Dock Co., 10 Sim. 519. §§ 1313, 1513, 1579.
Manhattan v. Walker, 130 U. S. 267. § 7087.
Manhattan Beach Co. v. Harned, 23 Blatchf. (U. S.) 494; 27 Fed. Rep. 484. § 1496.
Manhattan Brass Co. v. Webster & C. Co., 37 Mo. App. 145. §§ 3977, 5204, 6494.
Manhattan Co. v. Lydig, 4 Johns. (N. Y.) 377. §§ 4836, 4941, 4897.
Manhattan Dispensary, Matter of, 7 N. Y. St. Rep. 871. § 387.
Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110. §§ 4882, 5029, 5249, 5270, 6025.
Manhattan Hardware Co. v. Roland, 128 Pa. St. 119. §§ 4882, 5029, 5249, 5270.
Manhattan Ins. Co. v. Ellis, 33 Ohio St. 338. § 7961.
Manhattan Life Ins. Co. v. Farmers' & C. Nat. Bank, 10 Blatchf. (U. S.) 344. § 4234.
Manhattan Man. & C. Co. v. New Jersey Stock Yard Co., 23 N. J. Eq. 161. § 5106.
Manice v. Hudson & C. R. Co., 3 Duer (N. Y.), 426. § 2238.
Manistee, The, 5 Biss. (U. S.) 381. §§ 7957, 7958, 7960.
Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490. § 6543.
Manley v. Kassiga, 13 Hun (N. Y.), 288. §§ 6946, 6950.
Manley v. St. Helen's Canal & C. Co., 2 Hurst. & N. 840; 27 L. J. (Ex.) 159. §§ 6358, 6373, 6374.
Manlove v. Burger, 33 Ind. 211. §§ 6377, 6379, 7234, 7247.
Manlove v. Naw, 39 Ind. 289. § 7247.
Mann's Case, L. R. 3 Ch. 459, note. §§ 3255, 3271.
Mann v. Blanchard, 2 Allen (Mass.), 386. § 4146.
Mann v. Butler, 2 Barb. Ch. (N. Y.) 362. §§ 325, 4565.
Mann v. Chandler, 9 Mass. 335. §§ 5126, 5132.
Mann v. Commission Co., 15 Johns. (N. Y.) 44. § 5045.
Mann v. Cooke, 30 Conn. 178. §§ 1185, 1400, 1550, 1579, 1595, 1784, 1801, 3047, 3423.
Mann v. Currie, 2 Barb. (N. Y.) 294. §§ 1550, 1784, 1794, 3222, 7282.
Mann v. Edinburgh Northern Tramways Co., (H. L. Soc.) [1883] A. C. 69. § 4094.
Mann v. Oriental Print Works, 11 R. I. 152. § 6350.
Mann v. Penta, 3 N. Y. 422. §§ 1033, 1569, 1573, 2951, 3366, 3429, 3469, 3481, 3482, 3483, 3483, 3493, 3515, 3665, 3567, 7570.
Mann v. Penta, 2 Sand. Ch. (N. Y.) 257. §§ 2954, 5104, 6918, 7219.
Manning v. Hayden, 5 Sawy. (U. S.) 379. § 2024.
Manning v. Norfolk Southern R. Co., 29 Fed. Rep. 838. § 6121.
Manning v. Quicksilver Mining Co., 24 Hun (N. Y.), 360. §§ 2403, 2504.
Manning v. Theisger, 1 Sim. & St. 106. § 4565.
Manser v. Northern & C. R. Co., 2 Eng. Rail. Cas. 380. § 6343.
Mansfield, Ex parte, 2 Macon. & G. 57. § 3830.
Mansfield & C. R. Co. v. Brown, 25 Ohio St. 223. §§ 345, 356, 387, 359.
Mansfield & C. R. Co. v. Drinker, 30 Mich. 124. §§ 327, 357, 358, 359.
Mansfield & C. R. Co. v. Hall, 26 Ohio St. 311. § 1824.
Mansfield & C. R. Co. v. Pettis, 26 Ohio St. 259. § 360.
Mansfield & C. R. Co. v. Stout, 26 Ohio St. 241. §§ 346, 358, 360, 1332.
Mansfield Iron Works v. Willcox, 52 Pa. St. 377. §§ 3472, 3493, 3502A, 3509.

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Mansur v. Pratt, 101 Mass. 60. § 3195.
Manufacturers' & Co. Bank v. Big Muddy Iron Co., 97 Mo. 38. § 4492.
Manufacturers' Bank v. Scofield, 39 Vt. 590. §§ 4779, 4791.
Manufacturers' Ins. Co. v. Loud, 99 Mass. 146. §§ 5556, 5557, 5560.
Manufacturers' Nat. Bank, Re, 5 Biss. (U. S.) 499. § 7262.
Manufacturers' Savings Bank v. Big Muddy Iron Co., 97 Mo. 38. §§ 4497, 6466, 6541, 6550.
Manufacturing Co. v. Bradley, 105 U. S. 175. § 7577.
Manville v. Belden Min. Co., 17 Fed. Rep. 725. § 6004.
Manville v. Edgar, 8 Mo. App. 324. §§ 3018, 3320.
Manville v. Roeber, 11 Mo. App. 317. §§ 3840, 3841.
Many v. Beekman Iron Co., 9 Paige (N. Y.), 188. §§ 5165, 7410.
Mapes v. Second Nat. Bank, 80 Pa. St. 163. §§ 4780, 4782.
Mappier v. Mortimer, 11 Abb. Pr. (N. s.) (N. Y.) 455. § 5625.
Marble v. Van Wert Bank, 3 Ohio Circ. Ct. 464. § 2173.
Marble Company v. Harvey, 92 Tenn. 115. § 5719.
Marbury v. Ehlen, 72 Md. 206. §§ 2528, 2530, 2534, 2535.
March v. Attorney-General, 5 Beav. 433. § 1067.
March v. Eastern R. Co., 40 N. H. 548. §§ 4518, 4519, 4520, 4566, 4578, 4585, 4588, 7989.
March v. Eastern R. Co., 43 N. H. 515, 533. §§ 2131, 2172, 2173, 4493, 4520.
Marchand v. Loan and Pledge Assn., 26 La. An. 389. § 484.
Marcy v. Clark, 17 Mass. 330. §§ 32789, 2925, 3042, 3076, 3077, 3182, 3255, 3259, 3260, 3270, 3319, 3352, 3359, 3476.
Mare v. Charles, 5 El. & Bl. 978. §§ 5126, 5156.
Mare v. Malachy, 1 Myr. & C. 559. § 4565.
Maria Anna & Co. Coke Co., Re, 6 Oh. Div. 447. § 3540.
Marietta & Co. v. Elliott, 10 Ohio St. 57. §§ 72, 74, 1284.
Marine & Co. Ins. Bank v. Jauncey, 1 Barb. (N. Y.) 486. § 7653.
Marine Bank v. Blays, 4 Harr. & J. (Md.) 338. §§ 292, 2183.
Marine Bank v. Butler Colliery Co., 23 N. Y. St. Rep. 318; 5 N. Y. Supp. 291. §§ 4623, 4626, 4966.
Marine Bank v. Chandler, 27 Ill. 525. § 7098.
Marine Bank v. Clements, 31 N. Y. 33. §§ 4639, 5126, 5133, 5756.
Marine Bank v. Clements, 3 Bosw. (N. Y.) 600. §§ 4617, 4622, 4638.
Marine Bank v. Clements, 6 Bosw. (N. Y.) 166. § 4639.
Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252. §§ 4138, 5951.
Marine Bank v. Ogden, 29 Ill. 248. § 5333.
Marine Ins. Co. v. Hodgson, 7 Oranch (U. S.), 332. § 7819.
Marine Ins. Co. v. St. Louis & Co. R. Co., 41 Fed. Rep. 643. § 7936.
Marine Nat. Bank v. National City Bank, 59 N. Y. 67. §§ 4815, 4817, 4933.
Mariner v. Waterloo, 75 Wis. 438. § 7524.
Mariners' Bank v. Sewall, 50 Me. 220. § 6737.
Marino's Case, L. R. 2 Ch. 596. §§ 3283, 3284.
Marion & Co. R. Co. v. Dillon, 7 Ind. 404. § 5124.
Marion & Co. R. Co. v. Dodge, 9 Ind. 163. § 5124.
Marion County Commrs v. Harvey County Commrs, 26 Kan. 181. §§ 612, 621.
Marion Sav. Bank v. Dunkin, 54 Ala. 471. § 6007.
Maritime Bank Liquidators v. Troop, 16 Sup. Ct. Can. 456. § 3786.
Markel v. Western Union Tel. Co., 19 Mo. App. 60. § 381.
Market Nat. Bank v. Hogan, 21 Wis. 317. § 7434.
Market National Bank v. Pacific Nat. Bank (1882), 64 How. Pr. (N. Y.) 1. §§ 675, 7436.
Market Nat. Bank v. Pacific Nat. Bank, 30 Hun (N. Y.), 60. §§ 7271, 7276.
Market Street Bank v. Stumpe, 2 Mo. App. 545. § 4014.
Markey v. Mutual Benefit Ins. Co., 103 Mass. 78. §§ 4622, 4629, 4978.
Markham v. Brown, 37 Ga. 277. § 5621.
Markham v. Jaudon, 41 N. Y. 235. §§ 2479, 2692.
Markley v. Rhodes, 59 Iowa, 57. § 4672.
Marks, Re, 6 N. Y. Supp. 105. § 7932.
Marks v. Hardy, 85 Mo. 232, 237; 12 Mo. App. 595. §§ 3609, 3610, 3611, 3613, 3617, 3640.
Markwell's Case, 5 De Gex. & S. 528. § 428.
Marlatt v. Love Steam Cotton Press Co., 10 La. 553. §§ 4613, 4617, 5045, 5176.
Marborough & Co. R. Co. v. Arnold, 9 Gray (Mass.), 159. § 1933.
Marborough Man. Co. v. Smith, 2 Conn. 579. § 86, 1705, 2392, 3283, 3284, 3973, 3980.
Marlor v. Texas & Co. R. Co., 19 Fed. Rep. 867. § 6121.
Marlow v. Pitfield, 1 P. Wms 558. § 5978.
Marquette & Co. R. Co. v. Taft, 28 Mich. 289. §§ 4849, 4855, 4984.
Marqueze v. Oresswell, 3 Pa. Co. Ct. 559. § 5050.
Marquis of Abercorn's Case, 4 De Gex. F. & J. 78. § 1260.
Marr v. Hanna, 7 J. J. Marsh. (Ky.) 642. § 7581.
Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471. §§ 6555, 7082.
Marr v. Bank of West Tennessee, 4 Lea (Tenn.), 578. §§ 3172, 3722, 3779, 3783, 3797, 3822.
Marriage v. Lawrence, 3 Barn. & Ald. 142. §§ 1931, 7740.
Marsden Land & Co. v. Aldrich, 86 Ill. 504. 4517, 4520.
Marseilles R. Co., Re, L. R. 7 Ch. 161. §§ 3905, 5209, §§ 5214.
Marselis v. Seaman, 21 Barb. (N. Y.) 319. § 5929.
Marsh v. Astoria Lodge, 27 Ill. 421. § 507, 7364, 7669, 7689, 7701.
Marsh v. Brett, 16 How. Pr. (N. Y.) 95. §§ 4760, 5746.
Marsh v. Burroughs, 1 Woods (U. S.), 463. §§ 1703, 2952, 2959, 3429, 3481, 3484, 3486, 3494, 3519, 3536, 3537, 3835.
Marsh v. Fairbury & Co. R. Co., 64 Ill. 414. § 7828.
Marsh v. Fulton County, 10 Wall. (U. S.) 676. §§ 5287, 6288, 6004.
Marsh v. South Carolina R. Co., 56 Ga. 274. § 6300.
Marsh v. Whitmore, 21 Wall. (U. S.) 178. § 5300.
Marshall v. Baltimore & Co. R. Co., 16 How. (U. S.) 314. §§ 1834, 7448, 7456, 7457, 7458, 7875.
Marshall v. Clark, 22 Tex. 23. § 7780.
Marshall v. Colman, 2 Jac. & W. 266. § 4482.
Marshall v. Columbian Fire Ins. Co., 27 N. H. 157. § 5191.
Marshall v. Farmers' & Co. Bank, 85 Va. 676. §§ 4104, 4139.
Marshall v. Golden Fleece & Co. Min. Co., 16 Nev. 156. § 1774.
Marshall v. Harris, 55 Iowa, 182. §§ 2977, 3370, 4236.
Marshall v. Queensborough, 1 Sim. & Stu. 520. § 5297.
Marshall v. Silliman, 61 Ill. 218. § 530.
Marshall v. Taylor, 4 Mo. App. 590. § 3605.
Marshall v. Western & Co. R. Co., 92 N. C. 322. §§ 256, 265.
Marshall County High School Co. v. Iowa Evangelical Synod, 23 Iowa, 360. § 4951.
Marshall Foundry Co. v. Killia, 99 N. C. 501. §§ 1311, 1312, 1513, 1534, 1607, 2054, 2062, 2951, 2952, 3683, 3711.
Marson v. Deither, 49 Minn. 423. §§ 3639, 6469.
Marson v. Lund, 16 Ad. & El. (N. s.) 344. § 3357.
Marston v. Dewberry, 21 La. An. 518. § 1084.
Mart. Matter of, 22 Abb. N. Cas. (N. Y.) 227. § 6701.
Martin's Case, 2 Hem. & M. 669. §§ 1446, 1552, 1555.
Martin, Ex parte, 27 Ark. 467. § 1024.
Martin v. Almond, 25 Mo. 313. § 5083.
Martin v. Baltimore & Co. R. Co., 151 U. S. 673. § 7489.
Martin v. Black, 9 Paige (N. Y.), 641. §§ 3722, 6999.
Martin v. Branch Bank, 14 La. 415. § 7790.
Martin v. Broach, 6 Ga. 21. § 611.
Martin v. Colburn, 88 Mo. 231, 237. § 1097.
Martin v. Continental Pass. R. Co., 14 Phila. (Pa.) 10. § 3951.
Martin v. Fewell, 79 Mo. 401. §§ 1913, 2969, 2973.
Martin v. Fox & Co. Imp. Co., 19 Wis. 552, 555. § 4465.
Martin v. Great Falls Man. Co., 9 N. H. 51. §§ 4886, 4887.
Martin v. Hill, 12 Barb. (N. Y.) 631. § 6200.
Martin v. Hughes, 67 N. C. 293, 296. § 4170.
Martin v. Hunter, 1 Wheat. (U. S.) 304, 334. § 7320.
Martin v. Jackson, 27 Pa. St. 504. § 5194.
Martin v. Jewell, 37 Md. 530. § 2771.
Martin v. Junction R. Co., 12 Ind. 605. § 71.
Martin v. Martin, 131 Mass. 547. § 5815.
Martin v. McLean, 49 Mo. 361. § 3729.
Martin v. Mobile & Co. R. Co., 7 Bush (Ky.), 116. § 8060.
Martin v. Nashville Building Assn., 2 Cold. (Tenn.) 413. §§ 955, 956.

- Martin v. Niagara Falls Paper Man. Co.**, 44 Hun (N. Y.), 130; 122 N. Y. 165. §§ 4623, 4626, 5289, 5290, 5315, 5724, 6082, 6139, 6163, 6172.
- Martin v. Pensacola R. Co.**, 9 Fla. 370, 381. §§ 73, 80, 99, 1149, 1315, 1332, 1344, 1395, 1377.
- Martin v. Reg.**, 12 Irish L. 399. § 7756.
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- Martin v. Wade**, 37 Cal. 168. § 7958.
- Martin v. Walton**, 1 McOord (S. C.), 16. § 5239.
- Martin v. Webb**, 110 U. S. 7. §§ 4607, 5221, 7087.
- Martin v. White**, 58 Vt. 398. § 6964.
- Martin v. W. J. Johnston Co.**, 62 Hun (N. Y.), 557; 42 N. Y. St. Rep. 409; 11 Rail. & Corp. L. J. 122; 17 N. Y. Supp. 133. §§ 4421, 4433.
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- Martindale v. Wilson-Ossa Co.**, 134 Pa. St. 348. §§ 4380, 4382, 4682.
- Martino v. Commerce Fire Ins. Co.**, 15 Jones & S. (N. Y.) 520. §§ 4705, 4891.
- Martinson v. Clowes**, 21 Ch. Div. 860. § 2663.
- Martyn v. Hynd**, 1 Doug. 142; Comp. 437. § 1511.
- Martz v. Detroit Fire & Ins. Co.**, 28 Mich. 201. § 7815.
- Marvin v. Hawley**, 9 Mo. 378. § 6931.
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- Marvine v. Hymers**, 12 N. Y. 223. §§ 5754, 5755.
- Marye v. Baltimore & C. R. Co.**, 127 U. S. 117. §§ 8094, 8095, 8099.
- Maryland v. Northern Central R. Co.**, 18 Md. 193. § 7890.
- Maryland Agricultural College v. Keating**, 58 Md. 580, 584. §§ 610, 612.
- Maryland Fire Ins. Co. v. Dalrymple**, 25 Md. 242. §§ 2450, 2679.
- Marysville Electric Light Co. v. Johnson**, 93 Cal. 538. § 8697.
- Marysville Invest. Co. v. Munson**, 44 Kan. 491. § 7720.
- Mason v. Alexander**, 44 Ohio St. 318. §§ 3133, 3135, 3226, 3541, 3544, 3671, 3826.
- Mason v. Atlantic & C. Co.**, 5 R. I. 463. § 1715.
- Mason v. Bank of Commerce**, 16 Mo. App. 275. §§ 377, 3542, 2544, 3121, 4724, 4930, 5236.
- Mason v. Bogg**, 2 Myl. & Cr. 443, 448. § 7045.
- Mason v. Boom Co.**, 3 Wall. Jr. (U. S.) 252. § 5953.
- Mason v. Cheshire Iron Works**, 4 Allen (Mass.), 393. §§ 3382, 3656.
- Mason v. Comptoir d'Escompte (Q. B. Div.)**, 58 L. J. (Q. B.) 508. § 7990.
- Mason v. Cronk**, 35 N. Y. St. Rep. 859; 125 N. Y. 496. §§ 6528, 7227.
- Mason v. Davol Mills**, 132 Mass. 76. § 2040.
- Mason v. Farmers' Bank**, 12 Leigh (Va.), 84. §§ 7439, 7608.
- Mason v. Finch**, 28 Mich. 282. § 316.
- Mason v. Force**, 30 Ga. 99. §§ 3224, 3293, 3393.
- Mason v. Halle**, 12 Wheat. (U. S.) 370. §§ 1278, 3035, 3036.
- Mason v. Harper's Ferry Bridge Co.**, 17 W. Va. 396. § 5405.
- Mason v. Harris**, 11 Ch. Div. 97. §§ 4481, 4503, 4578.
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- Mason v. New York Silk Man. Co.**, 27 Hun (N. Y.), 307. § 3520.
- Mason v. Pewabic Min. Co.**, 133 U. S. 50. §§ 260, 4443, 4548, 6544, 6741.
- Mason v. Pewabic Min. Co.**, 25 Fed. Rep. 882. § 272.
- Mason v. Spencer**, 35 Kan. 512. § 590.
- Mason & C. Special Drainage District v. Griffin**, 134 Ill. 330, 338. § 7432.
- Masonic & C. Assur. Co. v. Sharpe**, 10 Rail. & Corp. L. J. 292; affirmed (1892), 1 Ch. 154. § 4127.
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- Masons' Hall Tavern Co., Re**, L. R. 5 Eq. 286. § 3786.
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- Massachusetts Iron Co. v. Hooper**, 7 Cush. (Mass.) 183. § 2317.
- Massey v. Banner**, 4 Madd. 416. § 1506.
- Massey v. Citizens' Building & C. Asso.**, 22 Kan. 624. § 246.
- Massey v. Insurance Co.**, 3 Phila. (Pa.) 202. § 5298.
- Massey v. Young**, 73 Mo. 260. § 475.
- Masters' Case**, L. R. 7 Ch. 292. §§ 3255, 3256, 3257.
- Masters v. Eclectic Life Ins. Co.**, 6 Daly (N. Y.), 455. § 6686.
- Masters v. Madison & Ins. Co.**, 11 Barb. (N. Y.) 624. § 5986.
- Masters v. Rosje Lead Min. Co.**, 2 Sand. Ch. (N. Y.) 301, 305. §§ 3138, 3356, 3429, 3432, 3437, 3438, 3483, 3513, 3521, 3819, 3822.
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- Mastermson v. West End Narrow Gauge R. Co.**, 5 Mo. App. 64. § 5238.
- Matheny v. Golden**, 5 Ohio St. 361. § 5570.
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- Mather v. Union Loan & C. Co.**, 26 N. Y. St. Rep. 58; 7 N. Y. Supp. 213. § 7631.
- Mathews v. Bank**, 1 Holmes (U. S.), 396. § 2589.
- Mathews v. Patterson**, 16 Colo. 215. § 4235.
- Mathez v. Neidig**, 72 N. Y. 100. §§ 3161, 3445, 3520, 3809, 3810.
- Mathis v. Pridham**, 1 Tex. Civ. App. 53. §§ 5204, 5228, 6557, 6668, 6979.
- Matson v. Alley**, 141 Ill. 284. § 6512.
- Matson's Ford Bridge Co. v. Com.**, 117 Pa. St. 265. §§ 2891, 2922, 2936.
- Mathews' Case**, 3 DeGex & S. 234. § 428.
- Mathewman's Case**, L. R. 3 Eq. 781. §§ 1097, 3275.
- Matthews v. Albert**, 24 Md. 537. §§ 2935, 2936, 2984, 3179, 3214, 3465, 3786, 3819.
- Matthews v. Coo**, 49 N. Y. 57. § 2480.
- Matthews v. Copiah County**, 53 Miss. 715. § 4708.
- Matthews v. Great Northern R. Co.**, 5 Jur. (N. S.) pt. 1, 284. § 2264.
- Matthews v. Hamilton**, 2 Utah, 35. § 6264.
- Matthews v. Massachusetts Nat. Bank**, 1 Holmes (U. S.), 396. § 4796, 4817.
- Matthews v. Murchison**, 15 Fed. Rep. 691. §§ 276, 3246.
- Matthews v. Patterson**, 16 Colo. 215. §§ 4242, 4244, 4255.
- Matthews v. Skinker**, 62 Mo. 329. §§ 5274, 5638, 6028, 6029, 6033, 6035, 6037.
- Matthews v. Stanford**, 17 Ga. 543. §§ 1462, 2943, 3113.
- Matthews v. Trustees**, 7 Phila. (Pa.) 270. § 693.
- Matthews v. Wallwyn**, 4 Ves. 118. § 6067.
- Matthews v. Warner**, 29 Gratt. (Va.) 570. § 6379.
- Mattingly v. District of Columbia**, 97 U. S. 687. § 590.
- Mattu v. Primrose**, 23 Md. 482. § 701.
- Mauch Chunk v. Shortz**, 61 Pa. St. 399. § 7759.
- Maudslay v. Le Blanc**, 2 Car. & P. 403. §§ 431, 1796.
- Maudslay and Field's Case**, 17 Sim. 157. § 428.
- Maule v. Murray**, 7 T. R. 470. § 6211.
- Maund v. Monmouthshire Canal Co.**, 2 Dowl. (N. S.) 113; 4 Man. & G. 452; 5 Scott (N. S.), 457; 1 Car. & M. 605. §§ 6276, 6279, 6303.
- Mauney v. Motz**, 4 Fed. Eq. (N. C.) 195. § 7589.
- Maunsell v. Midland & C. R. Co.**, 1 Hem. & M. 130. § 4519.
- Maupin v. Virginia Lead Min. Co.**, 78 Mo. 24, 26. § 4866.
- Maux Ferry Gravel Co. v. Branegan**, 40 Ind. 361. §§ 4380, 4381.
- Maximilian v. New York**, 62 N. Y. 160. § 6349.
- Maxted v. Paine**, L. R. 4 Exch. 210. § 2701.
- Maxwell's Case**, 24 Beav. 321. §§ 3202, 3273.
- Maxwell v. Atchison & C. R. Co.**, 34 Fed. Rep. 286. § 8049.
- Maxwell v. Dulwich Hospital**, 7 Sim. 222. § 5297.
- Maxwell v. Finnie**, 6 Coldw. (Tenn.) 434. § 693.
- Maxwell v. Planters Bank**, 10 Humph. (Tenn.) 507. § 4789.
- Maxwell v. Port Tennant & C. Coal Co.**, 24 Beav. 495. § 4024.
- Maxwell v. Reed**, 7 Wis. 582. § 7958.
- Maxwell v. Speed**, 60 Mich. 36. §§ 7546, 8038.
- Maxwell v. Stewart**, 22 Wall. (U. S.) 77. §§ 3729, 3754.
- May v. Black**, 77 Wis. 101. §§ 3064, 3162, 3423.
- May v. Breed**, 7 Cush. (Mass.) 15, 41, 42. § 7338.
- May v. Greenhill**, 50 Ind. 124. § 6839.

- May v. State Bank**, 2 Rob. (Va.) 56. §§ 6722, 6723, 7370.
Maybree v. Moore, 90 Mo. 340. § 5018.
Maybin v. Conlon, 4 Dall. (U. S.) 238. § 1217.
Mayer, Re, 50 N. Y. 504. § 610.
Mayer v. Attorney-General, 32 N. J. Bq. 815. § 7226.
Mayer v. Denver & C. R. Co., 38 Fed. Rep. 197. §§ 4490, 4498, 4602, 7572.
Mayer v. Garber, 53 Iowa, 689. § 1084.
Mayer v. Society for the Visitation of the Sick, &c., 2 Brews. (Pa.) 385. § 8663.
Mayfield v. Moore, 53 Ill. 428. § 4708.
Mayfield v. Wadsley, 3 Barn. & C. 357. § 1048.
Mayhew's Case, 5 De Gex, M. & G. 837. § 3221.
Mayhew v. Prince, 11 Mass. 54. §§ 5126, 5137.
Maynard's Case, L. R. 9 Ch. 60. § 1601.
Maynard v. Bond, 67 Mo. 315. §§ 6893, 6919, 6931, 7060.
Maynard v. Eaton, L. R. 9 Ch. 414. § 3255.
Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48. §§ 3953, 4332, 4398, 6306, 6310.
Mayne v. Griswold, 3 Sandf. (N. Y.) 463. § 4582.
Maylor, Re, 50 N. Y. 504. § 611.
Maylor v. Baltimore & C. R. Co., 21 Md. 50. § 1102.
Maylor v. Beasley, 1 Humph. (Tenn.) 232. §§ 1021, 1025.
Maylor v. Cooper, 6 Wall. (U. S.) 247. § 7477.
Maylor v. Hussey, 21 Ga. 80. § 1013.
Maylor v. Reitz, 50 Md. 579. § 610.
Maylor v. Steamboat Co., R. M. Charlt. (Ga.) 342. § 255.
Maylor v. Thorn, 7 Paige (N. Y.), 261. § 1024.
Maylor v. Winfield, 8 Humph. (Tenn.) 707. §§ 1021, 1024.
Mayor and Burgesses v. Bolton, 1 Bos. & P. 39. §§ 291, 293, 637.
Mayor & v. Colgate, 12 N. Y. 146. § 611.
Mayor & of Lynne Regis, Case of, 10 Co. Rep. 120, 122. § 294.
Mayor & of New York v. Conover, 5 Abb. Pr. (N. Y.) 171. § 766.
Mayor & of New York v. Ordrenan, 12 Johns. (N. Y.) 122. § 1037.
Mayor & of Wigon v. Pilkington, 1 Keb. 597. § 811.
Mayor of Carlisle v. Blamire, 8 East, 437. §§ 292, 294.
Mayor of London v. Mayor of Lynn, 1 H. Black. 214. § 1931.
Mayor of New York, Matter of, 11 Johns. (N. Y.) 77. § 1117.
Mayor of Oxford v. Wildgoose, 3 Lev. 294. §§ 948, 1044.
Mayor of Scarborough v. Butler, 3 Lev. 237. § 289.
Mayor of Westupka v. Winter, 39 Ala. 651. § 68.
Mays v. Foster, 13 Or. 214. § 2300.
Maysville & Turnp. Co. v. Ratliff, 85 Ky. 244. § 5910, 5913.
Maysville Turnp. Co. v. How, 14 B. Mon. (Ky.) 426. § 5381.
McAdams v. Boyer, 37 Fed. Rep. 73. § 1889.
McAden v. Commissioners &c., 97 N. C. 355. § 2884.
McAden v. Jenkins, 64 N. C. 796. §§ 5659, 5677.
McAfee v. Kennedy, 1 Litt. (Ky.) 92. § 5697.
McAleer v. McMurry, 58 Pa. St. 126. § 4472.
McAleer v. McMurray, 6 Phila. (Pa.) 244. § 4472.
McAllen v. Woodcock, 60 Mo. 174. §§ 4072, 4730, 7866.
McAllister v. Indianapolis & C. R. Co., 15 Ind. 11. §§ 1394, 1395.
McAllister v. Kuhn, 96 U. S. 87. §§ 2450, 2452.
McAllister v. Pennsylvania Ins. Co., 28 Mo. 214. §§ 8093, 8096.
McAllister v. Plant, 54 Mo. 106. §§ 5685, 6133.
McAlpin v. Jones, 10 La. An. 552. §§ 7329, 7341, 7342.
McAndrews v. Collier, 42 N. J. L. 189. § 6281.
McArdle v. Barney, 16 Abb. Pr. (N. s.) (N. Y.) 228. § 6854.
McArdle v. Irish Iodine & C. Co., 15 I. R. C. L. (N. s.) 146. § 5074.
McArthur v. Carrie, 32 Ala. 75. § 3774.
McArthur v. Home Life Assn., 73 Iowa, 336. § 4979.
McArthur v. Seaforth, 2 Taunt. 257. §§ 2479, 2480.
McArthur v. Times Printing Co., 48 Minn. 319. § 5321.
McAuley v. Billenger, 20 Johns. (N. Y.) 89. § 1206.
McAuley v. Chicago & C. R. Co., 83 Ill. 348. § 503.
McAuley v. Columbus & C. R. Co., 83 Ill. 348. § 512.
McAuley v. York Mining Co., 6 Cal. 80. § 3074.
McAunich v. Mississippi & C. R. Co., 20 Iowa, 342. §§ 592, 622, 5538.
McAvity v. Lincoln Pulp & C. Co., 82 Me. 501. §§ 1567, 2954, 3786, 3788, 3812, 4682.
McBride v. Farmers' Bank, 28 Barb. (N. Y.) 476; 7 Abb. Pr. (N. Y.) 347. § 3519.
McBroom v. Lebanon, 31 Ind. 268. § 518.
McCabe v. Board of Comm'rs, 46 Ind. 380. § 5045.
McCabe v. Crosier, 69 Ill. 501. § 7769.
McCahill v. Kipp, 2 E. D. Smith (N. Y.), 413. § 1476.
McCall v. Byram Man. Co., 6 Conn. 428. §§ 56, 694, 792, 3933, 3968, 7515.
McCall v. California, 136 U. S. 104. §§ 8105, 8107.
McCalla v. Rigg, 3 A. K. Marsh. (Ky.) 259. §§ 5126, 5132, 5149.
McCallie v. Walton, 37 Ga. 611. §§ 6467, 6477, 6534, 7050.
McCallion v. Hibernia & C. Soc., 70 Cal. 163. §§ 219, 221, 7708.
McCallum v. Lawrence, 1 Blatchf. (U. S.) 232. § 3519.
McCalmont v. Philadelphia & C. R. Co., 14 Phila. (Pa.) 479. § 6148.
McCann v. First Nat. Bank, 112 Ind. 354. § 2119.
McCaraber v. Com., 5 Watts & S. (Pa.) 21. § 6363.
McCargo v. Crutcher, 27 Ala. 171. § 4435.
McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437. §§ 5680, 5770, 5783, 5786, 5808, 5821, 7919.
McCarthy v. Com., 110 Pa. St. 243. § 594.
McCarthy v. Lavasche, 89 Ill. 270. §§ 1853, 1855, 1858, 3460, 3686, 6015.
McCarthy v. McCarthy, 74 Ala. 546. § 3774.
McCarthy v. McGinnis, 76 Mo. 341. § 3615.
McCarthy v. Missouri R. Co., 15 Mo. App. 385. § 4955.
McCartney v. Chicago & C. R. Co., 112 Ill. 611. §§ 217, 5686.
McCartys Appeal, 110 Pa. St. 379. § 4124.
McCarthy v. Embley, 2 Yeates (Ky.) 304. § 1084.
McCarthy v. Lavasche, 10 Oh. Leg. News, 342. § 4354.
McCarthy v. Sellingsgrove & C. R. Co., 87 Pa. St. 332. § 1401.
McCaughal v. Ryan, 27 Barb. (N. Y.) 376, 385. § 5783.
McCauley v. Columbus & C. R. Co., 83 Ill. 348. § 518.
McCauley v. Hargroves, 48 Ga. 50. § 3571.
McChord v. McClinton, 5 Litt. (Ky.) 304. § 6969.
McClaren v. Franciscus, 43 Mo. 452. §§ 3170, 3173, 3185, 3221, 3255, 3259, 3260, 3351, 3602.
McClasky v. Grand Rapids & C. R. Co., 16 Ind. 96. § 1824.
McClave v. Thompson, 36 Hun (N. Y.), 365. § 4185.
McClellan v. Reynolds, 49 Mo. 312. §§ 5030, 5126, 5129, 5132, 5144, 5171.
McClellan v. Scott, 24 Wis. 81. §§ 1372, 6321.
McClendon v. Norfolk & C. R. Co., 110 N. Y. 469, 475. §§ 6064, 6075, 6110, 6123.
McClendland v. Slingluff, 7 Watts & S. (Pa.) 134. § 7507.
McClendland v. Whiteley, 15 Fed. Rep. 322. § 1903.
McClinch v. Sturgis, 72 Me. 283. §§ 227, 633.
McClure v. Herring, 70 Mo. 18. §§ 5083, 5030.
McClure v. Owen, 26 Iowa, 243. § 1119.
McClure v. Oxford, 94 U. S. 429, 432. §§ 6072, 6031.
McClure v. People's Freight R. Co., 90 Pa. St. 269. §§ 1149, 1158, 1163.
McCollin v. Gilpin, 5 Q. B. Div. 390. § 5031.
McColloch v. Stone, 64 Miss. 737. § 5574.
McComb v. Barcelona Apartment Asso., 134 N. Y. 593. § 4079.
McComb v. Barcelona Apartment Asso., 134 N. Y. 598; affirming 10 N. Y. Supp. 546. §§ 6172, 6173.
McComb v. Barcelona Apartment Asso., 56 Hun (N. Y.), 644; 31 N. Y. St. Rep. 325. §§ 1140, 1646.
McComb & Chicago & C. R. Co., 7 Fed. Rep. 426. § 7411.
McComb v. Chicago R. Co., 19 Blatchf. (U. S.) 69. § 7409.
McComb v. Cordova Apartment Asso., 56 Hun, 644. § 1646.
McComb v. Cordova Apartment Asso. (Sup. Ct.), 31 N. Y. St. Rep. 334. § 1140.
McComb v. Credit Mobilier, 13 Phila. (Pa.) 468. § 1693.
McConahy v. Center & C. Turnp. Co., 1 Penn. & W. (Pa.) 426. § 8600.
McConnell v. Scott, 15 Ohio, 401. § 6841.

McConnell—McHose TABLE OF CASES CITED.

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 McConville v. Gilmour, 36 Fed. Rep. 277. § 7305.
 McCord v. High, 24 Iowa, 336. § 6363.
 McCord v. Ohio & C. R. Co., 13 Ind. 220. § 1492.
 McCord v. Weil, 33 Neb. 868; overruling 29 Neb. 652. § 6887.
 McCord & Co. Mercantile Co. v. Glen (Utah), 21 Pac. Rep. 500. § 518.
 McCormick v. Hadden, 37 Ill. 370. § 7209.
 McCormick v. Kansas & C. R. Co., 57 Mo. 433. § 6343.
 McCormick v. Kenyon, 13 Mo. 131. § 1832.
 McCormick v. Lafayette, 1 Ind. 43. § 5595.
 McCormick v. Pennsylvania R. Co., 49 N. Y. 303. §§ 6298, 7553, 7558.
 McCormick v. Wheeler, 36 Ill. 114. § 5197.
 McCortle v. Bates, 29 Ohio St. 419. § 3905.
 McCotter v. Jay, 30 N. Y. 80. § 7162.
 McCoy v. Farmer, 65 Mo. 244. §§ 6730, 6739.
 McCoy v. Kansas & C. R. Co., 36 Mo. App. 445. § 6293.
 McCoy v. McKown, 26 Miss. 487. § 6298.
 McCracken v. Halsey Fire Engine Co., 37 Mich. 361. § 4704.
 McCracken v. McIntyre, 1 Duv. (Canada) 479. §§ 1642, 1690, 1693.
 McCracken v. McIntyre, 1 Duv. (Canada) 525. § 3214.
 McCracken v. San Francisco, 16 Cal. 591, 624. § 5287.
 McCreavy v. Remson, 19 Ala. 430. § 5246.
 McCray v. Junction R. Co., 9 Ind. 358. §§ 71, 72, 75, 343.
 McCrea v. Port Royal R. Co., 3 S. C. 381. §§ 69, 5407.
 McCrea v. Purmort, 16 Wend. (N. Y.) 460. § 3796.
 McCready v. Guardians of the Poor, 9 Serg. & R. (Pa.) 94. §§ 6305, 7394.
 McCready v. Rumsey, 6 Duer (N. Y.), 574. §§ 2321, 2636.
 McCready v. Virginia, 94 U. S. 396. § 8001.
 McCreery v. Everding, 54 Cal. 168. § 7610.
 McCue v. Wapello County, 56 Iowa, 658. § 4708.
 McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278. §§ 5024, 5029.
 McCulloch v. Norwood, 58 N. Y. 562; reversing 4 Jones & Sp. (N. Y.) 180. §§ 6726, 6735, 6754, 6893, 7720.
 McCulloch v. State, 11 Ind. 424. § 658.
 McCulloch v. State of Maryland, 4 Wheat. (U. S.) 316, 400. §§ 670, 671, 1117, 2854, 2855, 5458, 7899, 8092.
 McCullough v. Moss, 5 Denio (N. Y.), 567, 580; 5 Hill (N. Y.), 131. §§ 1281, 3173, 3975, 4206, 4622, 4641, 4874, 5045, 5222, 5737, 5741, 5742.
 McCullough v. Talladega Ins. Co., 46 Ala. 376. §§ 532, 5047, 7676.
 McCully v. Pittsburgh & C. R. Co., 32 Pa. St. 25. §§ 1272, 1377, 1545, 1879, 1903, 1911, 1974, 1996, 2008.
 McCune Min. Co. v. Adams, 35 Kan. 138. § 1853.
 McCurdy v. Bowes, 88 Ind. 583. §§ 7183, 7184.
 McCurdy v. Myers, 44 Pa. St. 535. § 6679.
 McCurdy v. Rogers, 21 Wis. 197. §§ 2057, 5028.
 McCutchen v. Miller, 31 Miss. 65. § 6905.
 McCutcheon v. Rivers, 68 Mo. 122. § 4733.
 McDaniel v. Gate City Gaslight Co., 79 Ga. 58. § 6051.
 McDaniels v. Flower & Co., 22 Vt. 274. §§ 776, 789, 2624, 3927, 5089.
 McDermid v. Cotton, 2 Ill. App. 297. §§ 5300, 5301.
 McDermott v. Board of Police, 5 Abb. Pr. (N. Y.) 422. § 939.
 McDermott v. Clary, 107 Mass. 501. § 3363.
 McDermott v. Donegan, 44 Mo. 85. §§ 1741, 3578, 3582, 3587.
 McDermott v. Evening Journal Assn., 43 N. J. L. 483. § 6319.
 McDermott v. Harrison (Sup. Ct.), 30 N. Y. St. Rep. 324; 9 N. Y. Supp. 184. §§ 1364, 1438, 1456.
 McDermutt v. Strong, 4 Johns. Ch. (N. Y.) 687. § 2964, 3484.
 McDonald v. Chisholm, 131 Ill. 273; affirming 30 Ill. App. 176. §§ 4622, 4624, 4630, 4663, 5290.
 McDonald v. Leewright, 31 Mo. 29. § 7507.
 McDonald v. Massachusetts Hospital, 120 Mass. 432. §§ 26, 6364.
 McDonald v. Red Wing, 13 Minn. 38. § 5621.
 McDonald v. Smalley, 1 Pet. 62. § 4412.
 McDonald v. State, 81 Ala. 279. § 5509.
 McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 401. §§ 1849, 2009, 3024, 3040, 3095, 3344, 3345, 3347, 3359, 5224, 6559, 6663.

McDonough v. Phelps, 12 How. Pr. (N. Y.) 372. §§ 1259, 1550, 1794, 3046, 3048, 3050, 3051.
 M'Donough v. Templeman, 1 Har. & J. (Md.) 156. §§ 4001, 5034, 5077, 5035, 5088.
 McDougald v. Bellamy, 18 Ga. 411. §§ 2990, 3181, 4933, 5268.
 McDougald v. Lane, 18 Ga. 444. §§ 2990, 3660, 4264.
 McDougall v. Gardiner, 1 Ch. Div. 13, 22. §§ 4481, 4500.
 McDowall v. Sheehan, 129 N. Y. 200; 36 N. Y. St. Rep. 104; 13 N. Y. Supp. 386. §§ 3126, 3448, 3691, 4388.
 McDowel v. Delap, 2 A. K. Marsh. (Ky.) 33. § 5018.
 McDowell v. Bank of Wilmington, 1 Harr. (Del.) 27. § 3338.
 McDowell v. Hemphill, 1 Winst. (N. C.) 96. § 8.
 McElhenny's Appeal, 61 Pa. St. 183. §§ 457, 465, 4029.
 McElroy v. Kansas City, 21 Fed. Rep. 257. §§ 5405, 5406.
 McElroy v. Nashua & C. R. Co., 4 Cush. (Mass.) 400. § 6293.
 McElroy v. Nucleus Assn., 131 Pa. St. 393. §§ 4952, 5190.
 McEuen v. West London & C. Co., L. R. 6 Ch. 655. §§ 1224, 1225, 3283, 3284.
 McEvers v. Lawrence, 1 Hoff. (N. Y.) 172, 175. § 7225.
 McEwen v. Montgomery Co. Mut. Ins. Co., 5 Hill (N. Y.), 101. § 5191.
 McFadden v. Hunt, 5 Watts & S. (Pa.) 468. § 3446.
 McFall v. McKeesport & C. Ice Co., 123 Pa. St. 253. § 2969.
 McFarlan v. Triton Ins. Co., 4 Den. (N. Y.) 392, 397. §§ 508, 531, 1931, 5711, 7667, 7689, 7702.
 McFarland v. State Bank, 4 Ark. 44. § 5761.
 McGargell v. Hazleton Coal Co., 4 Watts & S. 425. § 788.
 McGary v. Lafayette, 12 Rob. (La.) 668, 674. § 6287.
 McGary v. Lafayette, 4 La. An. 440. § 6287.
 McGean v. Manhattan R. Co., 117 N. Y. 219. § 5625.
 McGee v. Mathis, 4 Wall. (U. S.) 143. § 5570.
 McGeogh v. Hooker, 11 Ill. App. 649, 655. §§ 5299, 5300.
 McGill v. Bank of United States, 12 Wheat. (U. S.) 511. § 817.
 McGillin v. Clafin, 52 Fed. Rep. 657. § 7556.
 McGinness v. Taylor, 22 Mo. App. 513. § 7547.
 McGinnis v. Barnes, 23 Mo. App. 413. §§ 1354, 2011, 3468.
 McGinnis v. Kortkamp, 24 Mo. App. 378. §§ 1335, 1342, 1354, 2009, 2011, 3387, 3770.
 McGoldrick v. Slevin, 43 Ind. 522. § 6839.
 McGough v. Jamison, 107 Pa. St. 336. § 7328.
 McGourkey v. Toledo etc. R. Co., 146 U. S. 536. § 4059.
 McGraw's Estate, Re, 111 N. Y. 66; affirming 45 Hun (N. Y.), 354. §§ 5775, 5782, 5787, 5801, 5809, 6019.
 McGraw v. Memphis & C. R. Co., 5 Coldw. (Tenn.) 434. § 7805.
 McGraw v. Walker, 74 Md. 554. § 7055.
 McGraw v. Junction R. Co., 9 Ind. 359. § 1273.
 McGregor v. Baylies, 19 Iowa, 43. § 583.
 McGregor v. Covington & C. R. Co., 1 Disney (Ohio), 509. § 7901.
 McGregor v. Deal & C. R. Co., 18 Ad. & El. (N. s.) 618; 22 L. J. (Q. B.) 69. § 75.
 McGregor v. Erie R. Co., 35 N. J. L. 115; 35 N. J. L. 89. §§ 7890, 7891, 7892.
 McGregor v. Fuller Implement Co., 72 Iowa, 143. § 7603.
 McGregor v. Vaupeal, 24 Iowa, 436. § 2812.
 McGrew v. Browder, 2 Mart. (N. s.) (La.) 17. § 7312.
 McGrew v. City Produce Exch., 85 Tenn. 572. § 2941.
 McGuire v. O'Halloran, Hill & D. (N. Y.) 85. § 2970.
 McGunneigle v. State, 6 Mo. 367. § 5338.
 McHarg v. Donnelly, 27 Barb. (N. Y.) 100. § 6948.
 McHarg v. Eastman, 7 Robt. (N. Y.) 137; 35 How. Pr. (N. Y.) 205. §§ 4164, 4189, 4208, 4222, 4331, 4338, 4339, 4340.
 McHenry, Ex parte, 9 Abb. N. Cas. (N. Y.) 256. § 6214.
 McHenry v. Duffield, 7 Blackf. (Ind.) 41. § 5126.
 McHenry v. Jewett, 26 Hun (N. Y.), 453. § 732.
 McHenry v. Ridgely, 2 Seam. (Ill.) 309. § 7553.
 McHose v. Wheeler, 45 Pa. St. 439. §§ 1377, 1853, 1859, 1878, 1879, 1895, 1936, 214, 3472, 3543, 4354.

TABLE OF CASES CITED. McIlhenny—McVicker

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- McIlhenny Co. v. Blum, 68 Tex. 197. §§ 5141, 5143.
- McIndoe v. Jones, 6 Wis. 334. § 1125.
- McIndoe v. St. Louis, 10 Mo. 575. §§ 5793, 6033, 6035.
- McIntire v. Calhoun, 27 Mo. App. 513. § 7678.
- McIntire v. Preston, 10 Ill. 48. §§ 5126, 5137, 5737, 5741, 5754, 5755, 5758, 7664, 7665, 7666, 7669, 7790.
- McIntire Poor School v. Zainesville & Co., 9 Ohio, 203. §§ 5686, 6577.
- McIntosh v. Flint & Co., 32 Fed. Rep. 350. § 2391.
- McIntosh v. Merchants' Co., 9 La. An. 403. § 5665.
- McIntyre v. Parks, 5 Met. (Mass.) 207. § 7942.
- McIntyre v. Strong, 63 How. Pr. (N. Y.) 43. § 3122.
- McIntyre v. Union College, 6 Paige (N. Y.), 239, 242. § 3138.
- McIver v. Robinson, 53 Ala. 456. § 2874.
- McKay's Case, 2 Ch. Div. 1. §§ 459, 469, 4039.
- McKay v. Beard, 20 S. C. 156. §§ 61, 6654.
- McKeag v. Collins, 87 Mo. 164. §§ 4622, 4634.
- McKean v. Turner, 45 N. H. 203. § 7815.
- McKeen's Appeal, 42 Pa. St. 479. § 2194.
- McKeen v. Northampton County, 49 Pa. St. 519, 525. §§ 2810, 2847, 2848.
- McKee v. United States, 14 Ct. of Cl. (U. S.) 396. § 5183.
- McKelhan v. Walker, 66 N. C. 95. § 3520.
- McKellar v. Stout, 14 Iowa, 359. §§ 2980, 3090.
- McKelvey v. Crockett, 18 Nev. 238. § 3573.
- McKelvey v. Truby, 4 Watts & S. (Pa.) 323. § 1486.
- McKenzie v. Johnson, 4 Madd. 198. § 1506.
- McKenzie v. L'Amoreux, 11 Barb. (N. Y.) 516. §§ 2293, 3484.
- McKenzie v. Murphy, 24 Ark. 155. § 1349.
- McKenzie v. Robinson, 3 Ark. 559. § 735.
- McKiel v. Real Estate Bank, 4 Ark. 592. §§ 7665, 7669, 7705.
- McKiernan v. Lenzen, 56 Cal. 61. §§ 4856, 4958.
- McKim v. Glenn, 66 Md. 479. §§ 1110, 3172, 3197, 3227, 3570, 3779.
- McKim v. Odum, 8 Brand (Md.), 407. § 6450.
- McKinley v. Chicago & Co., 44 Iowa, 314. §§ 6306, 6308.
- McKinley v. Smith, 2511 App. 168. § 7060.
- McKinley v. Wheeler, 130 U. S. 630. § 5956.
- McKinney v. Augusta, 5 Rich. Eq. (S. C.) 55. § 7438.
- McKinney v. Gubman, 38 Mo. App. 344. §§ 1924, 1931.
- McKinney v. Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104. §§ 657, 5720.
- McKinney v. Ohio & Co., 22 Ind. 99. §§ 7128, 7154.
- McKinney v. Whiting, 8 Allen (Mass.), 207. § 4146.
- McKinnon v. Penzon, 8 Ex. 319; 9 Ex. 609. § 6363.
- McKusick v. Seymour, 48 Minn. 158. §§ 3004, 3431.
- McKusick v. Seymour & Co., 48 Minn. 172. §§ 2136, 2957, 3690.
- McLanglin v. Chadwell, 7 Heisk. (Tenn.) 389. § 2849.
- McLaren v. First Nat. Bank, 76 Wis. 259. §§ 5157, 6948, 6951.
- McLaren v. Pennington, 1 Paige (N. Y.), 102. §§ 247, 5401, 6579, 6859, 7252.
- McLaren v. Stanton, 3 DeGex, F. & A. 202. § 2215.
- McLaughlin v. Bank of Potomac, 7 How. (U. S.) 220. § 3187.
- McLaughlin v. Detroit & Co. R. Co., 8 Mich. 100. §§ 1138, 2362, 4465, 4887.
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- McLean v. Buckingham, 3 McLean (U. S.), 185; 13 How. (U. S.) 151. § 4126.
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- McMahon v. McMahon, 13 Pa. St. 376. § 5246.
- McMahon v. Morrison, 16 Ind. 172. §§ 344, 378, 395, 6678, 6681.
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- McMullen v. Weener, 16 Serg. & R. (Pa.) 18. § 5273.
- McMullin v. McCreary, 54 Pa. St. 230. § 5681.
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- McMurray v. Taylor, 30 Mo. 263. §§ 1220, 1657.
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- McNaughton v. Osgood, 41 Hun (N. Y.), 109. §§ 4381, 4389.
- McNeely v. Woodruff, 13 N. J. L. 352. §§ 701, 725, 734.
- McNeil v. Boston Chamber of Commerce, 154 Mass. 277. §§ 3960, 3961, 3962.
- McNeil v. Tenth Nat. Bank, 46 N. Y. 325. §§ 2391, 2395, 2398, 2504, 2587, 2589, 2593, 2636, 4796.
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- McRee v. Wilmington & Co. R. Co., 2 Jones L. (N. C.) 186. §§ 5349, 5401.
- McReynolds v. Smallhouse, 8 Bush (Ky.), 447, 453. §§ 610, 612, 643.
- McShane v. Carter, 80 Cal. 310. § 5648.
- McSpedon v. New York, 7 Bosw. (N. Y.) 601; 20 How. Pr. (N. Y.) 395. § 6135.
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McWalker—Memphis TABLE OF CASES CITED.

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- Mead v. Bunn, 32 N. Y. 275, 280. § 1372.
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- Meadow Dam Co. v. Gray, 30 Me. 548. § 90.
- Meadow Valley Min. Co. v. Dodds, 7 Nev. 143. § 7470.
- Meadows v. Smith, 7 Ired. Eq. (N. C.) 7. §§ 1462, 6323.
- Meads v. Merchants' Bank, 25 N. Y. 143. §§ 4814, 4815, 4816, 4834, 4839.
- Meads v. Walker, Hopk. (N. Y.) 537. §§ 1247, 1248, 1249.
- Meadville v. Erie Canal Co., 18 Pa. St. 66. § 6373.
- Mealy v. Nickerson, 44 Minn. 430. § 4472.
- Means, Appeal of, 85 Pa. 86, 75. §§ 3013, 3352, 3551.
- Means v. Swormstedt, 32 Ind. 87. §§ 5126, 5132, 5145.
- Mearns v. Commissioners, 9 Ired. L. (N. C.) 73. § 6276.
- Mears v. Graham, 8 Blackf. (Ind.) 144. §§ 5126, 5132.
- Meason's Estate, 4 Watts, 341. § 3317.
- Meason, Re, 5 Binn. (Pa.) 167. § 3145.
- Mechanics' & Co. Asso. v. New York & Co., 35 N. Y. 505. §§ 5730, 5737, 5740.
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- Mechanics' Bank v. Burnet Man. Co., 32 N. J. Eq. 235. § 764.
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- Mechanics' Bank v. Heard, 37 Ga. 401. § 6679.
- Mechanics' Bank v. Merchants' Bank, 45 Mo. 513. §§ 849, 957, 1031, 1032, 2321, 2768, 3237.
- Mechanics' Bank v. New York & Co. R. Co., 13 N. Y. 599; 4 Duer (N. Y.), 480. §§ 1251, 1498, 1500, 1501, 2051, 2079, 2250, 2348, 2349, 2353, 2389, 2417, 2463, 2587, 2591, 3968, 4879, 4884, 4929, 4932, 4933, 5226, 6279.
- Mechanics' Bank v. Schaumburg, 38 Mo. 228. §§ 5189, 5211, 5226, 5229.
- Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299. §§ 2320, 2425, 2440, 5203.
- Mechanics' Banking Asso. v. Mariposa Co., 3 Robt. (N. Y.) 395. §§ 2365, 2460.
- Mechanics' Banking Asso. v. New York & Co. White Lead Co., 35 N. Y. 505. §§ 4724, 5138, 5233.
- Mechanics' Build. Asso. v. Stevens, 5 Duer (N. Y.), 676. §§ 6598, 6600.
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- Mecheleu v. Wallace, 7 Ad. & El. 49. § 1048.
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- Medbury v. Rochester Frear Stone Co., 19 Hun (N. Y.), 498. §§ 6638, 6688.
- Medbury v. Watson, 6 Met. (Mass.) 246. § 4146.
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- Medical College, Re, 3 Whart. (Pa.) 455. §§ 118, 119.
- Medical Institution v. Patterson, 1 Denio (N. Y.), 61. § 36.
- Medill v. Collier, 16 Ohio St. 599, 613. §§ 418, 419, 506, 2943, 2975, 3115.
- Medler v. Albuquerque Hotel & Co. (N. M.), 28 Pac. Rep. 551. § 3697.
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- Meech v. Smith, 7 Wend. (N. Y.) 315. § 5028.
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- Meeker v. Chicago Cast Steel Co., 84 Ill. 276. § 475.
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- Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48. § 4061.
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- Meikel v. German Sav. Fund Soc., 16 Ind. 181. §§ 518, 529, 530, 5151, 5275, 7682.
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- Melendy v. Barbour, 78 Va. 544. § 7128.
- Melendy v. Keen, 89 Ill. 395. § 6067.
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- Mellen v. Moline Malleable Iron Work, 131 U. S. 352. §§ 3347, 3367, 6559, 6561, 6565.
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- Mellish v. Robertson, 25 Vt. 603. §§ 1393, 1568.
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- Memphis v. Brown, 1 Flipp. (U. S.) 217. § 6064.
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- Memphis v. Ensley, 6 Baxt. (Tenn.) 553. § 2812.
- Memphis v. Farrington, 8 Baxt. (Tenn.) 539. §§ 2328, 2829.
- Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133. § 28.
- Memphis v. Memphis Water Co., 5 Heisk. (Tenn.) 495. § 650.
- Memphis v. Woodward, 12 Heisk. (Tenn.) 499. § 4702.
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TABLE OF CASES CITED. **Memphis—Merrimac**

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- Memphis Water Co. v. Magens**, 79 Tenn. 37, 44. § 263.
- Men of Guilford v. Mills**, 2 Keb. 1. § 6444.
- Menagh v. Whitwell**, 52 N. Y. 146. § 1084.
- Menard v. Goggan**, 121 U. S. 253. § 7456.
- Menard v. Hood**, 68 Ill. 121. § 4401.
- Menasha v. Milwaukee & C. R. Co.**, 52 Wis. 414. §§ 263, 6239.
- Mendelsohn v. Anaheim Lighter Co.**, 40 Cal. 657. § 6387.
- Mendota v. Thompson**, 20 Ill. 197. § 7689.
- Menges v. Wertman**, 1 Pa. St. 218. § 590.
- Menier v. Hooper Telegraph Works**, L. R. 9 Ch. 350. §§ 4479, 4481, 4484, 4565.
- Menown v. Crawford**, 10 Mo. App. 574. §§ 3553, 3620, 3730.
- Mennard v. Welford**, 1 Smale & G. 426. § 693.
- Mentz v. Hamman**, 5 Whart. (Pa.) 150. § 7507.
- Mercantile Bank v. McCarthy**, 7 Mo. App. 318. § 4746.
- Mercantile Bank v. New York**, 121 U. S. 138. §§ 2840, 2857, 2867, 2884.
- Mercantile Ins. Co. v. Jaynes**, 87 Ill. 199. §§ 6895, 6896.
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- Mercantile Trust Co. v. Missouri & C. R. Co.**, 7 Rail. & Corp. L. J. 30. § 7214.
- Mercer v. Jones**, 3 Camp. 477. §§ 2479, 2480.
- Mercer County v. Coovert**, 6 Watts & S. (Pa.) 71. § 84.
- Mercer Co. v. Haaket**, 1 Wall. (U. S.) 83. §§ 1118, 6034, 6107.
- Mercers v. Hart**, 1 Car. & P. 113. § 7693.
- Merchants' & Co. Bank v. Austin**, 48 Fed. Rep. 25. §§ 7084, 7088, 7104, 7105.
- Merchants' & Co. Bank v. Bailey Man. Co.**, 34 Minn. 323. § 6703.
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- Merchants' & Co. Bank v. Trustees**, 63 Ga. 549. §§ 7262, 7263.
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- Merchants' Bank v. Harrison**, 39 Mo. 433. §§ 3652, 7689.
- Merchants' Bank v. Livingston**, 74 N. Y. 226. § 2395.
- Merchants' Bank v. Marine Bank**, 3 Gill (Md.), 96. §§ 4763, 4777, 4782.
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- Merchants' Bank v. Stevenson**, 19 Gray, (Mass.) 232. §§ 3521, 4311, 4345.
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- Meredith Village Sav. Bank v. Simpson**, 22 Kan. 414. § 7128.
- Merivale v. Exeter Turnp. Road**, L. R. 3 Q. B. 149. § 5942.
- Meriwether v. Bank of Hamburg**, Dudley (S. C.), 36. § 7511.
- Meriwether v. Garrett**, 102 U. S. 472. § 5427.
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- Merrick v. Trustees & C.**, 8 Gill (Md.), 59. §§ 3986, 3988, 3994, 4639, 6473.
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- Merrimac Mining Co. v. Levy**, 54 Pa. St. 227; §§ 1185, 3063, 3221, 3222, 3262.

Merriman—Middletown TABLE OF CASES CITED.

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Merritt v. Lambert, Hoffman's Ch. (N. Y.) 166. §§ 5735, 5778, 5780, 5973.
Merritt v. Merritt, 16 Wend. (N. Y.) 405. § 6977.
Merritt v. Morse, 103 Mass. 270. § 4334.
Merritt v. Reid, 10 Daly (N. Y.) 311. § 2013.
Merritt v. Seaman, 6 N. Y. 168. § 7302.
Merritt v. Yates, 71 Ill. 636. § 5092.
Merryfield, Re, 3 Nat. Bank. Reg. 98. § 6998.
Merryweather v. Nixan, 8 T. R. 186. §§ 4095, 4376.
Merschheim v. Musical Mutual Protective Union, 8 N. Y. Supp. 702. §§ 874, 926.
Merserau v. Phoenix Mut. Life Ins. Co., 66 N. Y. 273, 282. § 5265.
Mersey & Irwell Navigation Co. v. Douglas, 2 East, 502. § 7432.
Mersey Docks & Co. Board v. Penhallow, 7 Hurlst. & N. 329. § 6358.
Mersey Docks Trustees v. Gibbs, in the House of Lords, L. R. 1 H. L. 93, 113; 11 H. L. Cas. 686. §§ 6342, 6358, 6362, 6363, 6364, 6365, 6370.
Mersey R. Co., Re, 37 Ch. Div. 610. § 6838.
Mersey Steel & Co. v. Naylor, 9 Q. B. Div. 667. § 3799.
Merz v. Missouri Pacific R. Co., 14 Mo. App. 453. §§ 849, 1022.
Meshmeier v. State, 11 Ind. 482. § 643.
Messenger v. Pate, 42 Iowa, 443. § 6362.
Messenger v. Pennsylvania Ry. Co., 36 N. J. L. 407. § 5549.
Messenger v. Pennsylvania R. Co., 37 N. J. L. 531. § 5547.
Messer v. Bailey, 31 N. H. 9. § 3363.
Messersmith v. Sharon Sav. Bank, 96 Pa. St. 440. §§ 3225, 3262.
Messmore v. Huggard, 46 Mich. 558. § 2775.
Metcalfe v. Baker, 2 Jones & S. (N. Y.) 10. § 6298.
Metcalfe v. Bruin, 12 East, 400; 2 Camp. 422. § 4905.
Metcalfe v. Messenger, 46 Barb. (N. Y.) 325. § 6669.
Metcalfe v. Watertown, 128 U. S. 586. § 7456.
Metcalfe v. Williams, 104 U. S. 93. § 5030.
Metcalfe v. Archbishop of York, 1 Mylne & C. 547. §§ 6141, 6145.
Metcalfe v. Hetherington, 11 Ex. 257. § 6363.
Methodist Chapel Corp. v. Herrick, 25 Me. 354. § 5176.
Methodist Episcopal Church v. Pickett, 19 N. Y. 482. §§ 503, 507, 1846, 1849, 1858, 2085, 4354, 7667, 7669, 7691.
Methodist Episcopal Church v. Sherman, 36 Wis. 404. § 3913.
Methodist Episcopal Church v. Wood, 5 Ohio, 283. § 7665.
Meton v. Isham Wagon Co., 15 N. Y. Civ. Proc. 259; 4 N. Y. Supp. 215. § 7632.
Metropolitan Bank v. Godfrey, 23 Ill. 579. § 6703.
Metropolitan Bank v. Heiron, 5 Ex. Div. 319; 31 Moak. Eng. Rep. 717. § 4027.
Metropolitan Board v. Barrie, 34 N. Y. 657. § 5482.
Metropolitan City R. Co. v. Chicago & R. Co., 87 Ill. 317. §§ 5615, 5616.
Metropolitan Co. v. Hawkins, 4 Hurlst. & N. 146. § 4428.
Metropolitan Concert Co. v. Abby, 52 N. Y. Super. 97. § 5890.
Metropolitan Elev. R. Co. v. Kneeland, 120 N. Y. 134. § 4109.
Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co., 11 Daly (N. Y.), 373; 14 Abb. N. Cas. (N. Y.) 103. §§ 3983, 4081, 4494, 4934, 5317.
Metropolitan Police Board v. Wayne County, 68 Mich. 576. § 645.
Metropolitan Trust Co. v. Towawanda & C. R. Co., 103 N. Y. 245. § 7173.
Metz v. Buffalo & C. R. Co., 58 N. Y. 61. §§ 5354, 6366, 7148.
Metzger, Re, 2 Nat. Bank. Reg. 355. § 4126.
Metzner v. Bauer, 98 Ind. 425. § 7339, 7344.
Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194. §§ 7456, 7556.
Mexican Nat. R. Co. v. Davidson, 157 U. S. 210. § 7459.
Mexico v. Arrangois, 11 How. Pr. (N. Y.) 1, 6. § 7372.
Meyer's Case, 16 B. av. 333. § 1528.
Meyer v. Berlandi, 39 Minn. 438. § 611.
Meyer v. Blair, 109 N. Y. 600. §§ 1311, 1402, 1515, 1516.
Meyer v. Blair, 19 Abb. N. Cas. (N. Y.) 214. § 1311.
Meyer v. Johnston, 53 Ala. 237. §§ 337, 6199, 7168, 7169, 7170, 7175, 7176.
Meyer v. Johnstone, 64 Ala. 603. § 337.
Meyer v. Lowell, 44 Mo. 328. § 5815.
Meyer v. Morgan, 51 Miss. 21. § 5300.
Meyer v. Muscatine, 1 Wall. (U. S.) 384. §§ 1118, 1119, 6064.
Meyer v. Staten Island R. Co., 43 Hun (N. Y.), 641; 7 N. Y. St. Rep. 245. § 4480.
Meyers v. Chicago & C. R. Co., 57 Iowa, 555. § 1021.
Meyers v. Scott, 20 N. Y. St. Rep. 35; 2 N. Y. Supp. 753. § 4581.
Meyers v. Union Trust Co., 82 Mo. 237. § 5504.
Meyers v. Valley Nat. Bank, 18 Bank. Reg. 34. § 2065.
Meynell v. Saltmarsh, 1 Keb. 847. § 6373.
Miami Exporting Co. v. Gano, 13 Ohio, 269. §§ 6720, 6981, 7720.
Miami Powder Co. v. Hotchkiss, 17 Ill. App. 622. § 505.
Michael v. Alestree, 2 Lev. 173. § 6290.
Michael v. St. Louis & C. Ins. Co., 17 Mo. App. 23. § 3531.
Michels v. Stork, 52 Mich. 260. § 3363.
Michener v. Payson, 13 Nat. Bank. Reg. 49. §§ 1450, 1451, 3537, 3707.
Michigan & C. R. Co. v. Branes, 40 Mich. 383. § 7756.
Michigan & C. R. Co. v. Chicago & C. R. Co., 1 Ill. App. 399. § 6195.
Michigan & C. R. Co. v. Day, 20 Ill. 375. § 4983.
Michigan Ins. Bank v. Eldred, 140 U. S. 692. § 7668.
Michigan Midland & C. R. Co. v. Bacon, 33 Mich. 465. § 1170.
Michigan State Bank v. Gardner, 15 Gray (Mass.), 362. §§ 6733, 6735.
Michoud v. Girod, 4 How. (U. S.) 503. §§ 4022, 4024, 4060.
Mickey v. Stratton, 5 Sawy. (U. S.) 475. § 5101.
Mickles v. Roches ter City Bank, 11 Paige (N. Y.), 118. §§ 531, 1071, 3368, 3513, 3877, 4075, 6602, 6619, 6638, 6671, 7866, 7867.
Middle Bridge v. Brooks, 13 Me. 391. § 5674.
Middle District Bank, Re, 1 Paige (N. Y.), 585. §§ 6865, 6866, 6867, 6868, 7302.
Middlebrook v. Merchants' Bank, 41 Barb. (N. Y.) 481. § 2425.
Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301. §§ 7529, 7989.
Middleport v. Aetna Life Ins. Co., 82 Ill. 562. § 614.
Middlesex County Bank v. Hirsch Bros. Vencer Man. Co., 4 N. Y. Supp. 385. § 5746.
Middlesex Husbandmen v. Davis, 3 Met. (Mass.) 133. §§ 87, 220, 5176, 7703.
Middlesex R. Co. v. Boston & C. R. Co., 115 Mass. 347. §§ 5358, 5880.
Middlesex R. Co. v. Charlestown, 8 Allen (Mass.), 330. §§ 2813, 2831.
Middlesex Turnp. Co. v. Locke, 8 Mass. 268. §§ 71, 72, 74, 78, 82, 1285.
Middlesex Turnp. Co. v. Freeman, 14 Conn. 85. § 5928.
Middlesex Turnp. Corp. v. Swan, 10 Mass. 384. §§ 71, 72, 74, 78, 1285.
Middleton's Case, Dyer, 333 a. § 1035.
Middletown v. Fowler, 1 Salk. 282. § 6298.
Middletown v. Kansas City & C. R. Co., 62 Mo. 579. § 5301.
Middletown v. New Jersey & C. R. Co., 26 N. J. Eq. 269. § 5438.
Middletown Bank v. Magill, 5 Conn. 28. § 3076.
Middletown v. Ames, 7 Vt. 166. § 7756.
Middletown v. Boston & C. R. Co., 53 Conn. 351. §§ 75, 5892.
Middletown Bank v. Magill, 5 Conn. 28. §§ 2925, 3074, 3076, 3170, 3183, 3221, 3231, 3319, 3415, 3458, 3501.
Middletown Bank v. Russ, 3 Conn. 135. §§ 3438, 3525, 7410, 7859.
Middletown First Nat. Bank v. Council Bluffs City Water Works Co., 56 Hun (N. Y.), 412; 9 N. Y. Supp. 859. §§ 4721, 5974.
Middletown Sav. Bank v. Dubuque, 15 Iowa, 394. § 6134.
Middletown Savings Bank v. Jarvis, 33 Conn. 372. § 2771.

TABLE OF CASES CITED. Middough—Minchin

- Middough v. St. Joseph & Co. R. Co., 51 Mo. 520. § 7993.
- Midland & Co. R. Co. v. Gordon, 16 Mees. & W. 803. § 82.
- Midland & Co. R. Co. v. Johnson, 6 H. L. Cas. 798. § 5297.
- Midland R. Co. v. Leech, 3 H. L. Cas. 372. § 356.
- Midland R. Co. v. Taylor, 3 H. L. Cas. 751. § 2567.
- Miers v. Zanesville Co., 11 Ohio. 373; 13 Ohio. 197. § 1563, 2951, 3429, 3432, 3438, 3519, 3703, 3835.
- Migotti's Case, L. R. 4 Eq. 238. § 1254.
- Mihills Man. Co. v. Camp, 49 Wis. 130. §§ 4933, 5204.
- Mikesell v. Durkee, 36 Kan. 92. § 5600.
- Milan & Co. Plank Road Co. v. Husted, 3 Ohio St. 578, 586. § 5569.
- Millbank v. New York & Co. R. Co., 64 How. Pr. (N. Y.) 20. § 5719.
- Millburn v. Codd, 7 Barn. & C. 419; 1 Man. & Ry. 238. §§ 429, 3446.
- Miles v. Bough, 3 Ad. & El. (N. s.) 845. §§ 1750, 1751.
- Miles v. Thomas, 9 Sim. 606. § 4482.
- Miley v. Parker, 7 Mo. App. 561. § 2930.
- Millford v. Holbrook, 9 Allen (Mass.). 17. § 4376.
- Millford & Co. Turnp. Co. v. Brush, 10 Ohio. 111. §§ 71, 294, 5038.
- Mill's Case, Sir T. Raym. 152. §§ 6302, 6448.
- Mill v. Hawker, L. R. 10 Ex. 92. §§ 4993, 5735, 6279.
- Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 417, 455. §§ 3113, 3173, 3180, 4182, 5070, 5073, 5081, 5104, 5106.
- Millard v. Eyre, 2 Ves. Jr. 94. § 693.
- Millard v. St. Francis Academy, 3 Ill. App. 341. §§ 5127, 7561.
- Millbank v. New York & Co. R. Co., 64 How. Pr. (N. Y.) 20. § 1104.
- Milledge v. Boston Iron Co., 5 Cush. (Mass.) 158. § 1220.
- Milledgeville v. Cooley, 55 Ga. 17. §§ 6363, 6442.
- Miller's Case, 3 Ch. Div. 681; 5 Ch. Div. 70. §§ 1765, 1792, 4039, 4154.
- Miller's Case, 1 W. Black. 451. § 4168.
- Miller v. Ammon, 145 U. S. 421. § 7955.
- Miller v. Bank, 2 Or. 291. § 7561.
- Muller v. Berlin, 13 Blatchf. (U. S.) 245. § 6107.
- Miller v. Bradish, 39 Iowa, 278. §§ 2137, 2963, 3091.
- Miller v. Chance, 3 Edw. Ch. (N. Y.) 399. § 3922.
- Miller v. Coal Co., 31 W. Va. 836. §§ 530, 6757, 7630, 7723.
- Miller v. Craig, 11 N. J. Eq. 175. § 5621.
- Miller v. Eastern Oregon Gold Min. Co., 45 Fed. Rep. 345. § 7488.
- Miller v. English, 21 N. J. L. 317. §§ 256, 772.
- Miller v. Ewer, 27 Me. 509. §§ 55, 56, 694, 696, 1082, 3968.
- Miller v. Excelsior Stone Co., 1 Ill. App. 273. § 5300.
- Miller v. Fenton, 11 Paige (N. Y.), 18. §§ 4376, 4582.
- Miller v. First Nat. Bank, 46 Ohio St. 424. § 2863.
- Miller v. Franklin Bank, 11 Paige (N. Y.), 444. § 7302.
- Miller v. Gable, 2 Den. (N. Y.) 492. § 927.
- Miller v. Great Republic Ins. Co., 50 Mo. 55. §§ 3221, 3255, 3259, 3261.
- Miller v. Guernard, 67 Ga. 284. § 2227.
- Miller v. Hanover Junction R. Co., 87 Pa. St. 95. §§ 446, 1149, 1395, 1400, 1401, 1516.
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- Miller v. Illinois & Co. R. Co., 24 Barb. (N. Y.) 312. §§ 1249, 2094, 5210.
- Miller v. Jones, 51 N. Y. St. Rep. 361. § 8021.
- Miller v. Kirkpatrick, 29 Pa. St. 226. § 5571.
- Miller v. Lancaster, 5 Coldw. (Tenn.) 514. § 365.
- Miller v. Larson, 19 Wis. 463. § 7958.
- Miller v. Life Ins. Co., 12 Wall. (U. S.) 285, 303, § 5265.
- Miller v. Loeb, 64 Barb. (N. Y.) 454. § 9128.
- Miller v. Manion, 50 Mo. 55. § 3135.
- Miller v. Miller, 1 Phil. Eq. (N. C.) 85. § 6841.
- Miller v. Murray, 17 Col. 408. §§ 3872, 4477, 4479, 4500, 4504.
- Miller v. New York & Co. R. Co., 21 Barb. (N. Y.) 513, §§ 5410, 5413, 5615.
- Miller v. New York & Co. R. Co., 8 Abb. Pr. (N. Y.), 431; 18 How. Pr. (N. Y.) 374. §§ 5731, 6051, 7616.
- Miller v. New York & Co. R. Co., 20 N. Y. St. Rep. 157; 3 N. Y. Supp. 245. § 5885.
- Miller v. Norfolk & W. R. Co., 41 Fed. Rep. 431. § 7502.
- Miller v. Palermo, 12 Kan. 14. § 6775.
- Miller v. Pittsburgh & Co. R. Co., 40 Pa. St. 237. §§ 1545, 1933.
- Miller v. Race, 1 Burr. 452, 457. §§ 2019, 7084, 7085.
- Miller v. Ratterman, 47 Ohio St. 141; 23 Ohio L. J. 416. §§ 2275, 2277, 2281, 2803, 2833.
- Miller v. Receiver, 1 Paige (N. Y.), 443. §§ 6965, 6966, 6988.
- Miller v. Rutland & Co. R. Co., 36 Vt. 452. §§ 3985, 5046, 5049, 5074, 5356, 6137, 6141, 6146, 6203.
- Miller v. Rutland & Co. R. Co., 49 Vt. 399. §§ 6117, 775.
- Miller v. Rutland & Co. R. Co., 49 Vt. 399. § 275.
- Miller v. Scherder, 2 N. Y. 282. § 370.
- Miller v. Shreve, 29 N. J. L. 250. § 2617.
- Miller v. State, 15 Wall. (U. S.) 488. §§ 92, 5108, 5410.
- Miller v. Supervisors of Sacramento County, 25 Cal. 93. § 794.
- Miller v. Thomson, 3 Man. & G. 576. § 5124.
- Miller v. Troost, 14 Minn. 365. § 5607.
- Miller v. White, 7 Blackf. (Ind.) 491. §§ 1336, 1577.
- Miller v. White, 57 Barb. (N. Y.) 504; 8 Abb. Pr. 46. §§ 3392, 3628, 4209, 4364.
- Miller v. White, 50 N. Y. 137; reversing 57 Barb. (N. Y.) 504; 63 Barb. 434; 10 Abb. Pr. (N. s.) 359; 8 Abb. Pr. (N. s.) 46. §§ 1082, 3392, 3396, 3398, 4164, 4255, 4331, 4364.
- Miller v. Wild Cat Gravel Road Co., 52 Ind. 51. §§ 246, 1140, 1185, 1748, 1962, 7756.
- Miller v. Wild Cat Gravel Road Co., 57 Ind. 241. § 5942.
- Miller v. Woodward, 8 Mo. 169. § 3329.
- Millett v. People, 117 Ill. 294. § 5493.
- Millhiser v. Erdman, 98 N. C. 232. § 6917.
- Milliard v. St. Francis Xavier Female Academy, 8 Ill. App. 341. §§ 5730, 6016, 6018.
- Milligan v. Mitchell, 1 Myl. & C. 433. § 3485.
- Milligan v. Wedge, 12 Adol. & El. 737. § 4993.
- Milliken v. Coombs, 1 Me. 343. § 5137.
- Milliken v. Dehon, 27 N. Y. 364. §§ 2672, 2699.
- Milliken v. Steiner, 56 Ga. 251, 253. § 5473.
- Milliken v. Whitehouse, 49 Me. 527. §§ 1082, 3187, 3392, 3394, 3769, 4331.
- Mills v. Central R. Co., 41 N. J. Eq. 1. § 5890.
- Mills v. Charleston, 29 Wis. 400. § 501.
- Mills v. Hicks, 44 N. Y. Super. 527. § 2025.
- Mills v. Hurd, 29 Fed. Rep. 41. §§ 272, 4533.
- Mills v. Jefferson, 20 Wis. 50. §§ 6064, 6111.
- Mills v. Northern R. & Co. Co., L. R. 5 Ch. 621. § 2167.
- Mills v. Parlin, 106 Ill. 60. § 5800.
- Mills v. Post, 76 Mo. 426. § 7094.
- Mills v. Rice, 6 Gray (Mass.), 458. § 7958.
- Mills v. Sargent, 36 Cal. 379. § 658.
- Mills v. Scott, 99 U. S. 25. §§ 3453, 3459.
- Mills v. Stewart, 62 Barb. (N. Y.) 444. §§ 1793, 2933.
- Mills v. Stewart, 41 N. Y. 384; affirming 62 Barb. 444; §§ 1550, 1551, 1792, 1794, 1795, 1800.
- Mills v. Williams, 11 Ired. L. (N. C.) 558. § 99.
- Milne v. Davidson, 5 Mart. (N. s.) (La.) 409. § 1017.
- Milne v. Moreton, 6 Binn. (Pa.) 353, 361. § 7208.
- Milner v. New Jersey R. Co., 6 Am. L. Reg. 6. § 5616.
- Milnes v. Gery, 14 Ves. 400. §§ 7408, 7754.
- Milroy v. Spurr Mountain & Co. Co., 43 Mich. 231. § 7577.
- Miltenberger v. Logansport R. Co., 106 U. S. 286, 288. §§ 6998, 7116, 7118, 7119, 7170, 7183, 7206.
- Milvain v. Mather, 5 Ex. 55; 1 Lown. M. & P. 220; 19 L. J. (Ex.) 227. § 4370.
- Milward v. Thatcher, 2 Durnf. & E. 87. § 794.
- Milwaukee & Co. R. Co. v. Arms, 91 U. S. 489. §§ 6276, 6378, 6380, 6385, 6389.
- Milwaukee & Co. R. Co. v. Faribault, 23 Minn. 167. § 5592.
- Milwaukee & Co. R. Co. v. Field, 12 Wis. 340. §§ 82, 1318, 1332, 1577.
- Milwaukee & Co. R. Co. v. Finney, 10 Wis. 388. § 6387.
- Milwaukee & Co. R. Co. v. Souther, 2 Wall. (U. S.) 510. § 6823.
- Milwaukee Bridge & Co. Works v. Brevoort, 73 Mich. 155. §§ 8019, 8080.
- Milwaukee Malt Extract Co. v. Chicago & Co. R. Co., 73 Iowa, 98. § 7827.
- Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207. §§ 6900, 7723.
- Mincer v. School District, 27 Kan. 253. § 3905.
- Minchin v. Second Nat. Bank, 36 N. J. Eq. 436. § 3520.

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- Miner v. Markham, 28 Fed. Rep. 387. § 7556.
- Miner v. Medbury, 6 Wis. 295. §§ 1462, 1486.
- Miner v. Phenix Ins. Co., 27 Wis. 693, 701. § 5265.
- Mineral Point R. Co. v. Barron, 83 Ill. 365. § 8075.
- Mineral Point R. Co. v. Keep, 22 Ill. 9. §§ 7507, 7539, 7552, 7790, 8019.
- Miners' Bank v. United States, 1 Greene (Iowa), 53; 1 Morr. (Iowa), 482. §§ 67, 5409, 5419, 6579, 6580.
- Miners' Ditch Co. v. Zellerbach, 37 Cal. 543. §§ 22, 5374, 5975, 5978, 6041, 6541.
- Mining Co. v. Anglo-Californian Bank, 104 U. S. 192. §§ 3894, 5703, 5706.
- Ministerial &c. Fund v. Kendrick, 12 Me. 381. §§ 7665, 7706.
- Ministerial &c. Fund v. Parks, 10 Me. 441. §§ 7589, 7592.
- Minneapolis &c. R. Co. v. Davis, 40 Minn. 110. § 3697.
- Minneapolis &c. R. Co. v. Bassett, 20 Minn. 535. §§ 1224, 1229.
- Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26. §§ 674, 5448.
- Minneapolis &c. R. Co. v. Herrick, 127 U. S. 210. § 5454.
- Minneapolis &c. R. Co. v. Minnesota, 134 U. S. 467. § 5537.
- Minneapolis &c. R. Co. v. St. Paul &c. R. Co., 35 Minn. 265. § 5898.
- Minneapolis Harvester Works v. Libby, 24 Minn. 327. §§ 1141, 1825, 3630, 3634, 3639.
- Minneapolis Threshing-Machine Co. v. Crevier, 39 Minn. 417. § 1333.
- Minneapolis Threshing-Machine Co. v. Davis, 49 Minn. 110. §§ 1171, 1311, 1513.
- Minneapolis Trust Co. v. Clark, 47 Minn. 108. § 4859.
- Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7. §§ 599, 622.
- Minnesota Thresher Man. Co. v. Langdon, 44 Minn. 37. §§ 3551, 3555, 3562, 6902.
- Minnett v. Milwaukee &c. R. Co., 3 Dill. (U. S.) 460. §§ 4756, 7464, 7468, 7469.
- Minor v. Mead, 3 Conn. 289. § 6939.
- Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46. §§ 246, 1235, 1368, 1739, 2103, 4014, 4815, 4892, 4905.
- Minot v. Curtis, 7 Mass. 441. § 284.
- Minot v. Paine, 99 Mass. 101. §§ 2128, 2167, 2207, 2908, 3210, 3221.
- Minot v. Philadelphia &c. R. Co., 2 Abb. (U. S.) 323. §§ 12, 5615, 7452, 8094.
- Minter v. Union Pac. R. Co., 3 Utah, 500. § 7561.
- Minturn v. Laroux, 23 How. (U. S.) 435. § 5659.
- Mirick v. French, 2 Gray (Mass.), 420. § 1337.
- Mississippi &c. Boom Co. v. Prince, 34 Minn. 71. § 86.
- Mississippi &c. Boom Co. v. Prince, 34 Minn. 79. §§ 617, 619, 625, 5266.
- Mississippi &c. R. Co. v. Ayres, 16 Lea (Tenn.), 725. § 7438.
- Mississippi &c. R. Co. v. Cross, 20 Ark. 443. §§ 72, 1270, 1311, 1315, 1395, 1513, 6598, 7665.
- Mississippi &c. R. Co. v. Gaster, 20 Ark. 455; 22 Ark. 361. §§ 1752, 1755, 1830, 1832.
- Mississippi &c. R. Co. v. Gaster, 24 Ark. 96. § 1289.
- Mississippi &c. R. Co. v. Gaster, 26 Ark. 455. § 1826.
- Mississippi &c. R. Co. v. Harris, 35 Miss. 17. §§ 1223, 1377, 1878, 1895, 1911.
- Mississippi &c. R. Co. v. Turrentine, 21 Ark. 445. § 1830.
- Mississippi &c. R. Co. v. Wooten, 36 La. An. 441. §§ 610, 612.
- Mississippi Society v. Musgrove, 44 Miss. 820. §§ 5430, 5489.
- Missouri v. Lewis, 101 U. S. 22. § 8001.
- Missouri &c. Clay Works v. Ellison, 30 Mo. App. 67. §§ 5070, 5092, 5105.
- Missouri &c. R. Co. v. Abney, 30 Kan. 41. § 599.
- Missouri &c. R. Co. v. Brown, 14 Kan. 557. § 4964.
- Missouri &c. R. Co. v. Finley, 38 Kan. 550. § 5437.
- Missouri &c. R. Co. v. Humes, 115 U. S. 512. §§ 5453, 5504, 6352, 6393.
- Missouri &c. R. Co. v. Mackey, 127 U. S. 205. §§ 5443, 5454.
- Missouri &c. R. Co. v. Mackey, 33 Kan. 298. § 5454.
- Missouri &c. R. Co. v. Merrill, 40 Kan. 404. § 620.
- Missouri &c. R. Co. v. Morrow, 36 Kan. 495. § 7622.
- Missouri &c. R. Co. v. Richmond, 73 Tex. 568, 572. § 4140.
- Missouri &c. R. Co. v. Texas &c. R. Co., 10 Fed. Rep. 497. § 3004.
- Missouri &c. R. Co. v. Texas &c. R. Co., 33 Fed. Rep. 701. § 7124.
- Missouri &c. R. Co. v. Thompson, 24 Kan. 178. § 1345.
- Missouri &c. R. Co. v. Weaver, 16 Kan. 456, 459. § 6276.
- Missouri &c. Soc. v. Academy of Science, 94 Mo. 459. § 5817.
- Missouri Lead Min. &c. Co. v. Reinhard, 114 Mo. 218. §§ 5016, 7913, 7915.
- Missouri River &c. R. Co. v. Commissioners, 12 Kan. 482. § 5052.
- Missouri River &c. R. Co. v. Shirley, 20 Kan. 680. §§ 7613, 7645.
- Missouri Valley &c. R. Co. v. Harrison County, 74 Iowa, 283. § 8129.
- Missouri Valley Land Co. v. Bushnell, 11 Neb. 192. §§ 5795, 5304, 7964.
- Mitchell's Case, 15 Ch. Div. 169. § 4024.
- Mitchell's Case (H. L.), App. Cas. 543. § 3199.
- Mitchell's Case, L. R. 9 Eq. 363. §§ 3194, 3203, 3255, 3271, 3274, 3283.
- Mitchell's Claim, L. R. 6 Ch. 822. § 1998.
- Mitchell, Ex parte, 128 O. 83. § 7182.
- Mitchell v. Alestry, 3 Keb. 650. § 6290.
- Mitchell v. Beckman, 64 Cal. 117. §§ 1140, 2019, 3102, 3691, 6023.
- Mitchell v. Burlington, 4 Wall. (U. S.) 270. § 1118.
- Mitchell v. Cook, 29 Barb. (N. Y.) 243. § 4764.
- Mitchell v. Dall, 2 Har. & G. (Md.) 159. § 3488.
- Mitchell v. Deeds, 69 Ill. 416, 419. §§ 317, 590, 4633.
- Mitchell v. Hazen, 5 Conn. 495. § 5136.
- Mitchell v. Lipe, 8 Yerg. (Tenn.) 179. § 7507.
- Mitchell v. Logan, 34 La. An. 998. § 3706.
- Mitchell v. Lycoming &c. Ins. Co., 51 Pa. St. 402. §§ 941, 5987.
- Mitchell v. Milhoan, 11 Kan. 617. § 8076.
- Mitchell v. Rockland, 52 Me. 118, 125. § 6287.
- Mitchell v. Rome &c. R. Co., 17 Ga. 574, 589. §§ 518, 1224, 1322, 3906, 4919, 5741, 5748, 5753, 7644, 7710.
- Mitchell v. Rubber Reclaiming Co., (N. J. Eq.), 24 Atl. Rep. 407. §§ 4412, 4416, 4426.
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- Mixer's Case, 4 De Gex & J. 575. §§ 1365, 6321.
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 Mobile Life Ins. Co. v. Pruett, 74 Ala. 487. §§ 7426, 7431.
 Mobile School Comm'rs v. Putnam, 44 Ala. 118. 506. §§ 5383.
 Modern Life Ins. Co. v. Keller, 3 Pa. County Ct. §§ 1511, 1517.
 Modesto Irrig. Dist. v. Tregea, 88 Cal. 334. §§ 6059, 6184.
 Moens v. Heyworth, 10 Mees. & W. 147, 157. §§ 4783, 4920.
 Moers v. Reading, 21 Pa. St. 188. § 1118.
 Moffatt v. Winslow, 7 Paige (N. Y.), 124. §§ 1078, 1219.
 Moffitt v. Jaquins, 2 Pick. (Mass.) 331. § 3910.
 Moffitt v. McDonald, 11 Humph. (Tenn.) 457. § 7084.
 Mohawk & C. R. Co., Matter of, 19 Wend. (N. Y.) 135. §§ 701, 731, 732, 739, 765, 788.
 Mohawk Bridge Co. v. Utica & C. R. Co., 6 Paige (N. Y.), 554, 565. §§ 5349, 5399, 5401, 5670.
 Mohr v. Minnesota Elevator Co., 40 Minn. 343. §§ 2939, 3004, 3009, 3736, 3741.
 Moies v. Sprague, 9 R. I. 541. § 3020.
 Moises v. Thornton, 8 T. R. 303. § 5104.
 Mokelumne Hill & C. Co. v. Woodbury, 14 Cal. 265. §§ 3016, 3074, 3077, 3173, 3358, 3360, 3478, 4206.
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 Money v. Jordan, 21 L. J. (Ch.) 531; 11 Eng. L. & Eq. 183; 21 L. J. (Ch.) 893; 13 Eng. L. & Eq. 245. §§ 1384, 1388.
 Money Penny v. Hartland, 2 Car. & P. 378; Car. & P. 352. § 452.
 Money Penny v. Sixth Ave. R. Co., 7 Rob. (N. Y.) 328. § 5543.
 Monmouth Bank v. Brooks, 22 Ill. App. 238. §§ 4785, 4825.
 Monongahela & C. Co. v. Coon, 6 Watts & S. (Pa.) 101. §§ 5391, 6342, 6370.
 Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112. §§ 5347, 5668.
 Monongahela Land Co. v. Ledlei, 3 Pa. L. Jour. 179. § 6571.
 Monongahela Nav. Co. v. Coon, 6 Pa. St. 379. §§ 69, 5411, 5429.
 Monongahela Nav. Co. v. United States, 148 U. S. 312. §§ 5405, 5429, 5615, 5624.
 Monroe v. Fort Wayne & C. R. Co., 28 Mich. 272. §§ 1849, 1850, 1857.
 Monroe v. Hoffman, 29 La. An. 651. § 5485.
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 Monroe v. New Canaan, 43 Conn. 309, 312. § 2913.
 Monseaux v. Urquhart, 19 La. An. 482. § 734.
 Montague v. Church School District, 34 N. J. L. 218. §§ 5730, 7617.
 Montclair v. Ramsdell, 107 U. S. 147, 155. § 610.
 Montclair Township v. New York & C. R. Co., 45 N. J. Eq. 436. §§ 5408, 7457.
 Monterey & C. R. Co. v. Faulkner, 21 Barb. (N. Y.) 212. § 5933a.
 Monterey & C. R. Co. v. Hildreth, 53 Cal. 123. §§ 1151, 1157.
 Montfort v. Hughes, 3 E. D. Smith (N. Y.), 591. § 4096.
 Montgomery v. Commercial Bank, 1 Smedes & M. Ch. (Miss.) 632. § 6466.
 Montgomery v. Forbes, 148 Mass. 249, 253. § 7896.
 Montgomery v. Hobson, Meigs (Tenn.), 437. § 590.
 Montgomery v. Louisiana Levee Co., 30 La. An. pt. 1, 607. § 7423.
 Montgomery v. Merrill, 18 Mich. 338, 343. § 6598.
 Montgomery v. Montgomery & C. Plank Road Co., 31 Ala. 76. §§ 5645, 6007.
 Montgomery v. Reese, 26 Pa. St. 143. § 2473.
 Montgomery & C. Asso. v. Robinson, 69 Ala. 413. §§ 609, 610, 615, 3323.
 Montgomery & C. Co. v. Dienelt, 103 Pa. St. 585. § 265.
 Montgomery & C. R. Co. v. Boring, 51 Ga. 582. §§ 385, 372.
 Montgomery & C. R. Co. v. Branch, 59 Ala. 139, 153. § 376.
 Montgomery & C. R. Co. v. Hartwell, 43 Ala. 508. §§ 7807, 7808.
 Montgomery R. Co. v. Hurst, 9 Ala. 513. §§ 518, 520, 4894, 6107, 5176, 5275, 7665, 7669.
 Montgomery & C. R. Co. v. Walton, 14 Ala. 207. § 7771.
 Montgomery County Agric. Soc. v. Francis, 103 Pa. St. 378. §§ 6121, 6124.
 Montgomery Gaslight Co. v. Montgomery, 87 Ala. 245, 257. §§ 7776, 7784.
 Montidonio v. Page, 10 Heisk. (Tenn.) 443. § 7813.
 Montpellier Academy v. George, 14 La. 395. § 5381.
 Montpelier & C. R. Co. v. Langdon, 46 Vt. 284. § 1850.
 Montross v. Roger Williams Ins. Co., 49 Mich. 477. § 4981.
 Monument Nat. Bank v. Globe Works, 101 Mass. 57. §§ 4724, 5236, 5737, 5740, 6306.
 Monum. Great Beach v. Rogers, 1 Mass. 159. §§ 5176, 7665.
 Moodalay v. Morton, 1 Bro. Ch. 469. §§ 7409, 7410.
 Moodie v. Seventh National Bank, 11 Phila. (Pa.) 386. § 2607.
 Moody v. Andrews, 7 Jones & S. (N. Y.) 302. § 2664.
 Moody v. Keener, 7 Port. (Ala.) 218. § 2455.
 Moody v. London & C. R. Co., 1 Best & S. 290. §§ 3914, 4922.
 Moody v. Wright, 13 Met. (Mass.) 17. §§ 6141, 6145.
 Mooers v. White, 6 Johns. Ch. (N. Y.) 360. §§ 3920, 7755.
 Moor v. Newfield, 4 Mo. 44. § 718.
 Moor v. Veazie, 31 Me. 360. §§ 7776, 7777.
 Moor v. Wilson, 26 N. H. 332. § 5028.
 Moore, Ex parte, 62 Ala. 471. § 616.
 Moore v. Atlantic Mut. Ins. Co., 56 Mo. 343. § 4838.
 Moore, Bank of Commerce, 52 Mo. 377. §§ 13, 1028, 1031, 1775, 2310, 2490, 3232, 3233, 3283.
 Moore v. Beelman, 27 La. An. 276. § 3187.
 Moore v. Boyd, 74 Cal. 167. §§ 3260, 3656, 3672.
 Moore v. Brooklyn City R. Co., 31 Hun (N. Y.), 90. § 5476.
 Moore v. Chicago & C. R. Co., 43 Iowa, 385. § 8075.
 Moore v. Fayetteville, 80 N. C. 154. § 2866.
 Moore v. Fitchburg R. Co., 4 Gray (Mass.), 465, 467. §§ 6275, 6276, 6288, 6299, 6303, 6306, 6313.
 Moore v. Fitz Randolph, 6 Leigh (Va.), 175. § 2729.
 Moore v. Gennett, 2 Tenn. Ch. 375. § 2786.
 Moore v. Hanover Junction & C. R. Co., 94 Pa. St. 324. § 1292.
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 Moore v. Jones, 3 Woods (U. S.), 53. § 3213.
 Moore v. Lent, 81 Cal. 502. §§ 4261, 4264.
 Moore v. Marshalltown & C. Co., 61 Iowa, 45. §§ 2374, 2634, 2792.
 Moore v. Mercer Wire Co., 15 Atl. Rep. 305. § 6993.
 Moore v. Metropolitan Bank, 55 N. Y. 41. § 2587.
 Moore v. Metropolitan R. Co., L. R. 8 Q. B. 36. § 6313.
 Moore v. Moore, 4 Dana (Ky.), 354. §§ 5771, 5783.
 Moore v. Munn, 69 Ill. 591. § 4654.
 Moore v. New Albany & C. R. Co., 15 Ind. 78. § 1353.
 Moore v. New Jersey Lighterage Co., 25 Jones & S. 1. § 1719.
 Moore v. N. J. Lighterage Co., 23 N. Y. St. Rep. 213; 5 N. Y. Supp. 192. § 1810.
 Moore v. Northwestern Bank (1891), 2 Ch. 599. § 2366.
 Moore v. Rawlins, 6 C. B. (N. s.) 310. § 1799.
 Moore v. Rawlins, 6 C. B. (N. s.) 412. § 1562.
 Moore v. Rector of St. Thomas, 4 Abb. N. C. (N. Y.) 51. § 5106.
 Moore v. Reynolds, 109 Mass. 473. §§ 3483, 3509, 4345.
 Moore v. Robertson, 16 N. Y. Supp. 403. § 7085.
 Moore v. Banborne, 2 Mich. 519. § 6298.
 Moore v. Schoppert, 22 W. Va. 282. §§ 5940, 6598.
 Moore v. Silver Valley Min. Co., 104 N. C. 534. §§ 4500, 4508, 4569, 4570, 8011.
 Moore v. Speed, 55 Mich. 84. § 8080.
 Moore v. State, 71 Ind. 478. §§ 6246, 6608.
 Moore v. State, 48 Miss. 147. §§ 5488, 5489.
 Moore v. Swanton Tanning Co., 60 Vt. 459. § 6004.
 Moore v. Tate, 87 Tenn. 725. § 7780.
 Moore v. Wabash Canal, 7 Ind. 462. § 7371.
 Moore v. Wade, 8 Kan. 390, 390. § 7622.
 Moore v. Whitcomb, 48 Mo. 543, 548. §§ 6662, 6670.
 Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206. §§ 7770, 7771.
 Moores v. Citizens' Nat. Bank, 111 U. S. 156. §§ 1499, 2378, 2377, 4824.

- Moores v. National**, 104 U. S. 625. § 3573.
Moran v. Commissioners 2 Black, (U. S.), 722 § 6064.
Moran v. Lydecker, 27 Hun (N. Y.), 582. § 6656.
Moran v. Miami Co., 2 Black (U. S.), 722. §§ 1118, 5262.
Moran v. New Orleans, 112 U. S. 69. §§ 8094, 8107.
Moran v. Ross, 79 Cal. 159. §§ 5588, 5589, 5592, 5600.
Morehead v. Atlantic & R. Co., 7 Jones L. (N. O.) 500. § 7426.
Moreland v. State Bank, 1 Breeze (Ill.), 263. § 5019.
Morrell v. Coddling, 4 Allen (Mass.), 403. §§ 5126, 5129, 5132, 5137, 5146, 5152.
Morston v. Hardern, 6 Dowl. & Ry. 275; 4 Barn. & C. 322. § 6283.
Morford v. Farmers' Bank, 26 Barb. (N. Y.) 563. §§ 6739, 5740, 5949.
Morford v. Unger, 8 Iowa, 82. § 623.
Morgan's Case, 1 De Gex & S. 750; 1 Mac. & G. 225; 1 Har. & Tw. 320. §§ 1523, 2054, 3263.
Morgan's Case, De Portibus Maris, 51. § 5530.
Morgan, Ex parte, 30 Ala. 51. § 7829.
Morgan, Ex parte, 1 Mac. & G. 225. § 2055.
Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73. §§ 2463, 3238, 3243.
Morgan v. Brower, 77 Ga. 627. §§ 3258, 3264, 3292.
Morgan v. Burrows, 45 Wis. 211, 217. § 5788.
Morgan v. Dod, 3 Colo. 551. § 8668.
Morgan v. Donovan, 58 Ala. 241. §§ 6198, 6199.
Morgan v. East Tennessee & C. R. Co., 4 Woods (U. S.), 523. § 7891.
Morgan v. Groff, 4 Barb. (N. Y.) 524. § 1772.
Morgan v. Kansas Pac. R. Co., 15 Fed. Rep. 55. § 6210.
Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 285. §§ 530, 7666, 7669, 7671, 7682.
Morgan v. Lewis, 46 Ohio St. 1. §§ 1634, 3367, 3470, 3631.
Morgan v. Louisiana, 93 U. S. 217, 223. §§ 5364, 5545, 5576.
Morgan v. Merchants' Bank, 13 Lea (Tenn.), 234. §§ 4621, 4631.
Morgan v. Monmouth Plank-Road Co., 26 N. J. L. 99. § 646.
Morgan v. Morgan, 16 Abb. Pr. (n. s.) (N. Y.) 291. § 7733.
Morgan v. New York & R. Co., 10 Paige (N. Y.), 290. §§ 3438, 3469, 3481, 3483, 3493, 3513, 3519, 3520, 6558, 6567, 7078.
Morgan v. Neville, 74 Pa. St. 52. §§ 8073, 8075, 8078.
Morgan v. Parham, 16 Wall. (U. S.) 471. §§ 8094, 8096.
Morgan v. Potter, 17 Hun (N. Y.), 403. § 6932.
Morgan v. Railroad Co., 1 Woods (U. S.), 15. §§ 2767, 4500, 4508.
Morgan v. Skiddy, 62 N. Y. 319; 4 Jones & Sp. (N. Y.) 152. §§ 1462, 1469, 1472, 1476, 1500.
Morgan v. Struthers, 131 U. S. 246. §§ 1311, 1514, 1515, 1516, 1591.
Morgan v. United States, 113 U. S. 476. § 6080.
Morgan v. Watmough, 5 Whart. (Pa.) 125. § 1084.
Morgan v. White, 101 Ind. 413. § 7934.
Morgan County v. Allen, 103 U. S. 498. §§ 2951, 2952, 3404, 3453, 6197, 6242, 6527.
Morgan County v. Thomas, 76 Ill. 120, 147. §§ 263, 6197.
Morgau's Louisiana & C. R. Co. v. Texas Cent. R. Co., 32 Fed. Rep. 525, 530. § 6232.
Moriarty v. Kent, 71 Ind. 601. § 6979.
Morisey v. Bunting, 1 Dev. L. (N. C.) 3. § 3673.
Morison v. Morison, 7 De Gex, M. & G. 214. § 7171.
Morisse v. Royal British Bank, 1 Com. B. (n. s.) 67. § 3595.
Morley v. Thayer, 3 Fed. Rep. 737. §§ 3003, 3004.
Morley v. Thompson, 3 Madd 564. § 7413.
Morley Building Co. v. Barras [1891], 2 Ch. 386. § 3893.
Mormon Church v. United States, 136 U. S. 1. § 5774.
Morrice v. Bank of England, Cas. temp. Talbot, 218. § 2964.
Morrill v. Boston & C. R., 55 N. H. 831. § 5543.
Morrill v. Little Falls Man. Co., 46 Minn. 260. §§ 4478, 4479, 7579.
Morrill v. Noyes, 56 Me. 453. §§ 6927, 6940.
Morrill v. Railroad Co., 96 Mo. 174. § 5815.
Morrill v. Segar Man. Co., 32 Hun (N. Y.), 543. § 4893.
Morrill v. Wabash & C. R. Co., 96 Mo. 174. § 5816.
Morris Case, L. R. 7 Ch. 200. § 1550.
Morris v. Cheney, 61 Ill. 451. §§ 1818, 5754, 6149.
Morris v. Colman, 18 Ves. 437. § 6434.
Morris v. Glenn, 87 Ala. 628. §§ 3172, 3570.
Morris v. Hall, 41 Ala. 510. § 5645.
Morris v. Kell, 20 Minn. 531. § 5106.
Morris v. Penn Mut. Life Ins. Co., 120 Mass. 503. § 7901.
Morris v. People, 3 Den. (N. Y.) 381. §§ 582, 6808.
Morris v. Turin, 3 Dall. (Pa.) 47. § 1717.
Morris v. Tutbill, 72 N. Y. 576. § 4412.
Morris v. Underwood, 19 Ga. 559. § 785.
Morris v. Wadsworth, 11 Wend. (N. Y.) 100; 17 Wend. (N. Y.) 103. § 2015.
Morris & C. R. v. Ayres, 29 N. J. L. 393. §§ 849, 937, 1022.
Morris & C. R. Co. v. Green, 15 N. J. Eq. 469. § 4933.
Morris & C. R. Co. v. Newark, 10 N. J. Eq. 352. § 5641.
Morris & C. R. Co. v. Prudden, 20 N. J. Eq. 530. §§ 5216, 5279.
Morris & C. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542. §§ 5688, 5967.
Morris Canal & C. Co. v. Fisher, 9 N. J. Eq. 667. § 6064.
Morris Canal & C. Co. v. Lewis, 12 N. J. Eq. 323. §§ 2659, 6064.
Morris Canal & C. Co. v. Nathan, 2 Hall (N. Y.), 239. § 1919.
Morris Canal Co. v. Ryerson, 27 N. J. L. 457, 476. § 6344.
Morrison Ex parte, 11 Jur. 719. § 3915.
Morrison Ex parte, 15 Jur. 346; 20 L. J. Ch. 296. § 426.
Morrison v. Bachert, 112 Pa. St. 323. § 598.
Morrison v. Bowman, 29 Cal. 337. § 5074.
Morrison v. Buckner, Hempst. (U. S.) 442. § 6823.
Morrison v. Caldwell, 5 T. B. Mon. (Ky.) 426. § 5246.
Morrison v. Eaton & C. R. Co., 14 Ind. 110. § 6053.
Morrison v. Gold Mining Co., 52 Cal. 306. §§ 480, 490.
Morrison v. Ives, 4 Smedes & M. (Miss.) 652. § 1391.
Morrison v. Menhaden Co., 37 Hun (N. Y.), 522. § 5851.
Morrison v. National Rubber Co., 13 Civ. Proc. Rep. (N. Y.) 233. § 8025.
Morrison v. Price, 23 Fed. Rep. 217. §§ 3104, 7284.
Morrison v. Shuster, 1 Mackey (D. C.), 190. § 6840.
Morrison v. St. Louis & C. R. Co., 96 Mo. 602. § 636.
Morristown v. Shelton, 1 Head (Tenn.), 24. § 110.
Morristown Inst. v. Roberts, 42 N. J. Eq. 496. § 6710.
Morrow v. Nashville Iron & C. Co., 37 Tenn. 262. §§ 1309, 1337, 1513, 1586.
Morrow v. San Francisco Superior Court, 64 Cal. 383. § 3455.
Morrow v. Surber, 97 Mo. 155. § 1717.
Morrow v. United States Mortgage Co., 96 Ind. 21. § 4391.
Morrow v. Vernon, 35 N. J. L. 490. § 6064.
Morse v. Beale, 68 Iowa, 463. § 5105.
Morse v. Connecticut & C. R. Co., 6 Gray (Mass.), 450. § 4915.
Morse v. Massachusetts Nat. Bank, Holmes (U. S.), 209. §§ 4815, 4818.
Morse v. Reed, 13 Met. (Mass.) 62. § 3741.
Morse v. School Dist., 3 Allen (Mass.), 307. § 7758.
Morseman v. Younkun, 27 Iowa, 350. § 2834.
Mortensen v. West Point Man. Co., 12 Neb. 197. § 2849.
Morton's Case, L. R. 16 Eq. 104. § 1537.
Morton v. Hart, 85 Tenn. 427. § 4298.
Morton v. Ludlow, 1 Edw. Ch. 643. § 1717.
Morton v. Metropolitan Life Ins. Co., 34 Hun (N. Y.), 366; affirmed, 103 N. Y. 645. §§ 6293, 6312.
Morton v. Mutual Life Ins. Co., 105 Mass. 141, 145. § 12, 7463.
Morton v. New Orleans & C. R. Co., 79 Ala. 590, 607. §§ 6071, 6072, 6075, 6076, 6128, 6214, 6217, 6218, 6229, 6256, 6257, 6265, 6267, 6268.
Morton v. Preston, 18 Mich. 60, 72. §§ 2455, 2476, 2752.
Morton v. Timken, 2 Cent. Rep. 212. § 1652.
Morton Gravel Road v. Wyssong, 51 Ind. 4, 12. §§ 849, 956, 956, 5916, 5923, 5933 a.
Morville v. American Tract Soc., 123 Mass. 129. §§ 5983, 6004.
Morvius v. Lee, 30 Fed. Rep. 298. § 4358.
Mose v. Hastings & C. Gas Co., 4 Fost. & Fin. 324. § 6358.

- Moseby v. Burrow, 52 Tex. 396. §§ 6652, 6666, 7334.
 Mosely v. Jones, 66 Ga. 456. § 7758.
 Moser v. Kreigh, 49 Ill. 84, 86. § 4617, 4618.
 Moses v. MacFarlan, 2 Burr. 1005. § 6005.
 Moses v. Mobile, 52 Ala. 199. § 7171.
 Moses v. Ocoee Bank, 1 Lea (Tenn.), 398. §§ 4103, 4153, 4206.
 Moses v. Sanford, 11 Lea (Tenn.), 731. § 5494.
 Moses v. Scott, 24 Ala. 608. § 3870.
 Moses v. Tompkins, 24 Ala. 513. §§ 3853, 4500, 4520, 4521, 4522, 4524, 4525.
 Moses Taylor, The, 4 Wall. (U. S.) 411. §§ 673, 7320.
 Moshannon Land & Lumber Co. v. Sloan, 109 Pa. St. 542. § 4697.
 Moshassuck Felt Mill v. Blanding, 17 R. I. 297. § 8080.
 Mosier v. Hilton, 15 Barb. (N. Y.) 657. §§ 588, 620.
 Mosler v. Potter, 121 Mass. 89. § 7666.
 Moss Appeal, 43 Pa. St. 23. §§ 2233, 2732.
 Moss Appeal, 83 Pa. St. 264. §§ 2194, 2196, 2199, 2215, 2220.
 Moss v. Averell, 10 N. Y. 449. §§ 1032, 3074, 3077, 3358, 3392, 3399, 3405, 3555, 3661, 3681, 3734, 4331, 5045, 5175, 5730, 5732, 5734, 5805, 7747.
 Moss v. Burroughs, 1 Woods (U. S.), 467. §§ 1569, 1951.
 Moss v. Harpeth Academy, 7 Heisk. (Tenn.) 283. §§ 5697, 5698, 5816.
 Moss v. Livingston, 4 N. Y. 208. §§ 5126, 5137, 5152, 5156.
 Moss v. McCullough, 5 Hill (N. Y.), 131. §§ 1082, 3077, 3358, 3392, 3396, 3405, 4331.
 Moss v. McCullough, 7 Barb. (N. Y.) 279. §§ 3177, 3358, 3396, 3399, 3661.
 Moss v. Oakley, 2 Hill (N. Y.), 265. §§ 1082, 3074, 3076, 3173, 3221, 3358, 3392, 3396, 3473, 4206, 4331, 5045, 5730.
 Moss v. Rossie Lead M. Co., 5 Hill (N. Y.), 137; 5 Denio (N. Y.), 567. §§ 5045, 5303, 5304, 5730, 5737, 5869.
 Mott v. Clark, 9 Pa. St. 399. § 6067.
 Mott v. Consumers' Ice Co., 18 Alb. L. J. 90. § 9298.
 Mott v. Hicks, 1 Cow. (N. Y.), 513. §§ 4802, 5045, 5046, 5126, 5135, 5136, 5730, 5734.
 Mott v. Pennsylvania R. Co., 30 Pa. St. 9. §§ 5569, 5571.
 Mott v. United States Trust Co., 19 Barb. (N. Y.) 568. § 5019.
 Moulin v. Trenton & Co. Ins. Co., 24 N. J. L. 234. §§ 7929, 7989, 7994, 7994, 7995, 7998, 8030, 8031, 8032.
 Moulin v. Trenton Mut. & Co. Ins. Co., 25 N. J. L. 57. §§ 4588, 8032.
 Moulton v. Bowker, 115 Mass. 36. § 4943.
 Moultrie v. Hoge, 21 Ga. 513. § 4355.
 Moultrie v. Hunt, 23 N. Y. 394. § 5829.
 Moultrie v. Smiley, 16 Ga. 289. §§ 530, 4264, 4278, 4355, 6740.
 Mount Holly & Co. Turnp. Co. v. Ferree, 17 N. J. Eq. 119. §§ 2389, 2395, 2496, 2593.
 Mount Holly Paper Co. v. Appeal, 99 Pa. St. 513. § 2380.
 Mount Olivet Cemetery Co. v. Shubert, 2 Head (Tenn.) 116. § 4717.
 Mount Palatine Academy v. Kleinschultz, 28 Ill. 133. § 5037.
 Mount Pleasant v. Beckwith, 100 U. S. 514. § 405.
 Mount Sterling & Co. Turnp. Road Co. v. Looney, 1 Met. (Ky.) 550. §§ 4617, 4619, 4622, 4874.
 Mount Sterling Coal Road Co. v. Little, 14 Bush (Ky.), 429. § 1164.
 Mount Washington Hotel Co. v. Marsh, 63 N. H. 230. §§ 4496, 5316.
 Mount Washington Road Co., Petition of, 35 N. H. 134. § 5595.
 Mountford v. Scott, 3 Madd. 26; 1 Turn. & R. 274. §§ 5194, 5200, 5212.
 Mountfort, Ex parte, 15 Ves. 445. § 6883.
 Mouys v. Leake, 8 T. R. 411. § 1048.
 Movius v. Lee, 30 Fed. Rep. 298; 24 Blatchf. 291. §§ 4107, 4109, 4111, 4121, 4304, 4671, 7253.
 Mowatt v. Wright, 1 Wend. (N. Y.) 355. § 1717.
 Mowbray v. Antin, 123 Ind. 24. §§ 4014, 4695.
 Mower v. Leicester, 9 Mass. 247, 250. §§ 20, 7352.
 Mower v. Staples, 32 Minn. 284. § 82.
 Mowrey v. Illinois & C. R. Co., 4 Bias. (U. S.) 78. § 345.
 Mowrey v. Indianapolis R. & C. Co., 4 Bias. (U. S.) 78. §§ 67, 72, 75, 80, 343, 349, 354, 725, 1291, 3926.
 Mowry v. Crocker, 6 Wis. 326. § 7336.
 Mowry v. Hawkins, 57 Conn. 453. § 2778.
 Mowry v. Wood, 12 Wis. 413. § 2477.
 Moxey v. Philadelphia Stock Exchange, 14 Phila. (Pa.) 185. § 865.
 Moxie Nerve Food Co. v. Baumbach, 32 Fed. Rep. 205. § 7422.
 Moyer v. Pennsylvania State Co., 71 Pa. St. 293. §§ 3013, 5681.
 Moyers v. Colner, 22 Fla. 422. § 6380.
 Moyle v. Landers, 78 Cal. 99. § 4534.
 Moyle v. Landers, 83 Cal. 579. §§ 4500, 4509, 4566.
 Moyle v. Alston, 1 Phil. Ch. 790. §§ 329, 349, 355, 764, 3877, 4483, 4499, 4508, 4518, 4566, 4602.
 Mrs. Matthewman's Case, L. R. 3 Ex. 731. §§ 1097, 3275.
 Mud Creek Draining Co. v. State, 43 Ind. 236. § 7676.
 Mudford's Claim, 14 Ch. Div. 634. § 3712.
 Mudge v. Commissioners, 10 Rob. (La.) 460. §§ 3342, 6731.
 Mudge v. Rowan, L. R. 3 Ex. 85. § 3209.
 Mudgett v. Horrell, 33 Cal. 25. §§ 1913, 1923, 1924, 7734, 7739, 7740.
 Mueth v. Schardin, 4 Mo. App. 403. § 7805.
 Mugler v. Kansas, 123 U. S. 623. §§ 5460, 5482, 5622.
 Muir v. Glasgow Bank (H. L.), 4 App. Cas. 537. § 3194.
 Muir v. Louisville & C. Canal Co., 8 Dana (Ky.), 161. § 5046.
 Mulder v. American Lumber Co., 55 Mich. 622. § 4967.
 Muldon v. Whitlock, 1 Cow. (N. Y.) 290. § 1220.
 Muldrow v. Robinson, 58 Mo. 331, 350. § 5238.
 Mulhearn v. Press Pub. Co., 53 N. J. L. 150. §§ 7559, 8049.
 Mulholland v. Brownrigg, 2 Hawks, 349. § 6282.
 Mullaly v. Holden, 123 Mass. 583. § 5018.
 Mullan v. Philadelphia & C. R. Co., 78 Pa. St. 25. § 6350.
 Mullanphy v. Schwab Bank v. Schott, 135 Ill. 655. §§ 4065, 4142, 5016, 6193, 6234, 6509.
 Mullen v. Beech Grove Driving Park, 64 Ind. 202. § 7647.
 Mullens v. American Freehold & Co. Co., 88 Ala. 280. §§ 7935, 7936, 7950, 7955, 7956, 7965, 7966, 7981.
 Muller v. Dows, 94 U. S. 444. §§ 1834, 6860, 7456, 7465, 7875.
 Mulligan v. Mulligan, 18 Ia. An. 20. § 3145.
 Mullin v. Leitch, 83 Cal. 239. § 5938.
 Mullins v. North & South R. Co., 54 Ga. 580. § 1980.
 Mulloy v. Nashville & C. R. Co., 8 Lea (Tenn.), 427. § 5891.
 Mulrey v. Shawmut Mutual Fire Ins. Co., 4 Allen (Mass.), 116. §§ 945, 5265.
 Mumford v. American Life Ins. & Co. Co., 4 N. Y. 463. § 6092, 7882.
 Mumford v. Hawkins, 5 Denio (N. Y.), 355. § 4866.
 Mumma v. Potomac Co., 8 Pet. (U. S.) 281. §§ 530, 1569, 2951, 3340, 3341, 3342, 3355, 3357, 3403, 3583, 6555, 6609, 6678, 6718, 6723, 6730, 6731, 6748, 7720.
 Muncy Creek R. Co. v. Hill, 84 Pa. St. 459. § 6571.
 Muncy Traction Engine Co. v. De La Green, 21 Am. & Eng. Corp. Cas. 325. § 1516.
 Munger v. Jacobson, 99 Ill. 349. §§ 3134, 3540.
 Municipality v. Theater Co., 2 Rob. (La.) 209. § 590.
 Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 246. § 4868.
 Munn v. Burch, 25 Ill. 35. § 4836.
 Munn v. Commission Co., 15 Johns. (N. Y.) 44. § 5730.
 Munn v. Illinois, 94 U. S. 113; affirming 69 Ill. 80. §§ 91, 644, 650, 5470, 5453, 5530, 5931, 5534, 5535, 5539, 5540, 5541.
 Munroe v. Thomas, 5 Cal. 470. § 7853.
 Munson v. Syracuse & C. R. Co., 103 N. Y. 58. §§ 332, 480, 4059, 4061.
 Munson v. Syracuse & C. R. Co., 29 Hun (N. Y.), 76. § 275.
 Munster Bank Re, 17 L. R. Ir. 341. § 3196.
 Munt's Case, 22 Bear. 55. §§ 1523, 2054, 2055, 3255.
 Munt v. Shrewsbury & C. R. Co. 13 Bear. 1. §§ 4518, 4527, 4566.
 Munt v. Shrewsbury & C. R. Co., 3 Eng. L. & Eq. 144; 20 L. J. (Ch.) 169. § 4519.
 Munt v. Stokes, 4 T. R. 561. § 6040.
 Murch v. Concord R. Co., 29 N. H. 9. § 5884.
 Murch v. Wright, 46 Ill. 487. §§ 7209, 7210.
 Murdock's Appeal, 7 Pick. (Mass.) 303. §§ 820, 822, 824, 841.
 Murdock v. Blesdel, 106 Mass. 370. § 3956.

Murdock—National TABLE OF CASES CITED.

- Murdock v. Phillips' Academy**, 12 Pick. (Mass.) 244. §§ 812, 815, 817, 820, 824, 841, 881, 882.
- Murdock v. Walker**, 152 Pa. St. 595. § 7722.
- Murdock v. Woodson**, 2 Dill. (U. S.) 188. § 588.
- Murphy v. State Bank**, 7 Ark. 57. § 7669.
- Murphy**, Application of, 51 Wis. 519. §§ 2392, 2397, 2409.
- Murphy**, Ex parte, 7 Cow. (N. Y.) 153. § 781.
- Murphy v. Branch Bank**, 5 Ala. 421. § 7760.
- Murphy v. Farmers' Bank**, 20 Pa. St. 415. §§ 6775, 6776.
- Murphy v. Holbrook**, 20 Ohio St. 137. §§ 6366, 7130, 7155, 7159, 7160.
- Murphy v. Orr**, 32 Ill. 489. § 2775.
- Murphy v. People's Ins. Co.**, 7 Allen (Mass.), 239. § 945.
- Murphy v. Union R. Co.**, 118 Mass. 228. § 6308.
- Murray v. Albert**, 24 Md. 522. § 3432.
- Murray v. Ballou**, 1 Johns. Ch. (N. Y.), 575. § 6187.
- Murray v. Bininger**, 3 Keyes (N. Y.) 109. § 5310.
- Murray v. Charleston**, 96 U. S. 432, 440. § 5427.
- Murray v. East India Co.**, 5 Barn. & Ald. 204. § 5735.
- Murray v. Glasse**, 17 Jur. 816. § 2199.
- Murray v. Gouverneur et al.**, 2 Johns. Cas. (N. Y.) 438. § 1220.
- Murray v. Gulf & C. R. Co.**, 63 Tex. 407. § 5543.
- Murray v. Hudson River R. Co.**, 47 Barb. (N. Y.) 196. § 6358.
- Murray v. Lardner**, 2 Wall. (U. S.) 110. §§ 4724, 6064, 6081.
- Murray v. Lyburn**, 2 Johns. Ch. (N. Y.) 441. §§ 6067, 6905.
- Murray v. Nelson Lumber Co.**, 143 Mass. 255. §§ 4108, 5306, 5308, 5310.
- Murray v. Pinkett**, 12 Cl. & Fin. 764. § 2317.
- Murray v. Scott**, 9 App. Cas. 519. § 5690.
- Murray v. Vanderbilt**, 39 Barb. (N. Y.) 140. §§ 4011, 4043, 4673, 5098, 5106, 5108, 6755, 6862, 7553.
- Murray v. Walker**, 31 N. Y. 399. § 6189.
- Muscantine Turn Verein v. Funck**, 18 Iowa, 469. §§ 6656, 6727, 6730, 6759, 7720.
- Muscantine Water Works Co. v. Muscantine Lumber Co.**, 85 Iowa, 112. § 6045.
- Musgrave v. Morrison**, 54 Md. 161. § 1242.
- Musgrave & Hart's Case**, L. R. 5 Eq. 193. § 3284.
- Musgrave & Hart's Case**, L. R. 5 Eq. 695. § 3283.
- Musgrove v. Catholic Church**, 10 La. An. 431. § 1017.
- Musgrove v. Neilson**, 1 Str. 584; 2 Ld. Raym. 1358. §§ 708, 713.
- Musik Hall Co. v. Carey**, 116 Mass. 471. § 1172.
- Muskingum Valley Turnpike v. Ward**, 13 Ohio, 120. §§ 1694, 1752, 3279.
- Musser v. Johnson**, 42 Mo. 74. §§ 5030, 5098, 5106, 5144, 5165, 5171, 7074.
- Mussey v. Eagle Bank**, 9 Met. (Mass.) 306. §§ 4812, 4815, 4834, 4837, 5228.
- Mussey v. Rayner**, 22 Pick. (Mass.) 223. § 3383.
- Mussey v. Scott**, 7 Cush. (Mass.) 215. § 5146.
- Mussina v. Goldthwaite**, 34 Tex. 125. §§ 4479, 4509, 4589.
- Musson v. Richardson**, 11 Rob. (La.) 37, 42. § 7720.
- Mutual Aid Assn.**, Re, 15 Phila. (Pa.) 625. § 120.
- Mutual Aid Building Soc.**, Re, 29 Ch. Div. 182; 30 Ch. Div. 434. § 5699.
- Mutual Benefit Life Ins. Co. v. Bates**, 92 Pa. St. 352. § 7961.
- Mutual Benefit Life Ins. Co. v. Elizabeth**, 42 N. J. L. 235. § 590.
- Mutual Benefit Life Ins. Co. v. Rowland**, 26 N. J. Eq. 389. § 3145.
- Mutual Building Fund & C. Bank v. Bossieux**, 4 Hughes (U. S.), 387. § 4126.
- Mutual Fire Ins. Co. v. Stokes**, 9 Phila. (Pa.) 80. § 86.
- Mutual Loan & C. Asso. v. Price**, 16 Fla. 204. § 3904.
- Mutual Savings Bank v. Meriden Agency Co.**, 24 Conn. 159. §§ 1102, 1108.
- Mutter v. Eastern & C. R. Co.**, 38 Ch. Div. 92. §§ 4412, 4421, 4432, 4433.
- Myer v. Liverpool & C. Ins. Co.**, 40 Md. 595. §§ 8007, 8073.
- Myers v. Croft**, 13 Wall. (U. S.) 291. §§ 5114, 7964.
- Myers v. Dorr**, 13 Blatch. (U. S.) 22. §§ 7453, 7485.
- Myers v. Estell**, 48 Miss. 372. § 6823.
- Myers v. Irwin**, 2 Serg. & R. (Pa.) 368, 371. § 2925.
- Myers v. Machado**, 6 Abb. Pr. (N. Y.) 198. § 7602.
- Myers v. Malcolm**, 6 Hill (N. Y.), 292. § 6373.
- Myers v. Malcolm**, 20 Ill. 621. § 5183.
- Myers v. Murray**, 43 Fed. Rep. 695. §§ 7463, 7465.
- Myers v. Myers**, 8 La. An. 369. § 7342.
- Myers v. York & C. R. Co.**, 43 Me. 232. §§ 6064, 6107, 6109.
- Myers v. Perkal**, 2 De Gex, M. & G. 599. §§ 1066, 1073.
- Myers v. Seeley**, 1 Cent. L. J. 451. §§ 3537, 3552, 3569.
- Myers v. Zainesville & C. Turnp. Co.**, 11 Ohio, 273. § 1133.
- Mygatt v. New York Protection Ins. Co.**, 21 N. Y. 53. §§ 5857, 7236.
- Myrick v. Brawley**, 33 Minn. 377. § 6759.
- Myrick v. Dame**, 9 Cush. (Mass.) 248. § 3446.
- Nab v. Nab**, 10 Mod. 404. § 2623.
- Nabring v. Mobile Bank**, 58 Ala. 204. §§ 2463, 2667.
- Naglee v. Alexandria & C. R. Co.**, 83 Va. 707. §§ 5355, 6241.
- Naglee v. Pacific Wharf Co.**, 20 Cal. 529. §§ 2392, 2397, 2400, 2409.
- Nall v. Granger**, 8 Mich. 450. § 3363.
- Naltner v. Dolan**, 108 Ind. 500. § 4014.
- Nanson v. Jacob**, 93 Mo. 331. § 2437.
- Nant-y-Glo & C. Co. v. Grave**, 12 Ch. Div. 738. § 459.
- Napa & C. R. Co. v. Napa County**, 30 Cal. 435. §§ 5592, 5600.
- Napier v. Central & C. Bank**, 63 Ga. 637. §§ 2651, 2660.
- Napier v. Mortimer**, 11 Abb. Pr. (N. s.) (N. Y.) 455. § 4355.
- Napier v. Poe**, 12 Ga. 170. §§ 1220, 1226, 1246, 7644, 7710.
- Napman v. People**, 19 Mich. 352. § 1024.
- Narragansett Bank v. Atlantic Silk Co.**, 3 Met. (Mass.) 282. §§ 220, 508, 1859, 3652, 4720, 7694, 7702, 7703, 7712.
- Nash v. Rector**, 1 Miles (Pa.), 78. §§ 8030, 8032.
- Nashua & C. R. Corp. v. Boston & C. R. Corp.**, 136 U. S. 356. §§ 3977, 4079, 7448, 7452.
- Nashua & C. R. Co. v. Boston & C. R. Co.**, 27 Fed. Rep. 821, 826. §§ 78, 4002.
- Nashua Fire Ins. Co. v. Moore**, 55 N. H. 48. § 3803.
- Nashville v. Althorp**, 5 Coldw. (Tenn.) 554. § 1018.
- Nashville v. Thomas**, 5 Coldw. (Tenn.) 500. § 2849.
- Nashville & C. R. Co. v. Alabama**, 128 U. S. 96; affirming 83 Ala. 71. §§ 5592, 8109.
- Nashville & C. R. Co. v. Jones**, 9 Heisk. (Tenn.) 27. § 6350.
- Nashville & C. R. Co. v. Jones**, 2 Coldw. (Tenn.) 574. §§ 1285, 1288.
- Nashville & C. R. Co. v. Marion County**, 7 Lea (Tenn.), 663. § 5571.
- Nashville & C. R. Co. v. Starnes**, 9 Heisk. (Tenn.) 52. §§ 6378, 6387.
- Nashville Bank v. Petway**, 3 Humph. (Tenn.) 522. § 752.
- Nashville Bridge Co. v. Shelly**, 10 Yerg. (Tenn.) 280. § 5404.
- Nashville Gas Light Co. v. Nashville**, 8 Lea (Tenn.), 406. § 2812.
- Nassau Bank v. Brown**, 30 N. J. Eq. 478. §§ 4164, 4336.
- Nassau Gas Light Co. v. Brooklyn**, 89 N. Y. 409. § 8101.
- Nassau Phosphate Co.**, Re, 2 Ch. Div. 610. §§ 1095, 1096.
- Natchez v. Mallory**, 54 Miss. 499. §§ 6016, 6013.
- Nathan v. Louisiana**, 8 How. (U. S.) 73. § 5761.
- Nathan v. Tompkins**, 82 Ala. 437. §§ 343, 349, 3851, 3853, 3854, 3859, 3878, 3887, 4504, 4524, 4525.
- Nathan v. Whitehill**, 67 Hun, 398. § 4059.
- Nathan v. Whitlock**, 9 Paige (N. Y.), 152; 3 Edw. Ch. 215. §§ 1401, 2958, 3255, 3259, 3263, 3417, 3419, 3562, 6486, 6555.
- Nation's Case**, L. R. 3 Eq. 77. §§ 3285, 3288.
- National & C. Bank's Appeal**, 55 Conn. 469. § 5698.
- National & C. Bank v. Beal**, 50 Fed. Rep. 355. §§ 7084, 7088, 7293.
- National & C. Bank v. Bethel Bank**, 36 Conn. 325. § 4827.
- National & C. Bank v. Butler**, 129 U. S. 223; affirming 22 Fed. Rep. 697. § 7272.
- National & C. Bank v. Cushman**, 121 Mass. 490. §§ 3907, 5190, 5221, 5225.
- National & C. Bank v. First Nat. Bank**, 36 Conn. 325. §§ 4746, 6730, 6732, 7268, 7720.
- National & C. Bank v. Gay**, 57 Conn. 224. §§ 256, 3725.

- National &c. Bank v. German American &c. Co., 116 N. Y. 281; 26 N. Y. St. Rep. 675. § 739.
- National &c. Bank v. Hartford &c. R. Co., 8 R. I. 375. §§ 6064, 6107.
- National &c. Bank v. Hills, 2 Nat. Bk. Cas. *456. § 2872.
- National &c. Bank v. Hubbell, 117 N. Y. 334. §§ 7088, 7090.
- National &c. Bank v. Landon, 45 N. Y. 410. §§ 2926, 2971.
- National &c. Bank v. McDonnell, 92 Ala. 387. §§ 3022, 3211, 3275, 3683.
- National Bank v. Mobile, 62 Ala. 284. §§ 2857, 2863, 2893.
- National Bank &c. v. Nichols, 2 Biss. (U. S.) 146. §§ 1375, 1376, 1383, 3676.
- National &c. Bank v. Ninth National Bank, 46 N. Y. 77. § 4833.
- National &c. Bank v. Peters, 44 Fed. Rep. 13. §§ 4137, 4303, 4304.
- National &c. Bank v. Pierce, 2 Nat. Bk. Cas. 177. § 2866.
- National &c. Bank v. Porter, 125 Mass. 333. § 6036.
- National &c. Bank v. Price, 22 Fed. Rep. 697. §§ 7041, 7273.
- National &c. Bank v. Remsen, 43 Fed. Rep. 226. §§ 4187, 5739.
- National &c. Bank v. Young, 25 Iowa 311. § 2858.
- National &c. Cs. v. Bowman, 60 Mo. 252. §§ 518, 7658.
- National &c. Co. v. Drew, 32 Eng. Law & Eq. 1. § 1364.
- National &c. Co. v. Drew, 2 Macq. 103; 1 Pat. (Sc.) App. 482. §§ 1462, 6312, 6321.
- National &c. Co. v. Gillfillan, 124 N. Y. 302. §§ 1616, 1623, 2983.
- National &c. Co. v. Gillfillan, 46 Hun (N. Y.), 243. § 1621.
- National &c. Co. v. Miller, 33 N. J. Eq. 155. §§ 2951, 5638, 7339, 7345, 7352.
- National &c. Co. v. Murphy, 30 N. J., Eq. 408. § 7922.
- National &c. Co. v. Robinson, 8 Neb. 452. §§ 7664, 7665.
- National &c. Co. v. State, 53 N. J. L. 217. § 5613.
- National &c. Co. v. Terre Haute Man. Co., 19 Fed. Rep. 514. § 4140.
- National &c. Co. v. Wilson, 5 App. Cas. 176. § 1205.
- National &c. Co. v. Yeomans, 8 R. I. 25. § 522.
- National &c. Soc., Re, L. R. 5 Ch. 309. § 5968.
- National &c. Soc. v. Anderson, 17 N. Y. St. Rep. 389; 2 N. Y. Supp. 49. §§ 7659, 7661.
- National &c. Works v. Oconto Water Co., 52 Fed. Rep. 29. § 6059.
- National Bank, Ex parte, L. R. 14 Eq. 507. §§ 6132, 6152.
- National Bank, Re, L. R. 10 Eq. 298. § 4096.
- National Bank v. Atlanta &c. R. Co., 25 S. C. 216. § 5884.
- National Bank v. Bigler, 83 N. Y. 59. § 2018.
- National Bank v. Case, 99 U. S. 628. §§ 3192, 3213, 3265, 7286.
- National Bank v. Colby, 21 Wall. (U. S.) 609. §§ 6718, 6723, 6965, 7041, 7274, 7278, 7281, 7311, 7720.
- National Bank v. Commonwealth (1869), 9 Wall. (U. S.) 353. §§ 671, 2811, 2827, 2840, 2855, 2857, 2864, 2877, 2914, 4414, 8092.
- National Bank v. Cushman, 121 Mass. 490. § 5209.
- National Bank v. De Bernales, 1 Car. & P. 569. §§ 7609, 7712.
- National Bank v. Drake, 29 Kan. 330. § 2253.
- National Bank v. Dun, 29 Hun (N. Y.), 529, 531. § 7182.
- National Bank v. Graham, 100 U. S. 699. §§ 6279, 7264.
- National Bank v. Huntington, 129 Mass. 444. §§ 7901, 7989, 7998, 7999, 8331.
- National Bank v. Insurance Co., 104 U. S. 54. §§ 3369, 7036, 7092, 7107, 7108, 7268, 7304.
- National Bank v. Iola, 2 Dill. (U. S.) 353. § 582.
- National Bank v. Kimball, 103 U. S. 732. §§ 2857, 2883.
- National Bank v. Kirby, 108 Mass. 497. § 8065.
- National Bank v. Lake Shore &c. R. Co., 21 Ohio St. 221. § 2502.
- National Bank v. Matthews, 98 U. S. 621. §§ 502, 5274, 5814, 5950, 6021, 6028, 6029, 6033, 6035, 6036, 6037, 7913, 7922, 7964.
- National Bank v. Mechanics' Nat. Bank, 94 U. S. 437. §§ 7311, 7314.
- National Bank v. Meredith, 44 Mo. 500. § 2857.
- National Bank v. National Bank, 7 W. Va. 544. § 7738.
- National Bank v. National Mechanics' Banking Assc., 55 N. Y. 211. § 4817.
- National Bank v. Norton, 1 Hill (N. Y.), 572. §§ 3950, 4920, 5197, 5199, 5219, 5220, 5221, 5310.
- National Bank v. Oxford &c. Car Co., 2 Pa. County Ct. 360. § 7867.
- National Bank v. Paige, 53 Vt. 452. §§ 4261, 4276.
- National Bank v. Phoenix Warehousing Co., 6 Hun (N. Y.), 71. §§ 7942, 7950.
- National Bank v. Richmond, 42 Fed. Rep. 877. §§ 2857, 2915.
- National Bank v. Richland Nat. Bank, 52 How. Pr. (N. Y.), 136. § 7275.
- National Bank v. Southern Porcelain Man. Co., 55 Ga. 35. § 8010.
- National Bank v. Texas, 20 Wall. (U. S.) 72. § 6080.
- National Bank v. Texas Investment Co., 74 Tex. 421. §§ 204, 205, 246, 2040, 2982, 4145, 4153, 4155, 6547.
- National Bank v. Van Derwerker, 74 N. Y. 234. § 7602.
- National Bank v. Watsontown Bank, 105 U. S. 217. §§ 2320, 2354, 2377, 3250.
- National Bank v. Whitney, 103 U. S. 99. §§ 502, 1595, 5950, 6036, 7964.
- National Bank v. Williams, 46 Mo. 17. § 4750.
- National Bank v. Yankton County, 101 U. S. 130. § 6064.
- National Bank v. Young, 41 N. J. Eq. 531. §§ 4724, 5236, 5739, 5740.
- National Bank of Augusta v. Southern &c. Co., 55 Ga. 36. § 3509.
- National Bank of Charlotte v. National Exchange Bank of Baltimore, 39 Md. 600. § 2065.
- National Bank of Chattanooga v. Mayor, 8 Heisk. (Tenn.) 814. § 2855.
- National Bank of the Republic v. Navaassa Phosphate Co., 56 Hun (N. Y.), 136; 8 N. Y. Supp. 929. §§ 4638, 4965.
- National Funds Assurance Co., Re, 10 Ch. Div. 118. §§ 2155, 2954, 2963, 4106, 4121, 6947.
- National Literary Association, 30 Pa. St. 150. § 1113.
- National Permanent Benefit Building Soc., Re, L. R. 5 Ch. 309. § 5702.
- National Sav. Bank Assc., Re, L. R., 1 Ch. App. 547, 553. § 6688.
- Native Iron Ore Co., Re, 2 Ch. Div. 345. § 6152.
- Natoma Water &c. Co. v. Clarkin, 14 Cal. 544. §§ 5770, 5795.
- Natusch v. Irving, 2 Coop. Ch. (Tenn.) 358. § 67.
- Natusch v. Irving, MS., Gow on Part. App. No. VI (3d ed.), 398. §§ 4480, 4518, 4566.
- Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468, 482. § 5645.
- Naugatuck Water Co. v. Nichols, 58 Conn. 403. § 1741.
- Nave v. Hadley, 74 Ind. 155, 157. § 7591.
- Navigation Co. v. Galveston Co., 45 Tex. 272. § 204.
- Nay v. Hannibal &c. R. Co., 51 Mo. 575. § 7547.
- Naylor v. South Devon R. Co., 1 De Gex & S. 32. § 1806.
- Nazro v. Cragin, 3 Dill. (U. S.) 474. § 8064.
- Neal's Appeal, 129 Pa. St. 64. §§ 6504, 6512.
- Neal v. Janney, 2 Cranch C. C. (U. S.) 188. § 2344.
- Neal v. Moultrie, 12 Ga. 104. §§ 4165, 4361, 4362.
- Neale v. Turton, 4 Bing. 149. §§ 1255, 3446, 5746.
- Neall v. Hill, 16 Cal. 145. §§ 803, 826, 4102, 4482, 4520.
- Neath &c. R. Co., In re (C. A.) (1892), 1 Ch. 349. § 2286.
- Nebraska Loan & Trust Co. v. Nine, 27 Neb. 507. § 297.
- Nebraska R. Co. v. Lett, 8 Neb. 251. § 4684.
- Neece v. Haley, 23 Ill. 418. § 2617.
- Needham's Case, L. R. 4 Eq. 135. § 1550.
- Neely v. State, 4 Lea (Tenn.), 316. § 5338.
- Neely v. Yorkville, 10 S. C. 141. § 294.
- Neff v. Mooresville &c. Gravel Road Co., 66 Ind. 279. §§ 5809, 5912.
- Neff v. Wolf River Boom Co., 50 Wis. 585. § 263.
- Neier v. Missouri Pacific R. Co., 12 Mo. App. 25. §§ 849, 1022.
- Neiffer v. Bank of Knoxville, 1 Head (Tenn.), 162. §§ 4620, 4623, 4626, 4642, 4964.
- Neifing v. Pontiac, 56 Ill. 172. § 611.
- Neil v. Board of Trustees, 31 Ohio St. 15, 21. § 39.
- Neil v. Ohio, 3 How. (U. S.) 720. § 5918.
- Neiler v. Kelley, 69 Pa. St. 403. §§ 2456, 2471, 2473, 2684, 2685.

- Neilson v. Crawford, 52 Cal. 248. § 3657.
 Neilson v. Iowa & Co. R. Co., 44 Iowa, 71. § 6147.
 Neilson v. Iowa & Co. R. Co., 51 Iowa, 184. § 7758.
 Neilson v. Lagow, 12 How. (U. S.) 98, 107, 108. § 5785.
 Nelligan v. Campbell, 20 N. Y. Supp. 234; 47 N. Y. St. Rep. 576. §§ 4625, 4650, 4678.
 Nellis v. Clark, 4 Hill (N. Y.), 424. §§ 1772, 7958.
 Nellis Co. v. Y. S. Rep. 599; 16 N. Y. Supp. 545. §§ 5287, 5288, 5649.
 Nelson v. Blakely, 47 Ind. 38. § 1827.
 Nelson v. Burrows, 9 Abb. N. Cas. (N. Y.) 280. § 4506.
 Nelson v. Conner, 6 Rob. (La.) 339. §§ 6898, 7812.
 Nelson v. Conner, 3 La. An. 456. § 1034.
 Nelson v. Cook, 19 Ill. 440. § 4943.
 Nelson v. Eaton, 20 N. Y. 410. § 4780.
 Nelson v. Edwards, 40 Barb. (N. Y.) 279. § 6466.
 Nelson v. First Nat. Bank, 49 Ill. 36. § 5154.
 Nelson v. Hubbard, 96 Ala. 238. §§ 6058, 6059, 6060, 6061, 6184, 6718, 6723, 6727, 6733, 6889.
 Nelson v. King, 25 Tex. 655. § 2477.
 Nelson v. Luling, 4 Jones & Sp. (N. Y.) 544; affirmed, 62 N. Y. 645. §§ 1388, 1460, 1462, 6326.
 Nelson v. People, 33 Ill. 390. § 658.
 Nelson v. Vermont & C. R. Co., 26 Vt. 717. §§ 5504, 5880, 5884, 5886, 6293.
 Nelson v. Wellington, 5 Bosw. (N. Y.) 178. §§ 2665, 4098, 5755.
 Nelson v. Withrow, 14 Mo. App. 270, 276. § 3145.
 Nerac, Estate of, 35 Cal. 392. § 6934.
 Nesbit v. Riverside Independent District, 144 U. S. 610. § 5262.
 Nesbitt v. Trumbo, 39 Ill. 110. § 5598.
 Nesmith v. Washington Bank, 6 Pick. (Mass.) 324. §§ 2062, 2321, 2339, 2389, 3283.
 Ness Ex parte, 5 Com. B. 155. § 3593.
 Ness v. Angas, 3 Exch. 805. §§ 1877, 1882.
 Ness v. Armstrong, 4 Ex. 21. §§ 1377, 1882, 3335.
 Nesmith v. Sheldon, 4 McLean (U. S.), 377; 7 How. (U. S.) 812. §§ 632, 654.
 Nettles v. Maroo, 33 S. C. 47. § 1527.
 Neuer v. O'Fallon, 18 Mo. 277. § 7805.
 Neufeld v. Moll, 37 Ill. App. 535. § 6503.
 Neuse River Nav. Co. v. Newburn, 7 Jones L. (N. C.) 275. §§ 1218, 1595.
 Neville v. Wilkinson, 1 Brown Ch. 548. Note a. § 1772.
 Nevins v. Townsend, 6 Conn. 5. § 5752.
 Nevitt v. Bank of Port Gibson, 6 Smedes & M. (Miss.) 513, 558. §§ 3341, 3342, 6555, 6556, 6730, 6731, 6750, 6813.
 New Albany v. Burke, 11 Wall. (U. S.) 96. §§ 1319, 1553, 1556, 1559, 2951, 3564, 7282.
 New Albany v. Meekin, 3 Ind. 481. § 8095.
 New Albany & C. R. Co. v. Fields, 10 Ind. 187. §§ 1149, 1311, 1366.
 New Albany & C. R. Co. v. Haskell, 11 Ind. 301. §§ 689, 4853, 7426.
 New Albany & C. R. Co. v. McCormick, 10 Ind. 499. §§ 1140, 1170, 1317, 1328, 1332, 1344, 1353, 1577, 1748, 1962, 3283, 3284.
 New Albany & C. R. Co. v. McNamara, 11 Ind. 543. § 7504.
 New Albany & C. R. Co. v. Pickens, 5 Ind. 247. §§ 1748, 1827.
 New Albany & C. R. Co. v. Slaughter, 10 Ind. 218. § 1400.
 New Albany & C. Plank Road Co. v. Lewis, 49 Ind. 161. § 5930.
 New Amsterdam Sav. Bank v. Garter, 54 How. Pr. (N. Y.) 385. § 7301.
 Newark Banking Co. v. Newark, 121 U. S. 163. § 2884.
 Newark City Bank v. Assessor, 30 N. J. L. 13. § 2848.
 Newark Savings Inst., Re, 28 N. J. Eq. 552. § 6710.
 New Athens v. Thomas, 82 Ill. 259. §§ 5045, 5181.
 New Bedford Turnp. Co. v. Adams, 8 Mass. 138. §§ 1187, 1550.
 Newberry v. Detroit & Co. Co., 17 Mich. 141. §§ 2432, 2780.
 Newberry v. Lee, 3 Hill (N. Y.), 523, 656. § 4943.
 Newberry v. Robinson, 41 Fed. Rep. 458. § 6560.
 Newbold v. Peoria & C. R. Co., 5 Ill. App. 367. § 7183.
 New Brunswick & C. Co. v. Nuggeridge, 1 Drew. & Sm. 363. §§ 1304, 1372, 1383, 1424, 1485, 6335.
 New Brunswick & C. Co. v. Conybeare, 9 H. L. Cas. 711. §§ 1462, 4096, 6321, 6326.
 New Brunswick Steamboat & Co. v. Baldwin, 14 N. J. L. 440. § 4629.
 New Buffalo v. Iron Co., 105 U. S. 73. § 5423.
 Newburg Petroleum Co. v. Wear, 27 Ohio St. 343. § 7889.
 Newburgh & C. Turnp. Co. v. Belknap, 17 Johns. (N. Y.) 33. § 5922.
 Newburgh Turnp. Road v. Miller, 5 Johns. Ch. (N. Y.) 101. §§ 5403, 5404.
 Newburyport Turnp. Corp. v. Eastern R. Co., 23 Pick. (Mass.) 326, 327. §§ 5664, 5668.
 Newby v. Oregon & C. R. Co., 1 Deady (U. S.), 609. §§ 296, 297, 7578.
 Newby v. Oregon Cent. R. Co., 1 Sawy. (U. S.) 63. §§ 4500, 4511.
 Newby v. Perkins, 1 Dana (Ky.), 440. § 1780.
 Newby v. Platte County, 25 Mo. 258. § 5626.
 Newby v. Von Oppen, L. R. 7 Q. B. 293; 26 L. T. Rep. (N. S.) 164. §§ 7450, 7990, 7998, 8000.
 Newcastle & C. R. Co. v. Brumback, 5 Ind. 543. § 5528.
 Newcastle & C. R. Co. v. Peru & C. R. Co., 3 Ind. 461. §§ 323, 5399.
 New Castle & C. R. Co. v. Simpson, 21 Fed. Rep. 533. § 1564.
 New Castle & C. R. Co. v. Simpson, 23 Fed. Rep. 214. § 6001.
 New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537. §§ 5591, 5592, 5600.
 New Child Gold M. Co. Re, 45 Ch. Div. 538. § 1777.
 Newcomb, Re, 42 N. Y. St. Rep. 442; 18 N. Y. Supp. 16. §§ 3859, 3861, 3872, 3880, 3895.
 Newcomb v. Boston Protective Department, 151 Mass. 215. § 6364.
 Newcomb v. Brackett, 6 Mass. 161. § 379.
 Newcomb v. Dewey, 27 Iowa, 381. § 3363.
 Newcomb v. Reed, 12 Allen (Mass.), 362. §§ 227, 1859, 3900, 4234, 4354.
 Newcomb v. Smith, 1 Chand. (Wis.) 71. § 5607.
 New Eberhart Co. Re, 43 Ch. D. 118. § 1519.
 Newell v. Borden, 128 Mass. 31. § 7747.
 Newell v. Fisher, 21 Miss. 392. § 6979.
 Newell v. Great Western R. Co., 19 Mich. 336. §§ 7529, 7994, 8030, 8031, 8060.
 Newell v. Hayden, 8 Iowa, 140. §§ 1430, 8075.
 Newell v. Hussey, 18 Me. 249. § 1220.
 Newell v. Williston, 138 Mass. 240. §§ 2409, 2416.
 New England & C. Bank v. Newport, 6 R. I. 154. §§ 1538, 2925, 3074, 3080, 3318, 3320, 3327, 3351, 3358, 3441, 3473, 3796.
 New England & C. Co. v. De Wolf, 8 Pick. (Mass.) 56. §§ 4697, 5020, 5106.
 New England & C. Co. v. Farmington Electric Light & Co., 84 Me. 284. § 5029.
 New England & C. Co. v. Hasbrook, 32 Ind. 447. § 7883.
 New England & C. Co. v. Ingram, 91 Ala. 337. §§ 7935, 7938.
 New England & C. Co. v. New York Loan Co., 55 How. Pr. (N. Y.) 321. § 4428.
 New England & C. Co. v. Robinson, 25 Ind. 536. § 5642.
 New England & C. Co. v. Schettler, 38 Ill. 166. § 5045.
 New England & C. Co. v. Union India Rubber Co., 4 Blatchf. (U. S.) 1. §§ 4728, 5231, 5258, 5264.
 New Era Life Asso. v. Musser, 120 Pa. St. 384. § 5524.
 Newfoundland R. & C. Co. v. Schack, 40 N. J. Eq. 222. §§ 4543, 4544, 6836.
 New Gloucester v. Bradbury, 11 Me. 118. § 5381.
 Newhall v. Buckingham, 14 Ill. 405. § 1084.
 Newhall v. Dunlap, 14 Me. 180. § 5137.
 Newhall v. Galena & C. R. Co., 14 Ill. 273. §§ 5642, 5543.
 New Hampshire v. Louisiana, 108 U. S. 76. § 7780.
 New Hampshire & C. R. Co. v. Downing, 16 N. H. 187. §§ 4887, 4973.
 New Hampshire & C. Co. v. Linden Spring Co., 143 Mass. 349, 353. § 2055.
 New Hampshire & C. Co. v. Tilton, 19 Fed. Rep. 73. §§ 7913, 7917.
 New Hampshire & C. Ins. Co. v. Rand, 24 N. H. 428. § 5646.
 New Hampshire & C. R. Co. v. Johnson, 30 N. H. 390. §§ 1187, 1550, 1724, 1725, 1728, 1784, 1787, 1879, 1881, 1890, 3893.
 New Haven v. City Bank, 31 Conn. 106, 108. §§ 2828, 6629.
 New Haven v. Sargent, 38 Conn. 50. §§ 5642, 5643.

- New Haven &c. Co. Cases, 57 Conn. 352. § 501.
 New Haven &c. Co. v. Hayden, 107 Mass. 525. §§ 4848, 4887.
 New Haven &c. Co. v. Linden Spring Co., 142 Mass. 349. §§ 3046, 3047, 3424, 3439, 3460, 8011.
 New Haven &c. Co. v. Vanderbilt, 16 Conn. 420. § 7746.
 New Haven &c. R. Co. v. Chapman, 38 Conn. 56. § 245.
 New Hope &c. Bridge Co. v. Phenix Bank, 3 N. Y. 156. §§ 5229, 6325.
 New Hope &c. Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.) 648. §§ 7950, 7952.
 New Jersey v. Yard, 35 U. S. 101. §§ 389, 5408, 5570.
 New Jersey &c. Bank v. Thorp. 6 Cow. (N. Y.) 46. § 7977.
 New Jersey &c. Co. v. Boston Franklinite Co., 13 N. J. Eq. 322. § 6663.
 New Jersey &c. Co. v. Boston Franklinite Co., 15 N. J. Eq. 418. §§ 268, 396.
 New Jersey &c. Co. v. Merchants' Bank, 6 How. (U. S.) 344. § 5543.
 New Jersey &c. R. Co., Re, 29 N. J. Eq. 67. § 6911.
 New Jersey &c. R. Co. v. Long Branch Comm'rs, 39 N. J. L. 28. § 6593.
 New Jersey &c. R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475. § 2070.
 New Jersey &c. R. Co. v. Strait, 35 N. J. L. 322. §§ 75, 379.
 Newland v. Buncombe Turnp. Co., 4 Ired. L. (N. C.) 372. § 5933.
 Newland v. Marsh, 19 Ill. 376. § 5448.
 New Lindell Hotel Co. v. Smith, 13 Mo. App. 7, 14. §§ 1205, 1542.
 Newling v. Francis, 3 T. R. 189. § 5266.
 New London &c. Bank v. Brocklebank, 21 Ch. Div. 302. §§ 2320, 2329.
 New London Bank v. Lee, 1 Conn. 112. § 1504.
 Newmard v. Chapman, 2 Rand. (Va.) 93. § 6905.
 Newman v. Newman, 4 Maule & S. 66. § 1048.
 New Mashonaland Exploration Co., Re [1892], 3 Ch. 677. § 4103.
 New Orleans v. Clark, 95 U. S. 644. § 590.
 New Orleans v. Graible, 9 La. An. 561. § 1118.
 New Orleans v. Houston, 119 U. S. 265, 277. § 2211.
 New Orleans v. Louisiana Savings Bank, 31 La. An. 826. § 2914.
 New Orleans v. Philippi, 9 La. An. 44. §§ 1011, 1013.
 New Orleans v. Pontchartrain R. Co., 41 La. An. 519. § 8091.
 New Orleans v. Savings Bank, 31 La. An. 637. § 1013.
 New Orleans v. St. Louis Church, 11 La. An. 244. § 1017.
 New Orleans v. Winter, 1 Wheat. (U. S.) 94. § 7474.
 New Orleans &c. Co. v. Board of Assessors, 31 La. An. 475. § 2811.
 New Orleans &c. Co. v. Brown, 36 La. An. 138. § 4397.
 New Orleans &c. Co. v. Lawson, 11 La. 34. § 4642.
 New Orleans &c. Co. v. Louisiana Light &c. Co., 4 Woods (U. S.), 90. § 337.
 New Orleans &c. Co. v. Louisiana Light Co., 115 U. S. 650. §§ 647, 648, 651, 5398, 5615, 5616.
 New Orleans &c. Co. v. Louisiana Sugar Refining Co., 125 U. S. 18. §§ 646, 5425, 5427.
 New Orleans &c. Co. v. Ocean Dry Dock Co., 28 La. An. 173. §§ 5638, 5953.
 New Orleans &c. Co. v. Rivers, 115 U. S. 674. § 647.
 New Orleans &c. Co. v. St. Tamany Water Works Co., 14 Fed. Rep. 194. § 5398.
 New Orleans &c. Co. v. Templeton, 20 La. An. 141. § 4724.
 New Orleans &c. R. Co. v. Bailey, 40 Miss. 395. §§ 6276, 6383.
 New Orleans &c. R. Co. v. Burke, 53 Miss. 200. § 6398.
 New Orleans &c. R. Co. v. Delamore, 34 La. An. 1225. § 5364.
 New Orleans &c. R. Co. v. Frank, 39 La. An. 707. §§ 235, 1562.
 New Orleans &c. R. Co. v. Harris, 27 Miss. 517. §§ 67, 71, 72, 82, 98, 4532, 5381.
 New Orleans &c. R. Co. v. Harrison, 48 Miss. 112. §§ 6298, 6300.
 New Orleans &c. R. Co. v. Lagarde, 10 La. An. 150. § 5826.
 New Orleans &c. R. Co. v. Lea, 12 La. An. 388. § 3714.
 New Orleans &c. R. Co. v. Mississippi, 112 U. S. 12. §§ 7826, 7830.
 New Orleans &c. R. Co. v. Moye, 39 Miss. 374. § 5626.
 New Orleans &c. R. Co. v. New Orleans, 143 U. S. 192; affirming 40 La. An. 587. § 5572.
 New Orleans &c. R. Co. v. Second Municipality, 1 La. An. 128. §§ 5612, 5643.
 New Orleans &c. R. Co. v. Southern &c. Tel. Co., 53 Ala. 211. § 5606.
 New Orleans &c. R. Co. v. Statham, 42 Miss. 607. § 6377.
 New Orleans &c. R. Co. v. Wallace, 50 Miss. 244. § 7433.
 New Orleans Cotton Exchange v. Assessors, 35 La. An. 1151. § 2915.
 New Orleans Nat. Banking Assn. v. Wiltz, 40 Fed. Rep. 330. §§ 2317, 2594.
 Newport &c. Bridge Co. v. Douglas, 12 Bush (Ky.), 673, 720. §§ 2679, 6188, 6495.
 Newport &c. Bridge Co. v. Woolley, 78 Ky. 523. §§ 48, 7422.
 Newport &c. Man. Co. v. Starbird, 10 N. H. 123. §§ 285, 292, 594, 5038, 7609.
 New Rochelle Water Co., Re, 46 Hun (N. Y.), 525. § 5610.
 Newry &c. R. Co. v. Coombe, 3 Exch. 565. § 1095.
 Newry &c. R. Co. v. Edmunds, 2 Exch. 118, 123. § 1959.
 Newry &c. R. Co. v. Moss, 14 Beav. 64. §§ 3193, 3203.
 New Sombrero Phosphate Co. v. Erlanger, 5 Ch. Div. 73. §§ 457, 458.
 Newsome v. Davis, 133 Mass. 343. § 2660.
 New South Meeting House, Re, 13 Allen (Mass.), 497. § 6542.
 Newton v. Belcher, 12 Q. B. 921. §§ 421, 434, 435.
 Newton v. Blunt, 3 C. B. 675. § 433.
 Newton v. Carbery, 5 Cranch C. C. (U. S.) 632. §§ 60, 62.
 Newton v. Commissioners, 100 U. S. 548. § 5383.
 Newton v. Fay, 10 Allen (Mass.), 505, 506. §§ 2616, 2622.
 Newton v. Porter, 69 N. Y. 133. § 7104.
 Newton v. Turner, 5 La. 46. § 7593.
 Newton County Draining Co. v. Nofsinger, 43 Ind. 566. § 7368.
 Newton Man. Co. v. White, 42 Ga. 148. § 6653.
 New York, Matter of, 11 Johns. (N. Y.) 77. § 5575.
 New York v. Bailey, 2 Denio (N. Y.), 433. § 7385.
 New York v. Exchange Fire Ins. Co., 17 How. Pr. (N. Y.) 380. § 4869.
 New York v. Second Avenue R. Co., 32 N. Y. 261; affirming 34 Barb. 41. §§ 1028, 5477.
 New York v. Starin, 56 N. Y. Super. 153; 2 N. Y. Supp. 346. §§ 4531, 7774.
 New York v. Third Ave. R. Co., 33 N. Y. 42. § 5477.
 New York v. Twenty-third Street R. Co., 113 N. Y. 311; affirming 48 Hun (N. Y.), 552. §§ 3593, 5414, 5415.
 New York &c. Bridge, Re, 72 N. Y. 527. § 611.
 New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412. §§ 315, 5793, 5833, 7567.
 New York &c. Co. v. Martin, 13 Minn. 417. §§ 1205, 1213.
 New York &c. Ins. Co. v. Bennett, 5 Conn. 574. § 5849.
 New York &c. Ins. Co. v. Ely, 2 Cow. (N. Y.) 678. § 5849.
 New York &c. Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468. § 4043.
 New York &c. Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664. § 5849.
 New York &c. R. Co., Re, 99 N. Y. 12. § 5620.
 New York &c. R. Co. v. Boston &c. R. Co., 36 Conn. 196. §§ 5615, 5620, 6586, 6589.
 New York &c. R. Co. v. Bristol, 151 U. S. 556. §§ 5410, 5411, 5504, 5505.
 New York &c. R. Co. v. Cook, 2 Sandf. (N. Y.) 732. § 5504.
 New York &c. R. Co. v. De Wolf, 5 Bosw. (N. Y.) 593. § 1251.
 New York &c. R. Co. v. Dixon, 114 N. Y. 80. §§ 4946, 5313, 5316.
 New York &c. R. Co. v. Dixon, 13 N. Y. St. Rep. 445. § 4732.
 New York &c. R. Co. v. Forty-second Street &c. R., 50 Barb. (N. Y.) 285, 309; 26 How. Pr. (N. Y.) 68; 32 How. Pr. (N. Y.) 481. §§ 5399, 5400.
 New York &c. R. Co. v. Haring, 47 N. J. L. 137. § 5993.
 New York &c. R. Co. v. Hunt, 39 Conn. 75. § 1254.

- New York & C. R. Co. v. Ketchum, 27 Conn. 170. §§ 4380, 4381, 4382, 4384, 4338, 4707.
- New York & C. R. Co. v. Kip, 46 N. Y. 546. § 5600.
- New York & C. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326. §§ 5615, 5617.
- New York & C. R. Co. v. New York, 1 Hilt. (N. Y.) 562. §§ 5047, 5184, 5518.
- New York & C. R. Co. v. New York, 4 Blatchf. (U. S.) 193. § 5876.
- New York & C. R. Co. v. Nickals, 119 U. S. 296; 21 Blatchf. (U. S.) 177. §§ 2211, 2265, 2266, 2267, 2268, 2291.
- New York & C. R. Co. v. Saratoga & C. R. Co., 39 Barb. (N. Y.) 289. §§ 365, 396.
- New York & C. R. Co. v. Schuyler, 38 Barb. (N. Y.) 542. §§ 732, 2378, 3981.
- New York & C. R. Co. v. Schuyler, 34 N. Y. 30; 17 N. Y. 592. §§ 1492, 1495, 1496, 1500, 1684, 2044, 2351, 2377, 2378, 2391, 2406, 2447, 2501, 2577, 2595, 2652, 4091, 4796, 4884, 4929, 4933, 5046, 5191, 5226, 6275, 6276, 6279, 6298, 6322, 6335.
- New York & C. R. Co. v. Van Horn, 57 N. Y. 473. § 1138.
- New York & C. R. Co. v. Winans, 17 How. (U. S.) 30. §§ 5355, 5359, 5998, 6233.
- New York African Soc. v. Varick, 13 Johns. (N. Y.) 38. §§ 5114, 7599, 7592, 7597.
- New York Bank Comm'rs v. Bank of Buffalo, 6 Paige (N. Y.), 497. § 3998.
- New York Cable Co. v. Mayor, 104 N. Y. 1. §§ 219, 511.
- New York Cable R. Co., Matter of, 109 N. Y. 32. § 238.
- New York Central R. Co., Matter of, 66 N. Y. 407. § 5592.
- New York Conference v. Clarkson, 8 N. J. Eq. 541. § 294.
- New York Dry Dock v. Hicks, 5 McLean (U. S.), 111; §§ 7913, 7915, 7977.
- New York Elev. R. Co. v. Manhattan R. Co., 63 How. Fr. (N. Y.) 14. §§ 5688, 7162.
- New York Exchange Co., Re, (1893), 1 Ch. 371. § 6688.
- New York Exchange Co. v. De Wolf, 5 Bosw. (N. Y.) 593. § 1102.
- New York Express Co., Re, 23 Hun (N. Y.), 615. § 765.
- New York Fire Ins. Co. v. Donaldson, 3 Edw. Ch. (N. Y.) 199. § 5720.
- New York Fire Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664. § 5741.
- New York Firemen Ins. Co. v. Bennett, 5 Conn. 574, 548. § 5713.
- New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678. §§ 5050, 5712.
- New York Firemen Ins. Co. v. Ely, 5 Conn. 560. §§ 5645, 5713, 5350, 5989.
- New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205. § 3570.
- New York Iron Mine v. Negaunee Bank, 39 Mich. 644. § 4959.
- New York Life & C. Ins. Co. v. Beebe, 7 N. Y. 364. § 5762.
- New York Life Ins. Co. v. Best, 23 Ohio St. 105. § 7466.
- New York Life Ins. Co. v. Statham, 93 U. S. 24. § 7226.
- New York Marble Iron Works v. Smith, 4 Duer (N. Y.), 362. §§ 6679, 6722.
- New York Mut. Life Ins. Co. v. Wilcox, 8 Biss. (U. S.) 203. § 6021.
- New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer (N. Y.), 618. §§ 7882, 7883, 7977.
- New York Fourth Nat. Bank v. American Mills Co., 137 U. S. 234. § 6518.
- New York National Bank v. Elmira, 53 N. Y. 49. § 2882.
- New York Piano Co. v. New Haven Steamboat Co., 2 Abb. Pr. (N. s.) (N. Y.) 358. § 7463.
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- New York R. Co. v. Miller, 10 Barb. (N. Y.) 260. § 90.
- Niagara Bridge Works v. Jose, 59 N. H. 81. § 4261.
- Niagara County Bank v. Baker, 15 Ohio St. 68. §§ 5950, 6036.
- Niagara Falls Paper Man. Co., Re, 25 N. E. Rep. 269. § 5317.
- Nichol, Ex parte, 5 Jur. (N. s.) 205; 28 Law J. Ch. (N. s.) 257. § 1362.
- Nichol v. Nashville, 9 Humph. (Tenn.) 252. § 1118.
- Nichol v. Ridley, 5 Verg. (Tenn.) 63. § 7507.
- Nicholas' Assignees, Ex parte, 2 De Gex, M. & G. 271. § 3208.
- Nicholas v. Burlington & C. Co., 4 Greene (Iowa), 42. § 1328.
- Nicholas v. Oliver, 36 N. H. 218. §§ 4802, 5126, 5135, 5175.
- Nicholay's Case, 15 Jur. 420. § 426.
- Nicholay v. St. Clair County, 3 Dill (U. S.) 163. § 5394.
- Nicholl v. Allen, 1 Best & S. 915, 916 §§ 5267, 6358, 6361.
- Nicholls v. Diamond, 9 Ex. 154. §§ 5126, 5156.
- Nichols' Case, L. R. 7 Ch. 533; 26 W. R. 819. § 1604.
- Nichols v. Bertram, 3 Pick. (Mass.) 342. §§ 3031, 5388.
- Nichols v. Brickport, 23 Conn. 189. § 5626.
- Nichols v. Burlington & C. Co., 4 Greene (Iowa), 42. § 1333.
- Nichols v. Frothingham, 45 Me. 220. §§ 4963, 5126.
- Nichols v. Mase, 94 N. Y. 160, 166. § 6200.
- Nichols v. Fatten, 18 Me. 231. § 7507.
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- Nichols v. Squire, 5 Pic. (Mass.) 168. § 4165.
- Nichols v. Stephens, 32 Mo. App. 330. § 3691.
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- Nicholson v. Bradford Union, L. R. 1 Q. B. 620. § 5059.
- Nicholson v. Great Western R. Co., 5 C. B. (N. s.) 366. § 5549.
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- Nicholson v. Leavitt, 6 N. Y. 510. § 6477.
- Nicholson v. Leavitt, & Sandf. (N. Y.) 252, 276. § 7321.
- Nicholson v. Mounsey, 15 East, 384. § 4097.
- Nicholson v. Williamstown & C. Turnp. Co., 28 N. J. L. 142. §§ 5923, 5930.
- Nickals v. New York & C. Ry. Co., 15 Fed. Rep. 575. § 2291.
- Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24. § 7622.
- Nickerson v. English, 142 Mass. 267. § 1401.
- Nickerson v. Gilliam, 29 Mo. 456. § 7595.
- Nickerson v. Kimball, 1 Nat. Bk. Cas. 409. § 2881.
- Nickerson v. Wheeler, 118 Mass. 295. § 4376.
- Nickoll's Case, 21 Bear. 639. §§ 1612, 1643, 3196.
- Nicol's Case, 3 De Gex & J. 387. §§ 1415, 1515, 3278, 3914, 4920.
- Nicol's Case, 3 De Gex & J. 420. § 1384.
- Nicoll v. New York & C. R. Co., 12 N. Y. 121; affirming 12 Barb. (N. Y.) 460. §§ 5791, 5691.
- Nicoulin v. Lowery, 49 N. J. L. 391. § 1021.
- Nightingale, Re, 11 Pick. (Mass.) 168. § 1028.
- Nightingale v. Oregon & C. R. Co., 2 Sawy. (U. S.) 338. § 4943.
- Niles v. Dodge, 70 Ind. 147. §§ 4336, 4341.
- Niles v. Shaw, 50 Ohio St. 370. § 2868.
- Nimick v. Mingo Iron Works Co., 25 W. Va. 184, 192. §§ 3046, 3052, 3055, 3057, 3361, 3513.
- Nimmons v. Hennion, 2 Sweeny (N. Y.), 663. §§ 4203, 4233.
- Nimmons v. Tappan, 2 Sweeny (N. Y.), 652. § 6666.
- Nipponese Man. Co. v. Sladon, 68 Pa. St. 256. § 1246.
- Nixon v. Brownlow, 1 Hurl. & N. 405. § 3357.
- Nixon v. Brownlow, 3 Hurl. & N. 686. §§ 346, 3608.
- Nixon v. Green, 11 Ex. 550; affirmed, 25 L. J. Ex. 209; 3 Hurl. & N. 686; 27 L. J. Ex. 509. §§ 3170, 3185, 3608.
- Nixon v. Nash, 12 Ohio St. 647. § 1084.
- Nixon v. Tart Vale R. Co., 7 Hare, 136. § 5297.
- Noble v. Callender, 2 Ohio St. 152. §§ 1611, 1643.
- Noble v. Halliday, 1 N. Y. 330. § 3319.
- Noble v. Hook, 24 Cal. 638. § 4170.
- Noble v. Turner, 69 Md. 519. §§ 2409, 2620, 2634.
- Nobleburn v. Clark, 68 Me. 87. §§ 5146, 5147.
- Nobles v. Langley, 66 N. C. 287. § 6363.
- Noels v. Crosby, 3 Barn. & C. 814. §§ 440, 442, 449.
- Noe v. Gibson, 7 Paige (N. Y.), 513. § 6918.
- Noel v. Bewley, 3 Sim. 103. § 6141.
- Neesen v. Town of Port Washington, 37 Wis. 168. § 1285.
- Nolan v. Hazen, 44 Minn. 478. §§ 3326, 3511, 3512.
- Nolde's Appeal (Pa.), 15 Atl. Rep. 777. § 7784.
- Nolensville Turnp. Co. v. Baker, 4 Humph. (Tenn.) 315. § 5906.
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TABLE OF CASES CITED. Nonantum—North.

- Nonantum Worsted Co. v. Holliston Mills, 149 Mass. 359. § 6469.
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- Norfleet v. Cromwell, 70 N. C. 634. § 5611.
- Norfleet v. Southall, 3 Murph. (N. C.) 139. §§ 7408, 7754.
- Norfolk v. American Steam Gas Co., 103 Mass. 160. §§ 4327, 4332.
- Norfolk v. American Steam Gas Co., 108 Mass. 404. §§ 4311, 4334, 4336.
- Norfolk & R. Co. v. Cottrell, 83 Va. 512. §§ 7516, 7538.
- Norfolk & R. Co. v. Pendleton, 86 Va. 100. § 5366.
- Norfolk & R. Co. v. Pennsylvania, 136 U. S. 114. §§ 7876, 7877, 8105, 8107.
- Norfolk & R. Co. v. Shippers' Compress Co., 83 Va. 272. § 5872.
- Norman v. Mitchell, 5 De Gex, M. & G. 618; 19 Beav. 278. §§ 1736, 1763.
- Norris v. Androscoggin R. Co., 39 Me. 273. §§ 5504, 6286.
- Norris v. Cook, 1 Curt. (U. S.) 464. § 5300.
- Norris v. Cooper, 3 H. L. Cas. 161. § 428.
- Norris v. Cottle, 2 H. L. Cas. 647. §§ 421, 426, 428, 1908.
- Norris v. Cottle, 2 H. L. Cas. 665. § 421.
- Norris v. Crocker, 13 How. (U. S.) 429. § 4168.
- Norris v. De Wolf, 12 Hun (N. Y.). 666. § 4183.
- Norris v. Johnson, 34 Md. 485. §§ 2984, 3081, 3095, 3416, 3465.
- Norris v. Morrill, 40 N. H. 395. § 3381.
- Norris v. Mumford, 4 Mart. (La.) (o. s.) 20. § 7208.
- Norris v. Smithville, 1 Swan (Tenn.). 164. § 6679.
- Norris v. Staps, Hob. 210 b. §§ 1021, 7665.
- Norris v. Sweeney, 60 N. Y. 463. §§ 1332, 211.
- Norris v. Trustees of Abingdon Academy, 7 Gill & J. (Md.) 7. §§ 5386, 6391.
- Norris v. Wrenchall, 34 Md. 492. §§ 3018, 3040, 3179, 3466, 4168.
- North v. Brace, 30 Conn. 60. § 3827.
- North v. Forest, 15 Conn. 400. § 2733.
- North v. McDonald, 1 Biss. (U. S.) 57. § 8064.
- North v. State, 107 Ind. 356. § 502.
- North & R. Co. v. Holland, 117 Pa. St. 613. § 5625.
- Northam Bridge & Roads v. London & C. R. Co., 6 Mees. & W. 428; 1 Eng. Rail. Cas. 653. § 5942.
- North American Gutta Percha Co., Re, 9 Abb. Pr. (N. Y.) 79. § 6959.
- North American Life Ins. Co., Re, 55 How. Pr. (N. Y.) 465. § 7220.
- Northampton v. County Comm'n's, 145 Mass. 108. § 5572.
- Northampton Bank v. Peponen, 11 Mass. 288. §§ 3947, 3989, 3994, 4633, 4659, 4802, 4905, 5133, 5153, 6474.
- Northampton County's Appeal, 30 Pa. St. 305. § 1615.
- North Bank v. Albot, 13 Pick. (Mass.) 465. § 7733.
- North Baptist Church v. Parker, 36 Barb. (N. Y.) 176. § 3877.
- North Branch & C. R. Co. v. City & C. R. Co., 38 Pa. St. 361. § 5673.
- North British Bank v. Collins, 28 Eng. L. & Eq. 7. § 5271.
- North Carolina v. Raleigh & C. R. Co., 3 Ired. Eq. (N. C.) 471. § 7538.
- North Carolina & C. Ins. Co. v. Hicks, 3 Jones L. (N. C.) 58. § 7601.
- North Carolina & C. Ins. Co. v. Williams, 91 N. C. 69. § 4873.
- North Carolina & C. R. Co. v. Carolina & C. R. Co., 83 N. C. 489. §§ 5615, 5620.
- North Carolina & C. R. Co. v. Moore, 70 N. C. 6. § 5711.
- North Carolina R. Co. v. Leach, 4 Jones L. (N. C.) 340. §§ 1149, 1284, 1298, 1311, 1368, 1395, 1396, 1513.
- North East & C. R. Co., Ex parte, 37 Ala. 679. §§ 69, 1841, 5437.
- North Eastern Co. v. Rodrigues, 10 Rich. L. (N. C.) 278. § 1784.
- Northern & C. R. Co. v. Bastian, 15 Md. 494. §§ 4621, 4652, 4662, 5176.
- Northern & C. R. Co. v. Washington, 142 U. S. 492. §§ 7827, 7829, 7830.
- Northern Bank v. Johnson, 5 Coldw. (Tenn.) 88. § 4813.
- Northern Central & C. R. Co. v. Eslow, 40 Mich. 222. §§ 1151, 1175, 1177, 1178, 1245.
- Northern Central R. Co. v. Com., 90 Pa. St. 300. §§ 6424, 6425, 6429, 6442.
- Northern Central R. Co. v. Rider, 45 Md. 24. §§ 7805, 7806.
- Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159. § 5575.
- Northern Liberties v. St. John's Church, 31 Pa. St. 104. §§ 1117, 5575.
- Northern Pacific R. Co. v. Jackman, 6 Dak. 236. § 7572.
- Northern Pacific R. Co. v. Washington, 142 U. S. 492. § 7828.
- Northern Railroad v. Concord & C. Railroad, 27 N. H. 183. §§ 5615, 5617.
- Northern R. Co. v. Miller, 10 Barb. (N. Y.), 250. §§ 1138, 1135, 1550, 1577.
- Northern Transp. Co. v. Chicago, 99 U. S. 635. §§ 6280, 6285, 6570.
- North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109. §§ 20, 39.
- North Hudson Mut. & C. Asso. v. Childs, 82 Wis. 460. §§ 4103, 4112, 4120, 4127.
- North Hudson Mut. & C. Asso. v. First Nat. Bank, 79 Wis. 31. § 3988.
- North Hudson R. Co. v. Hoboken, 41 N. J. L. 71. § 1028.
- North London R. Co. v. Great Northern R. Co., 11 Q. B. Div. 30. § 6849.
- North Missouri R. Co. v. Akers, 4 Kan. 453. § 7900.
- North Missouri R. Co. v. Gott, 25 Mo. 540. § 5600.
- North Missouri R. Co. v. Lackland, 25 Mo. 515. § 5600.
- North Missouri R. Co. v. Maguire, 20 Wall. (U. S.) 46; 49 Mo. 480. § 5571.
- North Missouri R. Co. v. Miller, 31 Mo. 19. § 1352.
- North Missouri R. Co. v. Koyal, 25 Mo. 534. § 5600.
- North Missouri R. Co. v. Winkler, 29 Mo. 518. § 1345.
- North Missouri R. Co. v. Winkler, 33 Mo. 354. §§ 1968, 5362, 7406.
- North Pac. R. Co. v. Adams, 54 Pa. St. 94. §§ 6111, 6112.
- North River Bank v. Aymar, 3 Hill (N. Y.), 262. §§ 4815, 4889, 5208, 5209.
- North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482. § 5712.
- Northrop v. Carter, 5 Conn. 246. § 2376.
- Northrop v. Newton & C. Tp. Co., 3 Conn. 544. § 2392.
- Northrop v. Turnpike Co., 3 Conn. 544. § 2409.
- Northrup v. Germania Fire Ins. Co., 48 Wis. 420. § 4084.
- North Shore Ferry Co., Re, 63 Barb. (N. Y.) 556. § 731.
- North Stafford Steel Co. v. Ward, L. R. 3 Ex. 172. § 1736.
- North Star Boot & C. Co. v. Ladd, 32 Minn. 381. § 7816.
- North Star Boot & C. Co. v. Stebbins, 2 S. Dak. 74. §§ 5949, 4754.
- North State Copper & C. Min. Co. v. Field, 64 Md. 151. § 7904.
- North St. Louis Christian Church v. McGowan, 62 Mo. 279, 280. §§ 5113, 7589.
- Northumberland County Bank v. Eyer, 60 Pa. St. 436. §§ 7609, 7613, 7669.
- North Wales Gun Powder Co., Re (1882), 2 Q. B. 220. § 6849.
- Northwestern & C. Aid Asso. v. Wanner, 24 Ill. App. 357. § 5988.
- Northwestern & C. Co. v. Brant, 69 Ill. 658. §§ 5077, 5078, 5087, 5088, 5089, 5146.
- Northwestern & C. Co. v. Brown, 36 Minn. 108. §§ 7979, 7980.
- Northwestern & C. Co. v. Cotton Exchange & C. Co., 46 Fed. Rep. 22. § 3636.
- Northwestern Co. v. Myers, 36 Ind. 375. § 7658.
- Northwestern & C. Co. v. Norwegian & C. Seminary, 43 Minn. 449. § 3531.
- Northwestern & C. Co. v. Overholt, 4 Dill. (U. S.) 287. § 7957.
- Northwestern & C. Co. v. Shaw, 37 Wis. 655; §§ 5954, 5975, 5977.
- Northwestern & C. Co. v. Stone, 31 N. W. Rep. 54. §§ 7979, 7980.
- Northwestern & C. R. Co. v. Hack, 66 Ill. 238. §§ 6275, 6298.
- North-West Transp. Co. v. Beatty, 12 App. Cas. 589. §§ 4048, 4461.
- Northwhitehall v. Keller, 100 Pa. St. 105. § 4943.

- North Whitehall v. South Whitehall, 3 Serg. & R. (Pa.) 117. §§ 5045, 7392.
- Northwood v. Harrington, 9 N. H. 369. § 718.
- North Yorkshire Iron Co., Re, 7 Ch. Div. 661. § 3122.
- Norton v. Berlin Iron Bridge Co., 51 N. J. L. 442. § 8038.
- Norton v. Eastman, 4 Me. 521. § 3383.
- Norton v. Hodges, 100 Mass. 241. §§ 1078, 2925, 3099.
- Norton v. Huxley, 13 Gray (Mass.), 285. § 4146.
- Norton v. Ittner, 56 Mo. 351. § 6352.
- Norton v. Kearney, 10 Wis. 443, 449. § 6477.
- Norton v. Marden, 15 Me. 45. § 1717.
- Norton v. Norton, 43 Ohio St. 509. §§ 2656, 2769, 2777.
- Norton v. Simmes, Hob. 14. § 1018.
- Norton v. Wiswall, 26 Barb. (N. Y.) 618. § 5884.
- Norton County v. Shoemaker, 27 Kan. 77. § 588.
- Norton Naval Constr. & Co. v. State Board of Assessors (N. J.), 22 Atl. Rep. 352. § 8102.
- Norval v. Cornell, 16 Johns. (N. Y.) 73. § 5329.
- Norvell v. Porter, 62 Mo. 310. § 8070.
- Norway v. Rowe, 19 Ves. 144. § 5246.
- Norwich v. Breed, 30 Conn. 535. § 4376.
- Norwich & Co. v. Theobald, 1 Mood. & Malk, 151. §§ 246, 1736.
- Norwich & Co. v. Worcester, 147 Mass. 518. § 5898.
- Norwich Gaslight Co. v. Norwich City Gas Co., 21 Conn. 19. § 1028.
- Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19. § 647.
- Norwood, Ex parte, 3 Biss. (U. S.) 504. § 7339.
- Norwood, Re, 32 Hun (N. Y.), 196. § 6726.
- Norwood v. Harness, 98 Ind. 134. § 4014.
- Norwood v. Memphis & Co. R. Co., 72 Ala. 563. §§ 7409, 7575.
- Nossaman v. Rickert, 18 Ind. 350. § 6379.
- Nougue v. Clapp, 101 U. S. 551. § 7173.
- Nourse v. Prime, 4 Johns. Ch. (N. Y.) 490; 7 Johns. Ch. (N. Y.) 69, 87. §§ 2642, 2643, 2644, 2645.
- Noyes v. Loring, 55 Me. 408. § 5028.
- Noyes v. Rich, 52 Me. 115. § 6932.
- Noyes v. Spaulding, 27 Vt. 421. § 2646.
- Nudd v. Burrows, 91 U. S. 426, 441. § 8022.
- Nuendorf v. Duryea, 69 N. Y. 557. § 611.
- Nugent v. Laduke, 87 Ind. 486. § 2795.
- Nugent v. Smith, 1 C. P. Div. 423. § 6340.
- Nugent v. Supervisors, 19 Wall. (U. S.) 241. §§ 346, 355, 366, 1123, 1274, 1291.
- Nulton v. Clayton, 54 Iowa, 425. §§ 1142, 1151, 1170.
- Nusbaum v. Stein, 12 Md. 315. §§ 6839, 6880.
- Nute v. Hamilton & Co. Ins. Co., 6 Gray (Mass.), 174. §§ 1034, 7465.
- Nutter v. Lexington & Co. R. Co., 6 Gray (Mass.), 85. § 2103.
- Nutter v. Messageries Maritimes (Q. B. Div.), 54 L. J. 527. § 7990.
- Nutting, Ex parte, 2 Mont. D. & De G. 302. § 5217.
- Nutting v. Thomason, 46 Ga. 34. § 2593.
- Nutting v. Thomasson, 57 Ga. 418. § 2475.
- Nye v. Burlington & Co. R. Co., 60 Vt. 585. §§ 7495, 7546.
- Nye v. Liscombe, 21 Pick. (Mass.) 263. §§ 7996, 8069.
- Nye v. Van Husean, 6 Mich. 329. § 6534.
- Oakes v. Hill, 14 Pick. (Mass.) 442. § 6577.
- Oakes v. Spaulding, 40 Vt. 347. §§ 4095, 4376.
- Oakes v. Turquand, L. R. 2 H. L. 325. §§ 248, 1363, 1365, 1375, 1390, 1438, 1439, 1441, 1442, 1444, 1445, 1448, 1462, 1800, 4486, 6321, 6323.
- Oakland Bank v. Wilcox, 60 Cal. 126. § 4674.
- Oakland R. Co. v. Fielding, 48 Pa. St. 320. § 6358.
- Oakland R. Co. v. Oakland & Co. R. Co., 45 Cal. 365. §§ 5337, 5367, 6586, 6587.
- Oakley v. Aspinwall, 3 N. Y. 547. §§ 3920, 7755.
- Oakley v. Paterson, 2 N. J. Eq. 173. § 4543.
- Oakley v. Workingmen's & Co. Soc., 2 Hilt. (N. Y.) 487. §§ 4622, 4629.
- Oak Pits Colliery Co., Re, 21 Ch. Div. 322, 330. §§ 3122, 6998.
- Oaks v. Cattaraugus Water Co., 21 N. Y. Supp. 351. § 5321.
- O'Bannon v. Louisville & Co. R. Co., 8 Bush (Ky.), 348. § 624.
- Ober v. Baltimore & Co. R. Co., 41 Md. 583. § 1958.
- Ober v. Railroad Co., 13 Mo. App. 84. § 3615.
- O'Brien v. Chicago & Co. R. Co., 53 Barb. (N. Y.) 568. § 1595.
- O'Brien v. Cummings, 13 Mo. App. 197. §§ 40, 216, 3235.
- O'Brien v. Jones, 38 Mo. App. 90. § 1657.
- O'Brien v. Krenz, 36 Minn. 136. § 658.
- O'Brien v. Mechanics Ins. Co., 56 N. Y. 52. § 2792.
- O'Brien v. Shaw's Flat & Co. Co., 10 Cal. 343. § 7503.
- O'Brien v. Wagner, 94 Mo. 93. §§ 5816, 5817.
- Occidental Ins. Co. v. Ganzhorn, 2 Mo. App. 205. §§ 1407, 1408, 1424, 1432, 1856, 6335.
- Occum Co. v. Sprague Man. Co., 34 Conn. 529. § 5772.
- Occum Co. v. Sprague Man. Co., 35 Conn. 496. § 5607.
- Ocean Ins. Co. v. Portsmouth & Co. R. Co., 3 Met. (Mass.) 420. §§ 4568, 8071.
- Ocean Nat. Bank v. Carll, 5 Hun (N. Y.), 237. § 7319.
- Ocean Nat. Bank v. Fant, 50 N. Y. 474. § 2656.
- Ochiltree v. Iowa Railroad Contracting Co., 54 Mo. 113; affirmed, 21 Wall. (U. S.) 249. §§ 3010, 3041, 3175.
- Ocmulgee & Co. Asso. v. Thomson, 52 Ga. 427. §§ 849, 1042.
- O'Conner Min. & Co. v. Coosa Furnace Co., 95 Ala. 614. §§ 6507, 6528, 6530.
- O'Connor, In re, 37 Wis. 379. § 676.
- O'Connor v. Pittsburgh, 18 Pa. St. 187. § 6370.
- Odd Fellows v. First Nat. Bank, 42 Mich. 461. § 5730.
- Odd Fellows Building Asso. v. Horgan, 28 Ark. 261. § 7658.
- Odd Fellows Hall Co. v. Glazier, 5 Harr. (Del.) 172. § 1187.
- Odiome v. Maxcy, 13 Mass. 178. §§ 4849, 4851.
- Odiome v. Wade, 8 Pick. (Mass.) 518. § 3394.
- O'Donald v. Evansville & Co. R. Co., 14 Ind. 259. §§ 1336, 1577, 7658.
- O'Donnell v. Atchison & Co. R. Co., 49 Fed. Rep. 689. § 7556.
- O'Donnell v. Johns, 76 Tex. 362. §§ 6040, 6665.
- Oels v. Helena & Co., 10 Mont. 524. § 7429.
- Oesterreicher v. Sporting Times Pub. Co., 5 N. Y. Supp. 2. §§ 7659, 7661.
- Oestrich v. Gilbert, 8 Hun (N. Y.), 242. § 4943.
- O'Ferrall v. Colby, 2 Minn. 180. § 6803.
- Officer v. Young, 5 Yerg. (Tenn.) 320. § 5331.
- Office Specialty Man. Co. v. Fenton Metallic Man. Co. (Pa. Exec. Dept.), 1 Pa. Dist. R. 576. § 7936.
- Offutt v. Ayres, 7 T. B. Mon. (Ky.) 356. § 5171.
- Ogden v. Andre, 4 Bosw. (N. Y.) 593; affirmed, 3 Abb. App. Dec. (N. Y.) 397; 1 Keyes (N. Y.), 427. §§ 5754, 5978, 6027.
- Ogden v. Rolliot, 3 T. R. 726. § 3050.
- Ogden v. Kip, 6 Jones Ch. (N. Y.) 160. §§ 3877, 4533, 6873.
- Ogden v. Kirby, 75 Ill. 555. § 1350.
- Ogden v. Lathrop, 65 N. Y. 158, 162. § 2668.
- Ogden v. Lathrop, 1 Sweeney (N. Y.), 643. § 2656.
- Ogden v. Murray, 39 N. Y. 202. §§ 3987, 4365, 6503.
- Ogden v. Raymond, 22 Conn. 379, 384. §§ 2057, 5028.
- Ogden v. Raymond, 3 Abb. App. Dec. (N. Y.) 396; 1 Keyes (N. Y.), 42; 5 Bosw. (N. Y.) 16. §§ 5738, 5754, 5978.
- Ogden v. Rollo, 13 Abb. Pr. (N. Y.) 300. §§ 4211, 4322.
- Ogden v. St. Joseph, 90 Mo. 522. §§ 2814, 2847, 2848.
- Ogdensburgh & Co. R. Co. v. Frost, 21 Barb. (N. Y.) 541. §§ 1165, 1223, 1257, 1784.
- Ogdensburgh & Co. R. Co. v. Vermont & Co. R. Co., 6 Thomp. & C. (N. Y.) 488; 4 Hun (N. Y.), 268. § 5888.
- Ogdensburgh & Co. R. Co. v. Wooley, 3 Abb. App. Dec. (N. Y.) 398. § 1228.
- Ogdensburgh Bank v. Van Rensselaer, 6 Hill (N. Y.), 240. §§ 4629, 7608.
- Ogilby v. Wallace, 2 Hall (N. Y.), 553. § 7593.
- Ogilvie v. Currie, 37 L. J. Ch. 541. § 1425.
- Ogilvie v. Knox & Co., 22 How. (U. S.) 380. §§ 1395, 1438, 1450, 1454, 1568, 1569, 2951, 2952, 2959, 3181, 3484, 3492, 3494, 4921, 6469.
- Ogle v. Somersett & Co. Turnpike Co., 13 Serg. & R. (Pa.) 256. § 1840.
- Oglesby v. Attrill, 105 U. S. 605. §§ 1710, 6694.
- O'Hara v. Lexington & Co. R. Co., 1 Dana (Ky.), 232. §§ 648, 5600.
- O'Hara v. Stack, 90 Pa. St. 477. §§ 927, 5443.
- O'Hara v. State, 112 N. Y. 146. § 540.
- Ohio v. Central R. Co., 20 Fed. Rep. 10. § 6211.
- Ohio v. Cleveland & Co. R. Co., 6 Ohio St. 489. § 2179.
- Ohio v. Covington, 29 Ohio St. 102. § 599.
- Ohio v. Frank, 103 U. S. 697. § 6114.
- Ohio v. Moore, 39 Ohio St. 486. §§ 7902, 7929.

- Ohio etc. Ins. Co. v. Merchants' & Co., 11 Humph. (Tenn.) 1. §§ 3008, 3095, 3500, 3527, 6459.
- Ohio & C. R. Co. v. Brown, 23 Ill. 94. § 4337.
- Ohio & C. R. Co. v. Cramer, 23 Ind. 490. §§ 1743, 1753.
- Ohio & C. R. Co. v. Davis, 23 Ind. 553. §§ 6349, 7143.
- Ohio & C. R. Co. v. Dunbar, 20 Ill. 623. §§ 5884, 6283.
- Ohio & C. R. Co. v. Fitch, 20 Ind. 498. §§ 6366, 7128, 7154.
- Ohio & C. R. Co. v. Lackey, 78 Ill. 55. § 5452.
- Ohio & C. R. Co. v. McPherson, 35 Mo. 26. §§ 55, 518, 523, 531, 694, 1973, 3814, 3939, 3933.
- Ohio & C. R. Co. v. Middleton, 20 Ill. 629, 636. §§ 5046, 6170.
- Ohio & C. R. Co. v. Russell, 115 Ill. 52. § 7152.
- Ohio & C. R. Co. v. Shanafelt, 25 Ill. 140. § 5504.
- Ohio & C. R. Co. v. Tindall, 13 Ind. 366. § 6377.
- Ohio & C. R. Co. v. Weber, 96 Ill. 443. § 320.
- Ohio & C. R. Co. v. Wheeler, 1 Black (U. S.), 286. §§ 47, 48, 319, 320, 683, 1834, 2786, 6860, 7433, 7448, 7450, 7456, 7457, 7875, 7881, 7890, 7891, 7892.
- Ohio College v. Rosenthal, 45 Ohio St. 183. §§ 2236, 2241.
- Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294. §§ 2082, 2095, 4457.
- Ohio Life Ins. & Co. v. Debolt, 16 How. (U. S.) 416. §§ 530, 5425, 5569.
- Ohryb v. Ryde Comm'r's, 5 Best & S. 743. §§ 6363, 6442.
- Oil Creek & C. R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160. §§ 6016, 6025.
- Okell v. Charles, 34 L. T. (N. S.) 822. §§ 5126, 5148, 5156.
- Oland v. Agricultural Ins. Co., 69 Md. 248. §§ 8019, 8025.
- Olcott v. Bynum, 17 Wall. (U. S.) 44. § 6243.
- Olcott v. Rathbone, 5 Wend. (N. Y.) 490. § 4802.
- Olcott v. Supervisors, 16 Wall. (U. S.) 678. §§ 1115, 1129, 5425, 5426, 5600.
- Olcott v. Tioga R. Co., 20 N. Y. 210. §§ 7341, 7500.
- Olcott v. Tioga & C. R. Co., 40 Barb. (N. Y.) 179; 27 N. Y. 546. §§ 4650, 4626, 4650, 5126, 5140, 5730, 5731, 5747, 5759.
- Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25. § 5732.
- Old Colony R. Co. v. Tripp, 33 Am. & Eng. R. Cas. 488. § 1022.
- Oldham v. Halley, 2 J. J. Marsh. (Ky.) 113. § 6245.
- Oldknow v. Wainwright, 2 Burr. 1017, 1020, 1021. § 723.
- Olds v. Cummings, 31 Ill. 188. § 6067.
- Old Town v. Dooley, 81 Ill. 255. § 779.
- Old Tm & C. R. Co. v. Veazie, 39 Me. 571. §§ 72, 76, 81, 1276, 1332, 1724, 1727, 5417, 7665.
- O'Leary v. Cook County, 28 Ill. 534. §§ 610, 612, 624, 6756.
- Oler v. Baltimore & C. R. Co., 41 Md. 583. § 2087.
- Oler v. Brown, 51 How. Pr. (N. Y.) 92. §§ 911, 912, 1047, 7602.
- Oliphant v. Woodburn Coal & Min. Co., 63 Iowa, 332. § 4472.
- Oliver's Estate, Re, 136 Pa. St. 43. §§ 2161, 2198.
- Oliver v. Liverpool, & Co., 100 Mass. 531; 10 Wall 568. §§ 2, 14, 2803, 2925.
- Oliver v. Memphis & C. R. Co., 30 Ark. 128. §§ 5380, 5570.
- Oliver v. North Pac. Transp. Co., 3 Or. 84. § 6283.
- Oliver v. Persons, 30 Ga. 331. § 7738.
- Oliver v. Townes, 2 Mart. (La.) (N. S.) 93. § 7208.
- Oliver v. Washington Mills, 11 Allen (Mass.), 268. §§ 2849, 2851, 2899, 8134.
- Oliver v. Worcester, 102 Mass. 489. §§ 28, 6275, 6276.
- Oliver Lee & Co's Bank, Re, 21 N. Y. 9. §§ 3032, 3034.
- Ollshesheimer v. Thompson Man. Co., 44 Mo. App. 172. §§ 1511, 1513, 1517, 1582, 3197, 3718.
- Olmstead v. Camp, 33 Conn. 532. § 5607.
- Olmstead v. Farmers Mutual Fire Ins. Co., 50 Mich. 200. § 851.
- Olmstead v. Rochester & C. R. Co., 44 Hun (N. Y.), 627; 8 N. Y. St. Rep. 856. § 7423.
- Olney v. Chadsey, 7 R. L. 224. §§ 4455, 4622, 4637, 4684, 4750, 7731.
- Olney v. Conanicut Land Co., 16 R. I. 597. §§ 6432, 6503, 6504, 6535, 6559.
- Olney v. Tanner, 21 Blatchf. (U. S.) 540. § 7334.
- Olney v. Tanner, 10 Fed. Rep. 101, 104. § 7335.
- Olyphant v. Atwood, 4 Bosw. (N. Y.) 459. § 7339.
- Olyphant v. St. Louis & Ore. Co., 28 Fed. Rep. 729. § 7051.
- Omaha v. Olmstead, 5 Neb. 446. § 7756.
- Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. Rep. 324. §§ 5402, 5405, 5406.
- O'Mahoney v. Belmont, 82 N. Y. 133, 143. § 6831.
- Omaley v. Freeport, 95 Pa. St. 24. § 1021.
- O'Mearo v. North American Mining Co., 2 Nev. 112, 113. §§ 2480, 4402.
- Omit v. Conn., 21 Pa. St. 426, 435. § 5680.
- Omnibus R. Co. v. Baldwin, 57 Cal. 160. §§ 6586, 6612.
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- O'Neill v. Progressive Endowment League, Circuit Court, Baltimore, Md., not reported. § 4553.
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- Ossipee Man. Co. v. Canney, 54 N. H. 295. §§ 507, 528, 1849, 1895, 3039, 3110, 3381, 3652, 5705.
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- Paddon v. Bartlett, 3 Ad. & E. 884. § 3021.
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 Page v. De Fries, 7 Best & S. 137. §§ 4930, 6283, 6303.
 Page v. Fall River & c. R. Co., 31 Fed. Rep. 257. §§ 4721, 4729, 5125.
 Page v. Fowler, 39 Cal. 412. § 2480.
 Page v. Heinberg, 40 Vt. 81. § 5770.
 Page v. Monks, 5 Gray (Mass.), 492. § 1048.
 Paige v. Fazaackerly, 36 Barb. (N. Y.) 392. §§ 3920, 7755.
 Paige v. Smith, 99 Mass. 335. § 7123.
 Paige v. Stone, 10 Met. (Mass.) 160. § 3205.
 Paine v. Hutchinson, L. R. 3 Eq. 257. § 2729.
 Paine v. Irwin, 59 How. Pr. (N. Y.) 316. §§ 4010, 4894.
 Paine v. Lake Erie & c. R. Co., 31 Ind. 283. §§ 385, 380, 634, 4016, 4043, 7661, 7984.
 Paine v. Lester, 44 Conn. 196. §§ 7342, 7344, 8072.
 Paine v. Little Rock & c. R. Co., April Term, 1874. § 7177.
 Paine v. Root, 121 Ill. 77; 13 N. E. Rep. 541; 9 West. 752. § 7889.
 Paine v. Strand Union, 8 Ad. & El. (N. S.) 326. § 5297.
 Paine v. Stewart, 33 Conn. 516. §§ 2020, 2021, 3050, 5088, 3255, 3368, 3375, 3500, 3502, 3758, 3833, 6561.
 Paine v. Thacher, 25 Wend. (N. Y.) 452. § 1255.
 Paine v. Tucker, 21 Me. 138. § 5295.
 Painsville & c. R. Co. v. King, 17 Ohio St. 534. § 2236.
 Painter's Case, 4 K. & J. 305. § 1523.
 Painter v. Liverpool Gas Co., 3 Ad. & El. 433. § 1750.
 Painter v. Pittsburgh, 46 Pa. St. 213, 216. § 6348.
 Palair's Appeal, 67 Pa. St. 479, 487. §§ 5448, 5614.
 Palestine v. Barnes, 50 Tex. 538. §§ 5364, 6837.
 Palestine & c. Co. v. Wooden, 13 Ohio St. 395. § 3032.
 Palfrey v. Paulding, 7 La. An. 363. §§ 97, 2122, 3652.
 Palm v. Medina Co. Ins. Co., 20 Ohio, 529. §§ 5024, 5045.
 Palmer v. Clarke, 2 Dev. L. (N. C.) 354. § 7507.
 Palmer v. Conly, 4 Denio (N. Y.), 374. § 3021.
 Palmer v. Cypress Hill Cemetery, 14 N. Y. St. Rep. 591. § 6025.
 Palmer v. Gould's Man. Co., Week. Notes [1884], 63. § 7990.
 Palmer v. Hutchinson Grocery Co. (Miss.), 11 South. Rep. 789. § 6494.
 Palmer v. Jones, 1 Vern. 144. § 2663.
 Palmer v. Lawrence, 3 Sandf. (N. Y.) 161. §§ 219, 247, 1133, 1185, 1568, 3222, 5272, 6275.
 Palmer v. Lawrence, 1 Seld. (N. Y.) 389. § 632.
 Palmer v. Logansport & c. Gravel Road Co., 108 Ind. 137. § 5906.
 Palmer v. Mason, 42 Mich. 146, 150. §§ 6534, 7337.
 Palmer v. McMahon, 133 U. S. 660; 102 N. Y. 176. § 2867.
 Palmer v. Nassau Bank, 78 Ill. 380. §§ 4621, 4638, 4640.
 Palmer v. Phoenix Mut. Life Ins. Co., 34 N. Y. 63. § 8007.
 Palmer v. Railroad, 3 S. C. 590. §§ 6383, 6390, 6391.
 Palmer v. Ridge Min. Co., 34 Pa. St. 288. §§ 3222, 3225, 3262.
 Palmer v. State, Wright (Ohio), 364. § 5595.
 Palmer v. Stephens, 1 Denio (N. Y.), 471. § 5028.
 Palmer v. Stumph, 29 Ind. 329. § 5575.
 Palmer v. Woodbury, 14 Cal. 43. § 766.
 Palmer v. Yates, 3 Sandf. (N. Y.) 137. §§ 3952, 3954, 4634, 4760.
 Palmetto Lodge v. Hubbell, 2 Strobh. L. S. C.) 457. §§ 921, 1021, 4393.
 Palmetto Lumber Co. v. Risley, 25 (S. C. 309, §§ 4029, 4072, 7664, 7665.
 Palmyra v. Morton, 25 Mo. 593. §§ 915, 941.
 Palsy v. Jewett, 32 N. J. Eq. 302. § 7130.
 Pana v. Bowler, 107 U. S. 523. § 6111.
 Panama & c. Tel. Co. v. India Rubber Co., L. R. 10 Ch. 515. § 469.
 Pancoast v. Travelers' Ins. Co., 79 Ind. 172. §§ 6021, 7922, 7983.
 Pangborn v. Citizens' Building Assn., 35 N. J. Eq. 341. § 4018.
 Pangborn v. Westlake, 36 Iowa, 546, 548. § 7958.
 Panhandle Nat. Bank v. Emery, 78 Tex. 498. § 2957.
 Pantou Turnp. Co. v. Bishop, 11 Vt. 198. §§ 5176, 5906, 5927.
 Paola & c. R. Co. v. Anderson Co., 16 Kan. 302. §§ 3905, 6176.
 Paola Town Co. v. Krutz, 22 Kan. 725. § 7603.
 Pape v. Capitol Bank, 20 Kan. 440. §§ 213, 5950, 6036.
 Paper Box Co., Re 17 Ch. Div. 471. § 458.
 Paradise v. Farmers' & c. Banq., 5 La. An. 710. §§ 7339, 7342.
 Paraguanu Steam Tramroad Co., Re, L. R. 3 Ch. 254. § 3791.
 Parbury's Case, 3 De Gex & S. 43. § 1418.
 Parbury's Case, De Gex, F. & J. 60. § 3209.
 Pardoe v. Treat, 82 N. Y. 387. § 381.
 Pardicaris v. Trenton & c. Bridge Co., 29 N. J. L. 367. § 1825.
 Paret v. Bayonne, 39 N. J. L. 559. § 7754.
 Parham v. Decatur Co., 9 Ga. 341. § 5621.
 Parham v. Justices, 9 Ga. 341. § 5592.
 Paris v. Mason, 37 Tex. 447. § 5626.
 Paris v. Paris, 10 Ves. 184. §§ 2129, 2212.
 Paris Chocolate Co. v. Crystal Palace Co., 3 Sm. & Giff. 119. § 7754.
 Parish v. Wheeler, 22 N. Y. 494. §§ 3534, 6023, 6160, 6199.
 Parish of Bellport v. Tooker, 29 Barb. (N. Y.) 256. § 788.
 Park v. Locomotive Works, 40 N. J. Eq. 114; affirmed, 45 N. J. Eq. 244. §§ 2128, 4487.
 Park v. New York & Kanawha Oil Co., 26 W. Va. 486. § 4590.
 Park v. Petroleum Co., 25 W. Va. 108. § 4590.
 Park v. Richmond & c. Turnp. Co. (Ky.), 10 Ky. L. Rep. 384. § 5924.
 Park Bank v. German American Mut. Warehousing & c. Co., 53 N. Y. Super. Ct. 367. § 4638.
 Park Bank v. Nichols, 4 Biss. (U. S.) 315. § 7449.
 Park Bank v. Watson, 42 N. Y. 490. § 4724.
 Parke v. Commonwealth Ins. Co., 44 Pa. St. 422. §§ 7423, 7512, 7525, 7539.
 Parke County Coal Co. v. Terre Haute Paper Co., 26 N. E. Rep. 881. § 2756.
 Parker's Case, L. R. 2 Ch. 685. § 1446.
 Parker v. Boston & c. Railroad, 3 Cush. (Mass.) 107. § 6345.
 Parker v. Browning, 8 Paige (N. Y.), 388. §§ 6700, 7027, 7130.
 Parker v. Com., 6 Pa. St. 507. § 643.
 Parker v. Donnally, 4 W. Va. 648. § 4635.
 Parker v. King, 16 Wis. 223. § 4170.
 Parker v. Mason, 8 R. L. 427. § 2205.
 Parker v. May, 5 Cush. (Mass.) 336. § 7774.
 Parker v. McKenna, L. R. 10 Ch. 96. §§ 4022, 4024, 4033.
 Parker v. Nickerson, 112 Mass. 195. §§ 458, 4022, 4024, 4037.
 Parker v. North British & c. Ins. Co., 42 La. An. 428. §§ 8090, 8119.
 Parker v. Northern Central & c. R. Co., 33 Mich. 23. §§ 1151, 1161, 1177, 1178, 1245, 1853.
 Parker v. Parker, 2 Met. (Mass.) 423, 432. § 2617.
 Parker v. Parker, 123 Mass. 584. § 5815.
 Parker v. Receiver, 49 N. J. L. 465. §§ 4622, 4630.
 Parker v. Rochester, 4 Johns. Ch. (N. Y.) 332. § 6040.
 Parker v. Scogin, 11 La. An. 629. § 1118.
 Parker v. Smith, 3 Minn. 240. § 770.
 Parker v. Sun Ins. Co., 42 La. An. 1172. §§ 2840, 2918.
 Parker v. Thomas, 19 Ind. 213. §§ 1336, 1390, 1393, 1394.
 Parker v. Vose, 45 Me. 54. § 2677.
 Parker v. Williamsburgh, 13 How. Pr. (N. Y.) 250. § 4869.
 Parkersburg v. Brown, 106 U. S. 487. §§ 5458, 6004, 6005.
 Parkhurst v. Citizens' Nat. Bank, 61 Md. 254. § 4756.
 Parkin v. Fry, 2 Car. & P. 311. § 429.
 Parkinson's Case, Carth. 92; 3 Mod. 265; 1 Show. 74. 1 Comb. 143. §§ 763, 829.
 Parks v. Automatic Bank Punch Co., 14 Daly (N. Y.), 424. § 2283.
 Parks v. Evansville & c. R. Co., 23 Ind. 567. § 1336.
 Parks v. Heman, 7 Mo. App. 14. §§ 3573, 3587.
 Parks v. S. & L. Turnp. Rd. Co., 4 J. J. Marsh. (Ky.) 458. §§ 5074, 5171.
 Parmelee v. Chicago, 60 Ill. 267. § 5626.
 Parmelee v. Lawrence, 48 Ill. 331. § 506.
 Parmelee v. Oswego & c. R. Co., 7 Barb. (N. Y.) 599, 625. § 5600.

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- Farnaby v. Lancaster Canal Co., 11 Ad. & El. 223; 3 Nev. & P. 523; 3 Per. & Dav. 162. § 6358.
- Parr, Ex parte, 18 Ves. 65. § 5124.
- Parr v. Bell, 9 Ir. Eq. 55. § 7128.
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- Parrott v. Colby, 71 N. Y. 597; 6 Hun (N. Y.), 55. §§ 3117, 3769.
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- Parrott v. Sawyer, 87 N. Y. 622; affirming, 22 Hun (N. Y.), 611. § 3117.
- Parry v. American Opera Co., 12 N. Y. Civ. Proc. 194; 9 N. Y. St. Rep. 536. § 6895.
- Parry v. Frame, 2 Bos. & Pul. 451. § 2476.
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- Parsons v. Jackson, 99 U. S. 431. § 6077.
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- Parsons v. Martin, 11 Gray (Mass.), 111. §§ 2471, 2649.
- Parsons v. Monroe Man. Co., 4 N. J. Eq. 187, 206. §§ 4543, 4544.
- Parsons v. Winchell, 5 Cush. (Mass.) 592. §§ 4096, 6290.
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- Partee v. New Orleans & Co., 3 La. An. 19. § 1585, 1702.
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- Partridge v. Life Ins. Co., 1 Dill. (U. S.) 123. § 5647.
- Paschal, Re, 10 Wall. (U. S.) 433. §§ 7055, 7056.
- Paschal v. Whitsett, 11 Ala. 472. §§ 1569, 3361, 3341, 3583, 6609, 6672, 6729.
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- Passumpsic Turnp. Co. v. Langdon, 6 Vt. 546. § 5922.
- Patapasco Ins. Co. v. Smith, 6 Harr. & J. (Md.) 166. § 1220.
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- Pearson v. Tower, 55 N. H. 215. § 4715.
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 Peck v. New York & C. R. Co., 9 Hun (N. Y.), 236. § 6309.
 Peck v. Providence Gas Co., 17 R. I. 275. §§ 2538, 2542.
 Peck v. San Antonio, 51 Tex. 490 § 614.
 Peckham v. North Parish, 16 Pick. (Mass.) 274. §§ 7529, 7989.
 Peckham v. School District, 7 R. I. 545. § 5598.
 Peckham v. Van Waggener, 83 N. Y. 40; affirming 13 Jones & Sp. 328. § 2911.
 Pedrick v. Bailey, 12 Gray (Mass.), 161. §§ 1021, 1025.
 Peddell v. Gwyn, 1 Hurlst. & N. 590. §§ 3537, 3592.
 Peebles v. Patapsco Guano Co., 77 N. C. 233. §§ 6276, 6321, 6328.
 Peek v. Derry, 37 Ch. Div. 511. §§ 1463, 1464.
 Peek v. Gurney, L. R. 6 H. L. 377; L. R. 13 Eq. 79. §§ 1387, 1400, 1461, 1467, 1471, 1472. 1483, 1485, 1503.
 Peels Case, L. R. 2 Ch. 674, 683. §§ 218, 1138, 1441, 1445, 1446, 1449.
 Peele, Ex parte, 6 Ves. 602. § 431.
 Peele v. Phillips, 8 Allen (Mass.), 86. §§ 3353, 4311, 6560.
 Peik v. Railway Co., 94 U. S. 161; affirming, 6 Biss. (U. S.) 177. §§ 641, 5500, 5530, 5533, 5535, 5541, 5543.
 Peirce v. Jersey Water Works Co., L. R. 5 Exch. 209. § 3970.
 Peirce v. Somersworth, 10 N. H. 369. §§ 5615, 6598, 7579, 7609, 7611.
 Pejeperot Proprietors v. Cushman, 2 Me. 94. § 3914.
 Pell's Case, L. R. 5 Ch. 11. §§ 1003, 1608, 1618, 1643.
 Pellatt's Case, L. R. 2 Ch. 527. §§ 1179, 1190, 1003, 1612, 1643.
 Pelletat v. Angell, 2 Comp. Mees. & Ros. 311. § 7942.
 Pelton v. National Bank (1879), 101 U. S. 143. §§ 676, 2857, 2870, 2883.
 Pemberton Nat. Bank v. Porter, 125 Mass. 333. § 5950.
 Pembina & Co. v. Pennsylvania, 125 U. S. 181. 189. §§ 674, 5448, 7876, 7877, 7928, 1208.
 Pemigewasset Bank v. Rogers, 18 N. H. 255. §§ 4917, 4920, 5743.
 Pendergast v. Bank of Stockton, 2 Sawy. (U. S.) 108. §§ 1032, 2321, 2397, 3238.
 Pendergast v. Commercial Mut. Ins. Co., 15 Gray (Mass.), 257. § 7232.
 Pendergast v. Turton, 1 Young & C. 98. § 1806.
 Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171, 177. §§ 294, 4051, 4773, 4803, 7977.
 Pendrton v. Kinsley, 3 Cliff. (U. S.) 416. §§ 6298, 6307.
 Pendleton v. Russell, 144 U. S. 640. §§ 6893, 7720.
 Pendleton v. Waterloo Baptist Church, 49 Hun (N. Y.), 596; 18 N. Y. St. Rep. 581. § 5811.
 Pendleton Co. v. Amy, 13 Wall. (U. S.) 287. § 5262.
 Peninsula Bank v. Hammer, 14 Mich. 208. § 4794.
 Peninsular E. Co. v. Duncan, 28 Mich. 130. §§ 1158, 1163, 1173.
 Peninsular R. Co. v. Gary, 22 Fla. 356. § 4855.
 Peninsular R. Co. v. Howard, 20 Mich. 18. § 7756.
 Peninsular R. Co. v. Tharp, 23 Mich. 506. §§ 327, 355.
 Penkivil v. Connell, 5 Ex. 331. §§ 5123, 5153.
 Penn Match Co. v. Hapgood, 141 Mass. 145. §§ 482, 483.
 Penn Mut. Life Ins. Co. v. Bradley, 21 N. Y. Supp. 876. § 7961.
 Pennell v. Deffell, 4 De Gex, M. & G. 372, 388. §§ 7034, 7103, 7108.
 Pennell v. Hinman, 7 Barb. (N. Y.) 644. § 1500.
 Penniman, Ex parte, 11 R. I. 333. § 3036.
 Penniman v. Briggs, 1 Hopk. Ch. (N. Y.) 300. §§ 3345, 3347, 6857, 6866, 6670.
 Pennington v. Gettings, 2 Gill & J. (Md.) 208. § 2436.
 Pennock v. Coe, 23 How. (U. S.) 117. §§ 6141, 6145.
 Pennoyer v. Neff, 95 U. S. 714. § 3401.
 Pennsylvania v. Quicksilver Co., 10 Wall. (U. S.) 553. §§ 1334, 7456.
 Pennsylvania & C. Canal Co. v. Graham, 63 Pa. St. 290. §§ 6358, 6559, 6362, 6373.
 Pennsylvania & C. R. Co. v. Dandridge, 8 Gill & J. (Md.) 245, 311. §§ 4900, 5301, 5306, 5969.
 Pennsylvania & C. R. Co. v. Leuffer, 84 Pa. St. 168. §§ 3145, 3146.
 Pennsylvania & C. R. Co. v. Vandyke, 137 Pa. St. 249. § 5574.
 Pennsylvania College Cases, 13 Wall. (U. S.) 190, 213. §§ 92, 316, 5384, 5386, 5110.
 Pennsylvania Co. v. Bauerle, 143 Ill. 459. § 5117.
 Pennsylvania Co. v. Com. (Pa.), 13 Cent. 436; 46 Phila. Leg. Int. 300. § 2813.
 Pennsylvania Co. v. Com. (Pa.), 15 Atl. Rep. 456; 22 W. N. C. 340. § 2814.
 Pennsylvania Co. v. Erie & C. R. Co., 108 Pa. St. 621. § 5893.
 Pennsylvania Co. v. Sloan, 1 Ill. App. 364. § 7424.
 Pennsylvania Co. v. Weddle, 100 Ind. 18. § 6312.
 Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36, 37. §§ 220, 945, 7875.
 Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265. § 4672.
 Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80. §§ 2486, 2488, 2561.
 Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. § 5619.
 Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316. § 6284.
 Pennsylvania R. Co. v. Baltimore & C. R. Co., 60 Md. 263. § 5624.
 Pennsylvania R. Co. v. Bowers, 121 Pa. St. 183. § 5435.
 Pennsylvania R. Co. v. Canal Comm'rs, 21 Pa. St. 9. §§ 516, 5639.
 Pennsylvania R. Co. v. Jersey City, 47 N. J. L. 286. § 1021.
 Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491. §§ 6358, 9362.
 Pennsylvania R. Co. v. Pemberton & C. R. Co., 28 N. J. Eq. 338. § 6811.
 Pennsylvania R. Co. v. Peoples, 31 Ohio St. 537. § 8070.
 Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 139. § 602.
 Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164. §§ 5504, 5505.
 Pennsylvania R. Co. v. St. Louis & C. R. Co., 118 U. S. 290. §§ 58:0, 5998, 5999, 6000, 7890, 7893.
 Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 57. §§ 271, 6222.
 Penny v. State, 88 Ala. 106. § 2677.
 Pennypacker v. Capital Ins. Co., 80 Iowa, 56. §§ 5861, 7958, 7960.
 Penobscot & C. R. Co. v. Bartlett, 12 Gray (Mass.), 244. §§ 1259, 1349, 3046.
 Penobscot Boom Corp. v. Lamson, 16 Me. 224. §§ 42, 60, 97, 5266, 5577, 6600, 7665, 7722.
 Penobscot R. Co. v. Dummer, 40 Me. 172. §§ 1158, 1170, 1193, 1238, 1322, 1332, 1390, 1577, 1714, 1724, 1726, 1753, 1831, 1879, 1879 a, 1911, 1918, 1924, 3858.
 Penobscot & C. R. Co. v. Dunn, 39 Me. 587. §§ 788, 1185, 1306, 1322, 1332, 1335, 1351, 1577, 1925, 3867, 3898, 3995, 4014, 7665.
 Penobscot R. Co. v. White, 41 Me. 512. §§ 1170, 1235, 1238, 1239, 1322, 1434, 1724, 1726, 1918, 1958.
 Penobscot R. Co. v. Whittier, 12 Gray (Mass.), 250. § 1724.
 Penrice v. Wallis, 37 Miss. 172. §§ 5621, 5626.
 Penrose v. Erie Canal Co., 55 Pa. St. 46. § 5140.
 Penrose v. Martyr, EL, BL & EL 499. § 5126.
 Pensacola Lumber Co., Re, 8 Ben. (U. S.) 17. § 6693.
 Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1. §§ 671, 683, 5460, 5562, 7373.
 Pentlow's Case, L. R. 4 Ch. 178. § 1412.
 Pentz v. Aetna Ins. Co., 3 Edw. Ch. (N. Y.) 341. § 5621.
 Pentz v. Sackett, Hill & D. (N. Y.) 113. § 4629.
 Pentz v. Stanton, 10 Wend. (N. Y.) 271; 25 Am. Dec. 558. §§ 5129, 5138.
 Pen-y-van Colliery Co., Re, L. R. 6 Ch. Div. 477. § 6688.
 People v. Albany, 11 Wend. (N. Y.) 539. § 6419.
 People v. Albany & C. R. Co., 24 N. Y. 261. §§ 6423, 6622, 6625, 6680.
 People v. Albany & C. R. Co., 57 N. Y. 161. §§ 771, 3877.
 People v. Albany & C. R. Co., 12 Abb. Pr. (N. Y.) 171; 20 How. Pr. (N. Y.) 358. § 6449.
 People v. Albany & C. R. Co., 57 Barb. (N. Y.) 204. § 6935.
 People v. Albany & C. R. Co., 15 Hun (N. Y.), 126. § 5372.
 People v. Albany & C. R. Co., 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 314; 38 How. Pr. (N. Y.) 228; 7 Abb. Pr. (N. Y.) (N. S.) 265. §§ 770, 771, 3867, 3878, 6880.
 People v. Albany Hospital, 61 Barb. (N. Y.) 397. § 3852.

- People v. Albany Ins. Co., 92 N. Y. 458. §§ 2894, 2901.
- People v. Albany Medical College, 26 Hun (N. Y.), 348; reversing 10 Abb. N. C. (N. Y.) 122; 62 How. Pr. (N. Y.) 220. § 823.
- People v. Albertson, 55 N. Y. 60. § 5419.
- People v. Allen, 1 Lans. (N. Y.) 248. § 559.
- People v. American Bell Teleph. Co., 117 N. Y. 241; reversing 50 Hun (N. Y.), 114; 3 N. Y. Supp. 733. §§ 8102, 8123.
- People v. American Sugar Refining Co., 7 Rail. & Corp. L. J. 63. § 6627.
- People v. American Sugar Refining Co., 8 Rail. & Corp. L. J. 128. § 6869.
- People v. Anderson & Co. Valley Road Co., 76 Cal. 190. § 6651.
- People v. Arensburg, 105 N. Y. 123. § 5483.
- People v. Assessors, 1 Hill (N. Y.), 620. §§ 2, 14, 19.
- People v. Assessors, 76 N. Y. 202; affirming 16 Hun (N. Y.), 196. § 2908.
- People v. Assessors of Albany, 5 Thomp. & C. (N. Y.) 155. § 2871.
- People v. Assessors, 111 N. Y. 505. § 5559.
- People v. Atlantic Mut. Life Ins. Co., 74 N. Y. 177. §§ 7219, 7220.
- People v. Ballard, 134 N. Y. 269. § 6544.
- People v. Ballard, 3 N. Y. Supp. 845; 29 N. Y. St. Rep. 926; 8 N. Y. Supp. 918. §§ 3963, 4110, 4118, 4326.
- People v. Ballou, 12 Wend. 277. § 4347.
- People v. Bank of Niagara, 6 Cow. (N. Y.) 196. §§ 6797, 6803, 6804.
- People v. Bank of Hudson, 6 Cow. (N. Y.) 217. §§ 6618, 6797, 6798.
- People v. Banks, 67 N. Y. 568. § 616.
- People v. Barrie, 49 Cal. 342. § 7713.
- People v. Bartlett, 3 Hill (N. Y.), 570. § 3375.
- People v. Batchellor, 53 N. Y. 128. §§ 590, 1129.
- People v. Batchelor, 22 N. Y. 128. §§ 707, 708, 710, 713, 715, 717, 720, 789, 893, 3936.
- People v. Beach, 19 Hun (N. Y.), 259, 262. §§ 232, 233.
- People v. Beigler, Hill & D. Supp. (N. Y.) 133. § 7689.
- People v. Bell, 4 Cal. 177. § 7829.
- People v. Benevolent Society, 3 Hun (N. Y.), 361. § 1013.
- People v. Black Diamond Coal Min. Co., 37 Cal. 54. § 2804.
- People v. Board of Fire Commrs., 82 N. Y. 358. § 825.
- People v. Board of Fire Underwriters, 5 Hun (N. Y.), 248. § 860.
- People v. Board of Fire Underwriters, 54 How. Pr. (N. Y.) 228, 240. § 1052.
- People v. Board of Fire Underwriters, 14 N. Y. Supr. Ct. 248. § 857.
- People v. Board of Police, 69 N. Y. 408. § 825.
- People v. Board of Police Commrs., 93 N. Y. 97. § 825.
- People v. Board of Police Commrs., 20 Hun (N. Y.), 402. § 397.
- People v. Board of Trade, 80 Ill. 134. §§ 908, 914, 923, 1047, 4395.
- People v. Bugart, 45 Cal. 73. § 6640.
- People v. Boston & C. R. Co., 70 N. Y. 569. §§ 5505, 5530, 5645, 7826.
- People v. Bostwick, 32 N. Y. 445. §§ 1253, 5094.
- People v. Bowen, 30 Barb. (N. Y.) 24; Affirming, 21 N. Y. 517. §§ 217, 588.
- People v. Bradley, 39 Ill. 130. § 2813.
- People v. Briggs, 30 N. Y. 553. §§ 611, 624.
- People v. Brishin, 80 Ill. 423. § 611.
- People v. Bristol & Co. Turnp. R. Co., 23 Wend. (N. Y.) 222. §§ 5926, 6611, 6792, 6793.
- People v. Broadway R. Co., 126 N. Y. 29. § 6608.
- People v. Brooklyn, 6 Barb. (N. Y.) 209, 217. § 5626.
- People v. Brooklyn, 9 Barb. (N. Y.) 535. § 5626.
- People v. Brooklyn & C. R. Co., 89 N. Y. 75, 84. §§ 258, 5431.
- People v. Bruff, 60 How. Pr. (N. Y.) 1. §§ 4118, 4326.
- People v. Budd, 117 N. Y. 1. § 5530.
- People v. Buffalo Stone & C. Co., 131 N. Y. 140. § 4233.
- People v. Cairo, 50 Ill. 154. § 7505.
- People v. Callaghan, 83 Ill. 128. §§ 6783, 6784.
- People v. Carr, 36 Hun (N. Y.), 488. § 5680.
- People v. Caryl, 12 Wend. (N. Y.) 547. § 7713.
- People v. Central Pac. R. Co., 76 Cal. 29. § 6097.
- People v. Central Pac. R. Co., 83 Cal. 393. §§ 7659, 7662.
- People v. Central R. Co. of New Jersey, 48 Barb. (N. Y.) 478. § 7886.
- People v. Chadwick, 2 Park. Cr. (N. Y.) 163. § 7713.
- People v. Chambers, 42 Cal. 201. §§ 327, 1216, 1222.
- People v. Chapman, 64 N. Y. 557. §§ 6960, 7228.
- People v. Chapman, 5 Hun (N. Y.), 222. § 7228.
- People v. Chautauqua County, 43 N. Y. 10. § 619.
- People v. Cheesman, 7 Colo. 376, 379. §§ 224, 228, 229.
- People v. Chenango, 10 N. Y. 317. §§ 635, 636.
- People v. Chicago & C. R. Co., 130 Ill. 175. §§ 7826, 7828.
- People v. Chicago Board of Trade, 40 Ill. 112. § 851.
- People v. Chicago Gas Trust Co., 130 Ill. 268. §§ 1102, 1106, 5372, 5896, 6401, 6405, 6411.
- People v. Church, 2 Lans. (N. Y.) 459; affirming 4 Abb. Pr. (N. s.) (N. Y.) 122. § 6935.
- People v. Circuit Court, 21 Mich. 577. § 7463.
- People v. Cipperly, 101 N. Y. 634; affirming 37 Hun (N. Y.), 323. § 5483.
- People v. City Bank, 7 Colo. 226. § 6623.
- People v. City Bank, 96 N. Y. 32. §§ 7026, 7086, 7094, 7104.
- People v. Clark, 14 N. Y. Supp. 642. § 4114.
- People v. Cohen, 31 Cal. 210. § 2804.
- People v. Cohocton Stone Road, 25 Hun (N. Y.), 13. § 6740.
- People v. Coleman, 126 N. Y. 433, 437. §§ 2810, 2811, 2816, 8100.
- People v. College of California, 38 Cal. 166. § 6658.
- People v. Collins, 3 Mich. 343. § 643.
- People v. Collins, 19 Wend. (N. Y.) 56. § 7830.
- People v. Colorado & C. R. Co., 42 Fed. Rep. 633. § 7827.
- People v. Commissioners, 23 N. Y. 192, 220. §§ 1065, 2840, 8093, 8095.
- People v. Commissioners, 47 N. Y. 501. §§ 609, 612, 5571.
- People v. Commissioners, 54 N. Y. 276. § 634.
- People v. Commissioners, 59 N. Y. 40, 43. §§ 8102, 8131.
- People v. Commissioners, 67 N. Y. 516. §§ 2816, 2871, 2873.
- People v. Commissioners, 99 N. Y. 154. § 8121.
- People v. Commissioners, 104 N. Y. 240. § 8121.
- People v. Commissioners, 63 Barb. (N. Y.) 70. § 5383.
- People v. Commissioners, 2 Black (U. S.), 620. § 2855.
- People v. Commissioners, 4 Wall. (U. S.) 244. §§ 2728, 2816, 2840, 2857, 2868.
- People v. Commissioners, 94 U. S. 415. §§ 2871, 2874.
- People v. Comptroller, 20 Wend. (N. Y.) 594, 598. § 7194.
- People v. Conley, 42 Hun (N. Y.), 98. § 4400.
- People v. Connelly, 3 N. Y. St. Rep. 372. § 4400.
- People v. Connor, 13 Mich. 238. § 772.
- People v. Contracting Board, 27 N. Y. 378. § 4816.
- People v. Cook, 410 N. Y. 443. § 261.
- People v. Coon, 25 Cal. 635. § 1118.
- People v. Crockett, 9 Cal. 112. §§ 1013, 1019, 1032, 2344, 2445, 3232, 3238, 3240, 3246.
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- People v. Davis, 21 Wend. (N. Y.) 309. § 7713.
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- People v. Dispensary & Co. Soc., 7 Lans. (N. Y.) 304. § 6615.
- People v. Distilling and Cattle Feeding Co., not yet reported (Sup. Ct. Ill.). § 6627.
- People v. Dolan, 36 N. Y. 69. §§ 2869, 2872.
- People v. Draper, 15 N. Y. 532, 545. § 5419, 5158.
- People v. Dubois, 18 Ill. 333. § 6636.
- People v. Dutches & C. R. Co., 58 N. Y. 152. § 7826.
- People v. Eadie, 43 N. Y. St. Rep. 649; 18 N. Y. Supp. 53; 133 N. Y. 873. §§ 4414, 4417.
- People v. Eddy, 43 Cal. 331. § 2804.
- People v. Eimore, 35 Cal. 655. §§ 2397, 2400.
- People v. Empire Mut. Life Ins. Co., 92 N. Y. 105. § 7227.

- People v. Equitable Gaslight Co.**, 5 N. Y. Supp. 19. §§ 6419, 6439.
People v. Equitable Trust Co., 96 N. Y. 387. §§ 2900, 8094, 8120.
People v. Erie Railway Co., 36 How. Pr. (N. Y.) 129. §§ 4533, 4539, 7774.
People v. Erie R. Co., 54 How. Pr. (N. Y.) 59. § 7162.
People v. Farnham, 35 Ill. 562. § 512.
People v. Farrington, 22 How. Pr. (N. Y.) 294. § 850.
People v. Father Matthew & Co. Society, 41 Mich. 67. § 524.
People v. Ferguson, 8 Cow. (N. Y.) 102. §§ 750, 757.
People v. Fire Association, 92 N. Y. 311. § 7930.
People v. Fire Department, 31 Mich. 458, 463. §§ 819, 853, 881, 882, 884, 904, 946, 1013, 1019.
People v. Fisher, 14 Wend. (N. Y.) 1. § 1030.
People v. Fishkill & Co. Plank Road Co., 27 Barb. (N. Y.) 445. §§ 5383, 5908, 6626, 6444.
People v. Flagg, 46 N. Y. 401. § 1129.
People v. Flanagan, 66 N. Y. 237. § 590.
People v. Fleming, 7 Colo. 230. § 608.
People v. Fleming, 59 Hun (N. Y.) 518. § 3851.
People v. Flint, 64 Cal. 49. § 7578.
People v. Forquer, 1 Ill. 68. § 766.
People v. Frank, 28 Cal. 507, 520. §§ 7695, 7713.
People v. Friebie, 31 Cal. 146. § 2804.
People v. Gallagher, 4 Mich. 244. § 5482.
People v. Geneva College, 5 Wend. (N. Y.) 211, 220. § 6778.
People v. Gerke, 35 Cal. 677. § 2804.
People v. Gilbert, 44 Hun (N. Y.) 522. § 7935.
People v. Gilson, 103 N. Y. 389. §§ 5483, 5488.
People v. Globe Mut. Life Ins. Co., 60 How. Pr. (N. Y.) 57. § 6912.
People v. Gobles, 67 Mich. 475. § 611.
People v. Golden Rule, 114 Ill. 34. § 6791.
People v. Goss & Co. Man. Co., 99 Ill. 355, 361. §§ 2790, 2794.
People v. Grand & Co. Plank Road Co., 10 Mich. 400. §§ 68, 5408.
People v. Grand Rapids & Co. R. Co., 67 Mich. 5. § 5937.
People v. Hall, 3 Colo. 485. § 659.
People v. Hall, 80 N. Y. 117. § 6808.
People v. Halsey, 37 Ind. 344. § 7890.
People v. Hammill (Ill.), 17 N. Y. Rep. 799. § 614.
People v. Harper, 31 Ill. 357. §§ 599, 643.
People v. Hatch, 19 Ill. 283. § 537.
People v. Hawley, 3 Mich. 330. § 5482.
People v. Henshaw, 76 Cal. 436. § 611.
People v. Hibernia & Co. Bank, 51 Cal. 243. § 2804.
People v. Higgins, 15 Ill. 110. §§ 802, 801, 824.
People v. Hill, 7 Cal. 97. § 658.
People v. Hills, 1 Lans. (N. Y.) 202. §§ 768, 3897.
People v. Hillsdale & Co. Turnp. Co., 23 Wend. (N. Y.) 254. §§ 5938, 6611, 6626.
People v. Holihan, 29 Mich. 116. § 3879.
People v. Holladay, 25 Cal. 300. § 2913.
People v. Holstein-Friesian Assn., 41 Hun (N. Y.) 439. § 29.
People v. Home Ins. Co., 29 Cal. 534. § 2913.
People v. Home Ins. Co., 92 N. Y. 323. § 8120.
People v. Horn Silver Min. Co., 105 N. Y. 76, 84; affirmed, 143 U. S. 305. §§ 2900, 8101, 8102.
People v. Hurlbut, 24 Mich. 44. § 5470.
People v. Imlay, 20 Barb. (N. Y.) 68. §§ 12, 7952.
People v. Insurance Co., 30 Hun (N. Y.) 142. § 6998.
People v. Jackson & Co. R. Co., 9 Mich. 285. §§ 3879, 5478, 5479.
People v. Jobs, 7 Colo. 475. § 658.
People v. Jones, 17 Wend. 81. § 792.
People v. Judge of Wayne Circuit, 24 Mich. 38. § 8019.
People v. Kankakee River Imp. Co., 103 Ill. 491. §§ 6803, 6804.
People v. Keese, 27 Hun (N. Y.) 483. § 5438.
People v. Kelly, 5 Abb. N. Cas. (N. Y.) 383. § 5494.
People v. Kelly, 35 Barb. (N. Y.) 460. § 6477.
People v. Kent County, 35 Mich. 351. § 4435.
People v. Kerr, 27 N. Y. 183. § 5609.
People v. Kibler, 106 N. Y. 321. § 5483.
People v. Kingston & Co. Turnp. Co., 23 Wend. (N. Y.) 193. §§ 5908, 5915, 5928, 6611, 6612, 6792, 6793, 6804.
People v. Kip, 4 Cow. (N. Y.) 382. §§ 748, 766, 774, 6785, 6786.
People v. Kirsch, 67 Mich. 539. § 611.
People v. Knight, 13 Mich. 230. § 6778.
People v. La Coste, 37 N. Y. 192. § 776.
People v. Lake Shore & Co. R. Co., 11 Hun (N. Y.) 1; 70 N. Y. 220. §§ 4403, 4419.
People v. Law, 34 Barb. (N. Y.) 494. §§ 100, 5600, 7573, 7578.
People v. Lawrence, 41 N. Y. 137. §§ 611, 620.
People v. Lawrence, 36 Barb. (N. Y.) 189, 192. §§ 609, 626.
People v. Lawrence, 54 Barb. (N. Y.) 589. §§ 5811, 5938.
People v. Livingston, 6 Wend. (N. Y.) 526. § 4168.
People v. Long Island R. Co., 60 How. Pr. (N. Y.) 395. § 632.
People v. Loomis, 8 Wend. (N. Y.) 396. §§ 750, 785.
People v. Louisville & Co. R. Co., 120 Ill. 48. §§ 6098, 6239, 6240, 7826.
People v. Love, 19 Cal. 676. § 294.
People v. Lowber, 7 Abb. Pr. (N. Y.) 158. § 7774.
People v. Lynch, 51 Cal. 15. § 590.
People v. Mahaney, 13 Mich. 481. §§ 609, 622, 6808.
People v. Manhattan Co., 9 Wend. (N. Y.) 351. §§ 530, 1270, 1969, 3388, 5381, 6586, 6598, 6602, 6804.
People v. Manhattan Gas Works, 45 Barb. (N. Y.) 136; 1 Abb. Pr. (N. Y.) 404. §§ 7403, 7764, 7826.
People v. Marshall, 6 Ill. 672. §§ 565, 632.
People v. Martin, 48 Hun (N. Y.) 193. § 8099.
People v. Matterson, 17 Ill. 167. §§ 762, 766.
People v. Mauran, 5 Denio (N. Y.) 339. §§ 5791, 5799, 5811, 6938.
People v. Maynard, 15 Mich. 463. § 3879.
People v. Mayor, 7 How. Pr. (N. Y.) 812. § 1028.
People v. McAnn, 16 N. Y. 58. § 620.
People v. McCreery, 34 Cal. 432. §§ 2804, 2913.
People v. McCumber, 18 N. Y. 315. § 7546.
People v. McKelroy, 72 Mich. 446. § 636.
People v. McKinney, 41 Barb. (N. Y.) 516. § 700.
People v. McLean, 17 Hun (N. Y.) 204. § 8099.
People v. Medical Society, 32 N. Y. 187. §§ 856, 873, 901, 905.
People v. Medical Society, 24 Barb. (N. Y.) 570. §§ 799, 846, 856, 904, 905, 955, 1010, 1013, 4393, 4398.
People v. Mellen, 32 Ill. 181. § 619.
People v. Merchants & Co. Bank, 78 N. Y. 269. §§ 7085, 7101.
People v. Metropolitan Bank, 7 How. Pr. (N. Y.) 144. § 7774.
People v. Metzger, 47 Cal. 524. § 6803.
People v. Miller, 24 Mich. 458. § 4708.
People v. Miller, 39 Hun (N. Y.) 557. § 4335.
People v. Mitchell, 35 N. Y. 551. §§ 590, 1118, 1120.
People v. Mitchell, 45 Barb. 208. § 1118.
People v. Morris, 13 Wend. (N. Y.) 325. §§ 67, 632, 5499.
People v. Mott, 1 How. Pr. (N. Y.) 247. § 5222.
People v. Mulholland, 82 N. Y. 324. § 1025.
People v. Murray, 5 Hill (N. Y.) 468. § 5257.
People v. Musical & Co. Union, 47 Hun (N. Y.) 273. § 884.
People v. Mutual Trust Co., 96 N. Y. 10. § 210.
People v. Nally, 49 Cal. 482. § 658.
People v. National Savings Bank, 129 Ill. 618. §§ 1238, 6611, 6612.
People v. National Trust Co., 82 N. Y. 283. §§ 6753, 6998.
People v. Nelson, 3 Lans. (N. Y.) 394; 10 Abb. Pr. (N. Y.) 200; affirmed, 46 N. Y. 477. § 245.
People v. New York, 32 Barb. (N. Y.) 35; 10 Abb. Pr. (N. Y.) 144; 19 How. Pr. (N. Y.) 155. §§ 6807, 7774.
People v. New York, 32 Barb. (N. Y.) 102. § 7874.
People v. New York, 10 Wend. (N. Y.) 393. § 7826.
People v. New York & Co. R. Co., 104 N. Y. 58. § 7828.
People v. New York & Co. R. Co., 5 N. Y. Supp. 945. § 5511.
People v. New York Benevolent Society, 3 Hun (N. Y.) 361. § 910.
People v. New York Central R. Co., 24 N. Y. 485. § 5419.
People v. New York City Ct. Justices, 33 N. Y. St. Rep. 147; 19 Civ. Proc. Rep. (N. Y.) 413; 25 Abb. N. Cas. (N. Y.) 403; 11 N. Y. Supp. 773. § 8027.
People v. New York Commercial Assn., 18 Abb. Pr. (N. Y.) 271. §§ 843, 849, 851, 856, 857, 859, 864, 893, 897, 4395.
People v. New York Cotton Exchange, 8 Hun (N. Y.) 216. §§ 847, 851, 853, 871, 914.
People v. New York Infant Asylum, 122 N. Y. 190. §§ 3856, 6808.

- People v. New York Infant Asylum, 43 Hun (N. Y.), 640; 7 N. Y. St. Rep. 287. § 726.
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- People v. Oakland County Bank, 1 Dougl. (Mich.) 282. §§ 690, 1931, 7896.
- People v. O'Brien, 45 Hun (N. Y.), 519. §§ 6579, 6534.
- People v. O'Brien, 103 N. Y. 657. § 6700.
- People v. O'Brien, 111 N. Y. 136; 19 N. Y. St. Rep. 173, 45 Hun (N. Y.), 519. §§ 91, 5113, 5414, 5415, 5451, 5628, 5791, 5891, 6700, 6747, 6748, 7722.
- People v. O'Keefe, 79 Cal. 171. § 5038.
- People v. Olmstead, 45 Barb. (N. Y.) 644. § 6678.
- People v. Otis, 90 N. Y. 48. § 1128.
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- People v. Parks, 58 Cal. 624. § 617.
- People v. Paton, 5 N. Y. St. Rep. 313. § 7904.
- People v. Pease, 27 N. Y. 63. § 777.
- People v. Peck, 11 Wend (N. Y.) 604, 611. §§ 703, 707, 712, 745, 757, 3877.
- People v. People's Ins. Exch. 126 Ill. 466. § 7931.
- People v. Perrin, 56 Cal. 345. § 512.
- People v. Pfister, 57 Cal. 532. § 5932.
- People v. Pittsburgh & C. R. Co., 53 Cal. 694. §§ 5613, 5955.
- People v. Plank Road Co., 86 N. Y. 1. § 550.
- People v. Plymouth Plankroad Co., 32 Mich. 248. § 6626.
- People v. Police Comm'rs, 20 Hun (N. Y.), 402. § 825.
- People v. Police Comm'rs, 23 Hun (N. Y.) 353. § 825.
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- People v. Quick, 92 Ill. 580. § 4943.
- People v. Railroad Co., 11 Hun (N. Y.), 1; affirmed, 70 N. Y. 220. § 4428.
- People v. Railroad Co., 60 N. Y. Super. 456. § 4428.
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- People v. Remington, 19 Abb. N. Cas. (N. Y.) 350. § 7140.
- People v. Rensselaer & C. Co., 15 Wend (N. Y.) 113. §§ 6767, 6768, 6770, 6782, 6783, 6785, 6796, 6803, 6807.
- People v. Rice, 7 West. Rep. 642. § 636.
- People v. Richardson, 4 Cow. (N. Y.) 97, 103. §§ 6785, 6789, 6792, 6799, 6801, 6803, 6806.
- People v. Rickert, 8 Cow. (N. Y.) 226. § 5933 a.
- People v. Ridgley, 21 Ill. 65. §§ 6566, 6797.
- People v. River Raisin & C. Co., 12 Mich. 389, 390. §§ 5745, 6797, 6800, 6805.
- People v. Robinson, 64 Cal. 373. § 730.
- People v. Rochester, 44 Hun (N. Y.), 166. § 1024.
- People v. Rochester & Co., 76 N. Y. 294. § 7826.
- People v. Rome & C. R. Co., 103 N. Y. 95. § 6239.
- People v. Roper, 35 N. Y. 629. § 5571.
- People v. Royalton Turnp. Co., 11 Vt. 431. §§ 5938, 6611, 6626.
- People v. Runkel, 6 Johns. (N. Y.) 334. § 294.
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- People v. San Francisco, 27 Cal. 655. § 1118.
- People v. San Francisco Savings Union, 72 Cal. 199. § 2152.
- People v. Scannell, 7 Cal. 432. § 776.
- People v. Seaman, 5 Denio (N. Y.), 409, 412. §§ 750, 557, 761, 785, 788.
- People v. Security Life Ins. Co., 78 N. Y. 114. §§ 7219, 7226.
- People v. Selfridge, 52 Cal. 331. §§ 221, 236.
- People v. Seneca Lake & C. Grape & C. Co., 52 Hun (N. Y.), 174; 5 N. Y. Supp. 136. §§ 6693, 6701.
- People v. Shaw, 14 Ill. 476. § 6785.
- People v. Shearer, 30 Cal. 645, 656. § 2804.
- People v. Shepard, 36 N. Y. 285, 289. § 5419.
- People v. Sierra Buttes & C. Min. Co., 39 Cal. 511, 514. § 6640.
- People v. Simonson, 18 N. Y. Supp. 37; 27 Abb. N. Cas. 422. §§ 6890, 4448.
- People v. Smith, 55 N. Y. 135. § 1132.
- People v. Smyth, 23 Cal. 21. § 4708.
- People v. Sneath, 66 Pa. St. 28. § 2913.
- People v. Spencer, 55 N. Y. 1. § 1132.
- People v. Squire, 107 N. Y. 593. § 5498.
- People v. Stanford, 77 Cal. 360. § 7644.
- People v. State Ins. Co., 19 Mich. 392. § 622.
- People v. State Treasurer, 24 Mich. 468. § 6847.
- People v. Steamship Co., 50 Barb. (N. Y.) 280. §§ 4412, 4427, 4431.
- People v. Steele, 2 Barb. (N. Y.) 397. § 763.
- People v. Sterling Man. Co., 82 Ill. 457. §§ 958, 1913, 2451.
- People v. Stevens, 5 Hill (N. Y.), 616. § 6808.
- People v. St. Francis Benevolent Soc., 24 How. Pr. (N. Y.) 216. §§ 850, 881, 904, 4394, 4398.
- People v. St. George's Society, 28 Mich. 261. §§ 857, 861, 893, 913, 914, 1047, 4400.
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- People v. Stockton & C. R. Co., 49 Cal. 414, 415. § 4861.
- People v. Stratton, 28 Cal. 382. § 6799.
- People v. Supervisors, 4 Hill (N. Y.), 20. § 2268.
- People v. Sweeting, 2 Johns. (N. Y.) 184. §§ 783, 6783.
- People v. Taylor, 3 Denio (N. Y.), 33. § 5003.
- People v. Thatcher, 55 N. Y. 525. §§ 777, 6797, 6804, 6805, 6806.
- People v. Third Ave. R. Co., 45 Barb. (N. Y.) 63. § 7774.
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- People v. Throop, 12 Wend. (N. Y.) 183. §§ 936, 1020, 1021, 4433, 5222.
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- People v. Tinsdale, 10 Abb. Pr. (N. s.) (N. Y.) 374. § 4986.
- People v. Trinity Church, 22 N. Y. 44; affirming 30 Barb. (N. Y.) 537. § 7837.
- People v. Troy & C. Co. 37 How. Pr. (N. Y.) 427. § 7826.
- People v. Troy House Co., 44 Barb. (N. Y.) 625. §§ 202, 1218.
- People v. Trustees, 5 Wend. (N. Y.) 211. §§ 690, 766.
- People v. Trustees, 70 N. Y. 23. § 5394.
- People v. Twaddell, 18 Hun (N. Y.), 427. §§ 7371, 1052.
- People v. Ulster & C. R. Co., 34 N. Y. St. Rep. 983. 12 N. Y. Supp. 303. § 7642.
- People v. Utica Insurance Co., 15 Johns. (N. Y.) 358; §§ 11, 775, 777, 5030, 5638, 6040, 6770, 6797, 6805, 6807, 7790.
- People v. Vail, 20 Wend. (N. Y.) 12. §§ 757, 792.
- People v. Van Slyck, 4 Cow. (N. Y.) 297. §§ 757, 761, 766.
- People v. Vein Coal Co., 10 How. Pr. (N. Y.) 186. § 2445.
- People v. Wabash & C. R. Co., 104 Ill. 476. §§ 5539, 5548.
- People v. Waite, 70 Ill. 25. §§ 6783, 6784, 6785, 6786.
- People v. Walker, 9 Mich. 328. § 4428.
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- People v. Wayne Circuit Court, 24 Mich. 38. § 7530.
- People v. Weaver, 100 U. S. 539. §§ 2557, 2869, 2872, 2883.
- People v. Webster, 10 Wend. (N. Y.) 554. § 3857.
- People v. Wemple, 117 N. Y. 136. §§ 2806, 8120.
- People v. Wemple, 129 N. Y. 543. §§ 8101, 8120, 8121.
- People v. Wemple, 133 N. Y. 323. §§ 8100, 8102.
- People v. West, 106 N. Y. 293. § 5483.

- People v. Wheaton College, 40 Ill. 186. § 1051.
 People v. Whitcomb, 55 Ill. 172. § 3879.
 People v. White, 11 Abb. Pr. (N. Y.) 168. § 748.
 People v. Whiteside, 23 Wend. 9; reversed, 26 Wend. (N. Y.) 634. § 3916.
 People v. Whitlock, 92 N. Y. 191. § 611.
 People v. Williams, 56 Cal. 647. § 29.
 People v. Williams, 145 Ill. 573. § 4611.
 People v. Williamsburg Turnp. & Co., 47 N. Y. 586. § 6626.
 People v. Wright, 70 Ill. 388, 396. § 611.
 People v. Young Men & C. Society, 41 Mich. 67. § 1018.
 People v. Young Men's & C. Soc., 65 Barb. (N. Y.) 357. §§ 701, 881, 882, 891.
 People's Bank v. Gridley, 91 Ill. 457. § 2409.
 People's Bank v. Kurtz, 99 Pa. St. 344. § 2740.
 People's Bank v. Mechanics' Nat. Bank, 62 How. Pr. (N. Y.) 422. § 7276.
 People's Bank v. Shryock, 48 Md. 427. § 1084.
 People's Brewing Co. v. Boebinger, 40 La. An. 277. § 7397.
 People's Ferry Co. v. Balch, 8 Gray (Mass.), 303. §§ 1235, 1236, 1332.
 People's Gaslight & C. Co. v. Chicago Gaslight & C. Co., 20 Ill. App. 473. § 6016.
 People's Mut. Ins. Co. v. Allen, 10 Gray (Mass.), 297. § 7235.
 People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.), 440. §§ 717, 718, 719, 4524.
 People's Sav. Bank v. Collins, 27 Conn. 142. § 7665.
 People's Sav. Bank v. Tripp, 13 R. I. 621. § 5380.
 Peoria & C. R. Co. v. Coal Valley Mining Co., 68 Ill. 489. §§ 365, 386, 387.
 Peoria & C. R. Co. v. Duggan, 109 Ill. 537. §§ 595, 5504.
 Peoria & C. R. Co. v. Elting, 17 Ill. 429. §§ 73, 77, 1278.
 Peoria & C. R. Co. v. Laue, 83 Ill. 448. § 5884.
 Peoria & C. R. Co. v. Peoria & C. R. Co., 66 Ill. 174. § 5620.
 Peoria & C. R. Co. v. Preston, 35 Iowa, 115. §§ 72, 74, 1278, 1724, 1725.
 Peoria & C. R. Co. v. Thompson, 103 Ill. 187. §§ 6058, 6067, 6068.
 Peoria Bridge Asso. v. Loomis, 20 Ill. 235. § 6377.
 Peoria Ins. Co. v. Warner, 28 Ill. 429, 433. §§ 7539, 8019.
 Pepper v. Chambers, 7 Ex. 226. § 4498.
 Pepper v. Haight, 20 Barb. (N. Y.) 429. § 7958.
 Peppin v. Cooper, 2 Barn. & Ald. 431. § 4904.
 Percy v. Millaudon, 8 Mart. (n. s.) (La.), 68; 3 La. 568. §§ 3948, 3979, 4045, 4102, 4479, 4481, 4582, 4743, 4752, 5222.
 Perdicaris v. Charleston Gas Light Co., Chase Dec. (U. S.) 435. § 2430.
 Perdicaris v. Trenton & C. Bridge Co., 29 N. J. L. 367. § 3826.
 Perdue v. Ellis, 18 Ga. 586. § 1025.
 Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140. §§ 6243, 6245.
 Perine v. Grand Lodge, 48 Minn. 82. § 7647.
 Perkins, Re (C. A.), 24 Q. B. Div. 613. § 2323.
 Perkins v. Bradley, 24 Vt. 66. § 4722.
 Perkins v. Church, 31 Barb. (N. Y.) 84. §§ 3352, 3169, 3512, 3639, 7883.
 Perkins v. Hendryx, 40 Fed. Rep. 657. § 7556.
 Perkins v. Jones, 20 Ind. 499. § 6291.
 Perkins v. Lewis, 24 Ill. 208. § 1118.
 Perkins v. Mayville Dist. Campmeeting Asso. (Ky.), 10 Ky. L. Rep. 781. § 4669.
 Perkins v. Missouri & C. R. Co., 55 Mo. 201. §§ 6287, 6298, 6301, 6307, 6309, 6383, 6388.
 Perkins v. Portland & C. R. Co., 47 Me. 573. §§ 4900, 5298, 5371.
 Perkins v. Sanders, 56 Miss. 733. §§ 3073, 3539, 3540, 3545.
 Perkins v. Union Button-Hole & C., 12 Allen (Mass.), 273. § 4458.
 Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645. §§ 4627, 4681, 5024.
 Perley v. Chandler, 6 Mass. 454. § 6373.
 Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149. § 957.
 Perrin v. Oliver, 1 Minn. 202. § 89.
 Perrin v. Sargeant, 33 Vt. 84. § 3021.
 Perrine v. Chesapeake & Canal Co., 9 How. (U. S.) 172. §§ 5534, 5638, 5559.
 Perrine v. Farr, 22 N. J. L. 356. § 5593.
 Perrine v. Fireman's Ins. Co., 22 Ala. 575. § 3250.
 Perrine v. Leachman, 10 Ala. 140. § 5018.
 Perring v. Hone, 4 Bing. 28. § 1877.
 Perrassee, 8 Ir. Eq. 111. § 7128.
 Perry v. Council Bluffs City Water Works Co., 67 Hun (N. Y.), 456; 22 N. Y. Supp. 151. §§ 4721, 4729.
 Perry v. Dover, 12 Pick. (Mass.) 206. § 718.
 Perry v. Erie Transf. Co., 49 N. Y. St. Rep. 36. § 8009.
 Perry v. Erie Transf. Co., 19 N. Y. Supp. 239. § 8009.
 Perry v. Hale, 143 Mass. 510. § 1460.
 Perry v. Hoadley, 19 Abb. N. Cas. (N. Y.) 76. §§ 1216, 1217.
 Perry v. Holloway, 6 La. An. 265. § 1084.
 Perry v. Little Rock & C. R. Co., 44 Ark. 383; 37 Ark. 164. §§ 486, 489, 3433.
 Perry v. Oriental Hotel Co., L. R. 5 Ch. 420. § 6849.
 Perry v. Pearson, 135 Ill. 218. § 4034.
 Perry v. Price, 1 Mo. 645. § 5059.
 Perry v. Price, 1 Mo. 664. § 5296.
 Perry v. Simpson Waterproof Man. Co., 37 Conn. 520. §§ 4088, 4642, 5215.
 Perry v. Turner, 55 Mo. 418, 426. §§ 3088, 3345, 3347, 3348, 3416, 3468, 3500, 3502, 3632, 6666, 6670, 6672.
 Perry v. Tuscaloosa Cotton-Seed Oil Mill Co., 93 Ala. 364. §§ 1691, 3876, 4016, 4023, 4024, 4493.
 Persch v. Simmons, 3 N. Y. Supp. 783. §§ 3064, 3422, 3469.
 Person v. Warren R. Co., 32 N. J. L. 441. § 7826.
 Persse & Broek's Paper Works v. Willett, 19 Abb. Pr. (N. Y.) 416. § 6599.
 Peru Iron Co., Ex parte, 7 Cow. (N. Y.) 540. § 5785.
 Peruvian Railways Co. v. Thames & C. Ins. Co., L. R. 2 Ch. 617. §§ 5211, 5735.
 Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205. § 1012.
 Peter v. Kendal, 6 Barn. & C. 703. §§ 5362, 6577.
 Peterborough R. Co. v. Nashua & C. R. Co., 59 N. H. 385. §§ 1111, 2052.
 Peterborough R. Co. v. Wood, 61 N. H., 418. §§ 779, 4704, 4731.
 Peterhoff, The, 5 Wall. (U. S.) 28. § 1094.
 Peters v. Bain, 133 U. S. 670, 692. § 3266.
 Peters v. Boston & C. R. Co., 114 Mass. 127. §§ 337, 5894.
 Peters v. Fort Madison Construction Co., 72 Iowa, 405. § 6089.
 Peters v. Foster, 56 Hun (N. Y.), 607; 32 N. Y. St. Rep. 174; 10 N. Y. Supp. 339. § 3537.
 Peters v. Lincoln & C. R. Co., 2 McCrary (U. S.), 275; 12 Fed. Rep. 513. § 5832.
 Peters v. Lincoln & C. R. Co., 14 Fed. Rep. 319. § 5892.
 Peters v. Neely, 16 Lea (Tenn.), 275. § 8049.
 Peters v. St. Louis & C. R. Co., 23 Mo. 107. § 5391.
 Petersburg v. Metzker, 21 Ill. 205. § 5638.
 Petersburg Savings & C. Co. v. Lumsden, 75 Va. 327. §§ 1661, 2325.
 Petersen v. Chemical Bank, 32 N. Y. 21. § 7339.
 Petersfield v. Vickers, 3 Coldw. (Tenn.) 205. § 1017.
 Peterson v. Clark, 15 Johns. (N. Y.) 203. § 6189.
 Peterson v. New York, 17 N. Y. 449. §§ 5045, 5046, 5176.
 Peterson v. Sinclair, 83 Pa. St. 250. §§ 3576, 7813.
 Petrie v. Peck, 21 Wend. (N. Y.) 172. § 5273.
 Petrie v. Fitzgerald, 1 Daly (N. Y.), 405. § 7552.
 Petrie v. Guelph Lumber Co., 11 Can. S. C. 451. § 469.
 Petrie v. Wright, 6 Smedes & M. (Miss.) 647. §§ 5045, 5175, 5181.
 Pettibone v. McGraw, 6 Mich. 441. §§ 3088, 3095, 3500.
 Pettibone v. Toledo & C. R. Co., 148 Mass. 411. § 6100.
 Pettingill v. Androscooggin R. Co., 51 Me. 370. §§ 4733, 7805.
 Pettis v. Atkins, 60 Ill. 454. §§ 417, 2926.
 Pettis v. Johnson, 56 Ind. 139. § 1017.
 Pettis v. Kellogg, 7 Cush. (Mass.) 456. § 6145.
 Pettit v. Muskegon Booming Co., 74 Mich. 214. § 7524.
 Pew v. First Nat. Bank, 130 Mass. 391. §§ 4380, 4384, 4385, 5182.
 Psychaud v. Hood, 23 La. An. 732. § 4155.
 Peyton v. Lamar, 42 Ga. 131. § 6839.
 Peyton v. St. Thomas' Hospital, 3 Car. & P. 363. § 4893.
 Pfeiffer v. Lansberg Brake Co., 44 Mo. App. 59. § 4707.
 Pfister v. Gerwig, 122 Ind. 567. § 5987.

- Pfister v. Milwaukee & C. R. Co., 83 Wis. 36. §§ 6039, 6031.
- Pfohl v. Simpson, 74 N. Y. 137. §§ 3434, 3515, 3520, 3809.
- Phalen v. Clark, 19 Conn. 421. §§ 7953, 7953.
- Phalen v. Com., 8 How. (U. S.) 163; affirming 1 Rob. (Va.) 713. § 5189.
- Phelan v. Hazard, 5 Dill. (U. S.) 45. §§ 1578, 1604, 1605, 1618, 1624, 1642, 1644, 1680.
- Phelan v. Moss, 67 Pa. St. 59. § 6083.
- Phelps v. Farmers' & C. Bank, 28 Conn. 269, §§ 7, 1064, 2172, 2173.
- Phelps v. Foster, 18 Ill. 309. § 6339.
- Phelps v. Gilchrist, 28 N. H. 266. § 3381.
- Phelps v. Lyle, 2 Per. & D. 314; 10 Ad. & El. 113; 3 Jur. 479. §§ 3833, 3887.
- Phelps v. Masterton & C. Stone Dressing Co., 3 Rob. (N. Y.) 517. § 7386.
- Phelps v. O'Brien County, 2 Dill. (U. S.) 518. § 7467.
- Phelps v. Wait, 30 N. Y. 78. §§ 4091, 4096.
- Phenix Bank v. Curtis, 14 Conn. 437. §§ 7664, 7665, 7666, 7669.
- Philadelphia v. Com., 52 Pa. St. 451. § 5380.
- Philadelphia v. Empire & C. R. Co., 3 Brews. (Pa.) 570. § 5516.
- Philadelphia v. Greble, 38 Pa. St. 339. § 7759.
- Philadelphia v. Ridge Avenue Pass. R. Co., 102 Pa. St. 190. §§ 2301, 2302, 2307.
- Philadelphia v. Ridge Avenue Pass. R. Co., 6 Pa. County Ct. 233. § 619.
- Philadelphia v. Thirteenth & C. R. Co., 1 Leg. Gaz. Rep. (Pa.) 183. § 337.
- Philadelphia v. Weller, 4 Brewst. (Pa.) 24. § 1476.
- Philadelphia v. Western Union Tel. Co., 40 Fed. Rep. 615. § 5562.
- Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.) 328. § 7853.
- Philadelphia & C. Co. v. Hotchkiss, 82 N. Y. 471. §§ 4228, 4233, 4358.
- Philadelphia & C. R. Co.'s Appeal, 70 Pa. St. 355. §§ 5364, 7758, 7849, 7857.
- Philadelphia & C. R. Co.'s Appeal, 102 Pa. St. 123. §§ 5435, 5615.
- Philadelphia & C. R. Co., Re, 6 Whart. (Pa.) 25. § 647.
- Philadelphia & C. R. Co. v. Bowers, 4 Houst. (Del.) 505. §§ 5361, 5366, 5337.
- Philadelphia & C. R. Co. v. Catawissa R. Co., 53 Pa. St. 20. § 4498.
- Philadelphia & C. R. Co. v. Com., 101 Pa. St. 80. § 7000.
- Philadelphia & C. R. Co. v. Cowell, 28 Pa. St. 329. §§ 1377, 1879, 1909, 1911, 2229, 4128, 5298, 5311.
- Philadelphia & C. R. Co. v. Derby, 14 How. (U. S.) 468. §§ 4930, 6283, 6228, 6357.
- Philadelphia & C. R. Co. v. Fidelity Ins. & C. Co., 103 Pa. St. 216. § 6109.
- Philadelphia & C. R. Co. v. Hickman, 28 Pa. St. 318. §§ 1322, 1332, 1577, 1644, 7734.
- Philadelphia & C. R. Co. v. Howard, 13 How. (U. S.) 307. § 410.
- Philadelphia & C. R. Co. v. Kent County R. Co., 5 Houst. (Del.) 127. § 7893.
- Philadelphia & C. R. Co. v. Larkin, 47 Md. 155. §§ 6333, 6390.
- Philadelphia & C. R. Co. v. Lewis, 33 Pa. St. 33. §§ 5611, 6050, 6051, 6053, 6062, 6032.
- Philadelphia & C. R. Co. v. Love, 125 Pa. St. 488. § 4360.
- Philadelphia & C. R. Co. v. Maryland, 10 How. (U. S.) 376. § 368.
- Philadelphia & C. R. Co. v. Pennsylvania, 122 U. S. 326. § 8106.
- Philadelphia & C. R. Co. v. Quigley, 21 How. (U. S.) 202, 213. §§ 6276, 6279, 6310, 6385, 6388, 6389, 6394.
- Philadelphia & C. R. Co. v. Smith, 103 Pa. St. 195. § 6109.
- Philadelphia & C. R. Co. v. Wilt, 4 Whart. (Pa.) 143. § 6298.
- Philadelphia & C. R. Co. v. Woelpper, 64 Pa. St. 366. §§ 6124, 6142, 6143, 6144.
- Philadelphia & C. Sewing Machine Co., Re, 6 Pa. Co. Ct. 65. § 6700.
- Philadelphia & C. Steamship Co. v. Pennsylvania, 122 U. S. 326, §§ 5562, 7878, 8105, 8106, 8117, 8118, 8119.
- Philadelphia Bank v. Officer, 12 Serg. & R. (Pa.) 49. §§ 7733, 7737.
- Philadelphia Wire Association v. New York, 119 U. S. 110. §§ 674, 7877.
- Philadelphia Loan Co. v. Towner, 13 Conn. 249, 262. § 6040.
- Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172. §§ 7088, 7089, 7096.
- Philadelphia Savings Institution, Case of, 1 Whart. (Pa.) 461. § 1947.
- Philippi v. Philippe, 115 U. S. 151. § 3774.
- Phillips v. Com., 98 Pa. St. 394. § 6808.
- Phillips v. Wickham, 1 Paige (N. Y.), 590. §§ 736, 781, 1052, 6578, 6655, 6658.
- Phillip's Church v. Zion Presbyterian Church, 23 S. C. 297. § 5070.
- Phillip v. Aurora Lodge, 87 Ind. 505. § 4001.
- Phillips, Re, 18 Beav. 629. §§ 1552, 1579, 1798.
- Phillips v. Albany, 28 Wis. 340. §§ 591, 611, 614, 618.
- Phillips v. Allegheny Car Co., 82 Pa. St. 368. § 2071.
- Phillips v. Berger, 2 Barb. (N. Y.) 608. § 2435.
- Phillips v. Campbell, 43 N. Y. 721. §§ 4831, 4833, 4835.
- Phillips v. Coffee, 17 Ill. 154. §§ 5104, 5106.
- Phillips v. Cook, 21 Wend. (N. Y.) 339. § 1084.
- Phillips v. Covington & C. Bridge Co., 2 Met. (Ky.) 219. §§ 246, 610, 614.
- Phillips v. Evans, 64 Mo. 17. § 7507.
- Phillips v. Germania Mills, 20 Abb. N. Cas. (N. Y.) 381. § 7904.
- Phillips v. Goldtree, 74 Cal. 151. §§ 7661, 7672.
- Phillips v. Hall, 8 Wend. 610. § 2519.
- Phillips v. Library Co., 141 Pa. St. 462. § 8030.
- Phillips v. Mayor, 1 Hilt. (N. Y.) 483. § 624.
- Phillips v. Moore, 100 U. S. 208. 7964.
- Phillips v. New Orleans Gas Light Co., 25 La. An. 413. § 2044.
- Phillips v. Newton, 12 R. I. 489. § 6860.
- Phillips v. State, 29 Ga. 105. § 7756.
- Phillips v. Wicks, 38 N. Y. Super. 74. § 7162.
- Phillips v. Winslow, 18 B. Mon. (Ky.), 431, 445. §§ 6142, 6194.
- Phillips v. Wortendyke, 31 Hun (N. Y.), 182. § 4669.
- Phillips Academy v. Davis, 11 Mass. 113. §§ 1175, 1205.
- Phillips Academy v. King, 12 Mass. 546. §§ 5809, 5810.
- Phillipsburgh Bank v. Lackawanna R. Co., 27 N. J. L. 203. § 8060.
- Phillipson v. Egremont, 6 Ad. & El. (N. s.) 587; 8 Jur. 1164. §§ 3357, 3399.
- Philomath College v. Hartless, 6 Or. 158. §§ 1206, 1207.
- Phinizy v. Murray, 83 Ga. 747. § 2183.
- Phinney v. Baldwin, 16 Ill. 108. § 6114.
- Phipps v. Jones, 20 Pa. St. 260. § 1159.
- Phipps v. Mansfield, 62 Ga. 299. § 7756.
- Phoenix Bank v. Donnell, 40 N. Y. 410. §§ 7658, 7659.
- Phoenix Ins. Co., v. Hamilton, 14 Wall. (U. S.) 508. §§ 1377, 1809.
- Phoenix Ins. Co. v. Pratt, 36 Minn. 409. § 4980.
- Phoenix Ins. Co. v. Welch, 29 Kan. 672. §§ 7930, 7931.
- Phoenix Iron Co. v. Com., 59 Pa. St. 104. §§ 2890, 2892.
- Phoenix Iron Co. v. Com., 113 Pa. St. 563. §§ 4427, 4431.
- Phoenix Iron Co. v. New York Wrought Iron Railroad Chair Co., 27 N. J. L. 431. § 7255.
- Phoenix Mut. Life Ins. Co. v. Holloway, 51 Conn. 310. § 4873.
- Phoenix Warehousing Co. v. Badger, 67 N. Y. 294. §§ 528, 1151, 1181, 1975, 3520.
- Phoenix Warehousing Co. v. Badger, 6 Hun (N. Y.), 203. §§ 1311, 1904.
- Phoenixville v. Phoenix Iron Co., 45 Pa. St. 135. §§ 6373, 6375.
- Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43. §§ 1521, 1553.
- Phosphate Sewage Co. v. Hartmont, 5 Ch. Div. 394, 441. §§ 458, 469.
- Platt v. Covington & C. Bridge Co., 8 Bush (Ky.), 31. § 5399.
- Platt v. People, 29 Ill. 54. § 1118.
- Pickard v. Pullman Southern Car Co., 117 U. S. 34. §§ 5460, 5998, 7878, 8107, 8125.
- Pickard v. Sears, 6 Ad. & El. 469. §§ 2572, 5246.
- Pickard v. Sears, 6 Ad. & El. 474; 2 Nev. & P. 491. § 2572.
- Pickens v. Yarborough, 26 Ala. 417. § 2661.
- Pickering's Case, L. R. 6 Ch. 525, §§ 4022, 4025, 4134, 6074.

TABLE OF CASES CITED. Pickering—Pittsburgh

Pickering, *Ex parte*, L. R. 4 Ch. 58. § 3208.
 Pickering v. Stephenson, L. R. 14 Eq. 322, 340. § 4519.
 Pickering v. Templeton, 2 Mo. App. 424. §§ 1138, 1313, 1513, 1518, 1550, 1577, 1579, 1953, 1974, 3006, 3729.
 Pickett v. Merchants' Nat. Bank, 32 Ark. 346. § 4943.
 Pickett v. School District, 25 Wis. 551. §§ 457, 458, 4043, 4044, 4060.
 Pickett v. Trustees, 8 Ark. 224. § 7669.
 Pie v. Danbury, 3 Brown C. O. 556. § 6141.
 Pier v. George, 86 N. Y. 613; 20 Hun (N. Y.), 210. §§ 3393, 4180, 4243, 4244, 4245.
 Pier v. George, 17 Hun (N. Y.), 207. §§ 3090, 6527.
 Pier v. George, 20 Hun (N. Y.), 210. §§ 4250, 4359.
 Pierly, Hanmore, 86 N. Y. 95. §§ 4243, 4244, 4245.
 Pierce v. Andrews, 6 Cnsh. (Mass.) 4. § 5246.
 Pierce v. Benjamin, 14 Pick. (Mass.) 351. § 2471.
 Pierce v. Bryant, 5 Allen (Mass.), 91. § 4216.
 Pierce v. Burroughs, 58 N. H. 302. § 2199.
 Pierce v. Carleton, 12 Ill. 358. § 6934.
 Pierce v. Chicago & C. R. Co., 36 Wis. 283. §§ 8077, 8078.
 Pierce v. Com., 104 Pa. St. 150. § 754.
 Pierce v. Concord Railroad, 51 N. H. 590, 593. § 5834.
 Pierce v. Emery, 32 N. H. 484. § 5353, 5355, 5356, 6133, 6141, 6142, 6147, 6162.
 Pierce v. Equitable Life Assurance Society, 145 Mass. 56. §§ 4558, 4564.
 Pierce v. Gilson, 9 Vt. 216. § 2455.
 Pierce v. Jackson, 6 Mass. 242. § 1084.
 Pierce v. Jersey Waterworks Co., L. R. 5 Ex. 209 § 1736.
 Pierce v. Milwaukee & C. R. Co., 24 Wis. 551. §§ 6141, 6146.
 Pierce v. Milwaukee Co., 38 Wis. 253. §§ 3038, 3476, 3481, 3482, 3486, 3493, 3519, 7804.
 Pierce v. New Orleans Building Co., 9 La. 397. §§ 706, 725, 727.
 Pierce v. O'Brien, 129 Mass. 314, 315. § 7337.
 Pierce v. Partridge, 3 Met. (Mass.) 44. § 4459.
 Pierce v. Robie, 39 Me. 205. §§ 7595, 7596.
 Pierce v. Somersworth, 10 N. H. 369. § 294.
 Pieri v. Mayor, 42 Miss. 493. § 1024.
 Pierpont v. Crouch, 10 Cal. 315. § 603.
 Pierson v. Bank of Washington, 3 Cranch C. C. (U. S.) 363. §§ 2420, 2561, 3248.
 Pierson v. Cronk, 26 Abb. N. Cas. (N. Y.) 25. § 4109.
 Pierson v. Morgan, 20 Abb. New Cas. 428; 4 N. Y. Supp. 898. § 2033.
 Pierson v. Thompson, 1 Edw. (N. Y.) 212. §§ 1553, 4380, 4384, 4385.
 Piggett v. Thompson, 3 Bos. & Pul. 147. § 7597.
 Pigot v. Cubley, 15 Com. B. (N. s.) 701. § 2656.
 Pike v. Bacon, 21 Me. 280. § 5295.
 Pike v. Bangor & C. R. Co., 68 Me. 445. §§ 1706, 1733, 3539.
 Pike v. Martindale, 91 Mo. 268. § 3531.
 Pike Co. v. Rowland, 94 Pa. St. 238. § 3936.
 Pilbrow v. Pilbrow's Atmospheric & Co., 5 O. B. 440. § 7710.
 Pilcher v. Brayton, 17 Hun (N. Y.), 429. § 3143.
 Pillow v. Roberts, 13 How. (U. S.) 472; Hemp. (U. S.) 634. § 5070.
 Pim's Case, 3 De Gex & Sm. 11; 1 Mac. & G. 291. § 1529, 3198, 3330.
 Pim v. Nicholson, 6 Ohio St. 176. § 603.
 Pinchain v. Collard, 13 Tex. 333. § 7117.
 Pinegrove Township v. Talcott, 19 Wall. (U. S.) 666. § 5426.
 Pine River Bank v. Hodsdon, 46 N. H. 114. § 5752.
 Pingry v. Washburn, 1 Aik. (Vt.) 264. § 5381.
 Pinkerton v. Gilbert, 22 Ill. App. 568. § 6312.
 Pinkerton v. Manchester & C. R. Co., 42 N. H. 424. §§ 2304, 2375, 2409, 2418, 2479, 2591, 2719.
 Pinkerton v. Verberg, 30 Cent. L. J. 352. § 1017.
 Pinkett v. Wright, 2 Hare, 120. §§ 2317, 2643.
 Pinkney, *Re*, 47 Kan. 89. § 6402.
 Pino v. Merchants' Mutual Ins. Co., 19 La. An. 214. § 5265.
 Pioneer Gold Min. Co. v. Baker, 20 Fed. Rep. 4. §§ 4456, 6510.
 Pioneer Paper Co., *Re*, 36 How. Fr. (N. Y.) 111. §§ 731, 765, 782.
 Piper's Case, 2 Browne (Pa.), 59. § 5338.
 Piper v. Chappell, 14 Mees. & W. 624. §§ 849, 1040.
 Piper v. Rhodes, 30 Ind. 309. § 511.
 Piqua Branch of State Bank v. Knoop, 16 How. (U. S.) 369. §§ 5381, 5539, 5570.
 Pirie v. Tvedt, 115 U. S. 41. § 7474.

Piscataqua & Co. v. Hill, 60 Me. 178, 182. §§ 4121, 4126.
 Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35. §§ 5393, 5399, 5401, 5453, 5615, 5616, 6342, 6370.
 Piscataqua Ferry Co. v. Jones, 39 N. H. 491. §§ 1149, 1224, 1230, 1311, 1393, 1787.
 Piscataqua Fire & Ins. Co. v. Hill, 60 Me. 178. §§ 3562, 4583.
 Pitcher v. Board of Trade, 20 Ill. App. 319. § 4396.
 Pitcher v. Chicago Board of Trade, 121 Ill. 412. §§ 843, 893, 897, 909.
 Pitchford v. Davis, 5 Mees. & W. 2. §§ 1235, 1320, 1332, 1577, 1728, 1732, 1735, 1800.
 Pitman, *Ex parte*, 12 Ch. Div. 707. § 5700.
 Pitman v. Kintner, 5 Blackf. (Ind.) 250. §§ 5126, 5132.
 Pitot v. Johnson, 33 La. An. 1286. §§ 1032, 2621, 2626.
 Pits v. James, Hobart, 122, 124. § 286.
 Pitt v. Snowden, 3 Atk. 750. § 6977.
 Pitts v. Shubert, 11 La. 288. §§ 5298, 5299.
 Pittsburgh & C. R. Co., Appeal of, 122 Pa. St. 511. §§ 5618, 5619.
 Pittsburgh's Appeal, 123 Pa. St. 374. § 24.
 Pittsburgh v. Craft, 1 Pitts. (Pa.) 77. § 294.
 Pittsburgh v. Grider, 22 Pa. St. 54. § 8358.
 Pittsburgh v. Scott, 1 Pa. St. 309. §§ 5279, 5591, 5592, 5593, 5595, 5596, 6359.
 Pittsburgh & C. Mining Co. v. Quintrell, 91 Tenn. 693. § 5321.
 Pittsburgh & C. R. Co. v. Allegheny Co., 63 Pa. St. 125, 136. §§ 1963, 2236, 5353, 6140.
 Pittsburgh & C. R. Co. v. Allegheny Co., 79 Pa. St. 210. § 4874.
 Pittsburgh & C. R. Co. v. Applegate, 21 W. Va. 172. §§ 1224, 7734.
 Pittsburgh & C. R. Co. v. Bedford & C. Co., 81½ Pa. St. 104. § 5355.
 Pittsburgh & C. R. Co. v. Benwood Iron Works, 31 W. Va. 710. § 5591.
 Pittsburgh & C. R. Co. v. Biggar, 34 Pa. St. 455; §§ 1278, 1287, 1308.
 Pittsburgh & C. R. Co. v. Byers, 32 Pa. St. 22. §§ 1976, 1977, 1996, 2008.
 Pittsburgh & C. R. Co. v. Clarke, 29 Pa. St. 146. §§ 1143, 1146, 2389, 2392, 2499, 3224, 3239, 3262.
 Pittsburgh & C. R. Co. v. Columbus & C. R. Co., 8 Biss. (U. S.) 456. §§ 5881, 5894, 5896.
 Pittsburg & C. R. Co. v. Com., 68 Pa. St. 73; 3 Brewst. (Pa.) 355. § 8130.
 Pittsburg & C. R. Co. v. Com., 101 Pa. St. 192. § 6424.
 Pittsburg & C. R. Co. v. Com. (Pa.), 10 Am. & Eng. Rail. Cas. 321. § 6429.
 Pittsburg & C. R. Co. v. Donahue, 70 Pa. St. 119. §§ 6298, 6300, 6308.
 Pittsburg & C. R. Co. v. Fierst, 96 Pa. St. 144. §§ 258, 277.
 Pittsburg & C. R. Co. v. Gazzam, 32 Pa. St. 340. §§ 1146, 5306.
 Pittsburg & C. R. Co. v. Gilleland, 56 Pa. St. 445. §§ 6313, 6345.
 Pittsburg & C. R. Co. v. Graham, 36 Pa. St. 77. §§ 1996, 2003.
 Pittsburg & C. R. Co. v. Keokuk & C. Co., 131 U. S. 371. §§ 5298, 5300, 5303, 5313, 5318, 5872, 5880, 5970, 5983, 5984, 5999, 6000, 6001.
 Pittsburg & C. R. Co. v. Lyon, 123 Pa. St. 140. §§ 1022, 6377.
 Pittsburg & C. R. Co. v. Plummer, 37 Pa. St. 413. § 1317.
 Pittsburg & C. R. Co. v. Reich, 101 Ill. 157. §§ 320, 321.
 Pittsburg & C. R. Co. v. Ruby, 38 Ind. 294. §§ 5232, 6276.
 Pittsburg & C. R. Co. v. Shaw (Pa. St.), 14 Atl. Rep. 323. §§ 6016, 6019.
 Pittsburg & C. R. Co. v. Slusser, 19 Ohio St. 157. §§ 6276, 5393, 6338.
 Pittsburg & C. R. Co. v. Stewart, 41 Pa. St. 54, 58 §§ 1321, 1892, 1901, 1910, 4648.
 Pittsburg & C. R. Co. v. Theobald, 51 Ind. 246. § 6298.
 Pittsburg & C. R. Co. v. Van Houten, 48 Ind. 90. § 6309.
 Pittsburg & C. R. Co. v. Woodrow, 3 Phila. (Pa.) 271. §§ 1278, 1287.
 Pittsburgh & C. R. Co. v. Woolley, 12 Bush (Ky.), 451. § 5298.

- Pittsburgh Carbon Co. v. McMillin, 119 N. Y. 46, § 6950.
 Pittsburgh Carbon Co. v. McMillin, 6 N. Y. St. Rep. 433; 53 Hun (N. Y.), 67, § 6414.
 Pittsburgh Mining Co. v. Spooner, 74 Wis. 307. §§ 470, 471, 4127, 7651.
 Pittsburgh Mining Co. v. Spooner, 24 Am. & Eng. Corp. Cas. 1, § 459.
 Pixley v. Western Pacific R. Co., 33 Cal. 183. §§ 5018, 5175, 5181, 5182, 5294, 5303.
 Pixley v. Winchell, 7 Cow. (N. Y.) 366, § 7552.
 Place v. Sweetzer, 16 Ohio, 142, § 1084.
 Plauto v. Merchants' & C. Ins. Co., 39 Mo. 248, 254, § 5175.
 Plainview v. Winona & C. R. Co., 36 Minn. 505, § 6084.
 Planché v. Colburn, 8 Bing. 14, §§ 379, 5183.
 Plank Road & C. Co. v. Arndt, 21 Pa. St. 317, § 74.
 Plank Road Co. v. Davidson, 39 Pa. St. 435, § 1995.
 Plank Road v. Rice, 7 Barb. 162, § 1924.
 Plank Road Co. v. Wetzel, 21 Barb. (N. Y.) 56, §§ 1185, 1235, 1545.
 Plant, Ex parte, 4 Deac. & Ch. 160, § 2320.
 Plant v. Wormager, 5 Blackf. (Ind.) 236, § 7624.
 Plant Seed Co. v. Michel Plant & Seed Co., 23 Mo. App. 579; 37 Mo. App. 313, § 296.
 Planters' & C. Bank v. Andrews, 8 Port. (Ala.) 404, §§ 5689, 7360, 7790.
 Planters' & C. Bank v. Leavens, 4 Ala. 753, §§ 1070, 3231, 3317, 7813.
 Planters' & C. Bank v. Padgett, 69 Ga. 159, § 2992.
 Planters' & C. Bank v. Walker, 1 Minor (Ala.), 391, § 7807.
 Planters' & C. Ins. Co. v. Selma Savings Bank, 63 Ala. 585, §§ 1032, 2328.
 Planters' Bank v. Bank of Alexandria, 10 Gill & J. (Md.) 346, §§ 531, 6588, 6500.
 Planters' Bank v. Bass, 2 La. An. 430, 436, § 7342.
 Planters' Bank v. Bivingsville & C. Co., 10 Rich. L. (S. C.) 95, §§ 3074, 3078, 3358, 3476, 3731, 4891, 5176, 5747.
 Planters' Bank v. Sharp, 4 Smedes & M. (Miss.) 75, §§ 4938, 5286, 5303, 5304.
 Planters' Bank v. Sharp, 6 How. (U. S.) 301, 322, §§ 5046, 5393, 5715 a, 5751, 5755.
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 Planters' Rice-Mill Co. v. Olmstead, 78 Ga. 586, § 4853.
 Plaskynaston Tube Co., Re, 23 Ch. Div. 542, § 2048.
 Plass v. Housman, 17 N. Y. 671; 2 N. Y. Supp. 235, § 2985.
 Plate Glass & C. Co. v. Sunley, 8 El. & Bl. 47, § 1516.
 Platt, Matter of, 1 Ben. (U. S.) 534, §§ 6973, 7281.
 Platt v. Archer, 9 Blatchf. (U. S.) 559, §§ 6727, 6730, 6731.
 Platt v. Beach, 2 Ben. (U. S.) 303, § 7270.
 Platt v. Beebe, 57 N. Y. 339, §§ 7266, 7267.
 Platt v. Bentley, 11 Am. Law Reg. (N. S.) 171; 1 Nat. Bank Cas. 753, §§ 7301, 7477.
 Platt v. Birmingham Axle Co., 41 Conn. 255, §§ 2337, 3248, 5204, 5711.
 Platt v. Crawford, 8 Abb. Pr. (N. S.) (N. Y.) 297, §§ 7265, 7267, 7279.
 Platt v. New York & C. R. Co., 26 Conn. 514, § 6708.
 Platt v. Platt, 42 Conn. 330, 347, § 5815.
 Platt v. Platt, 66 N. Y. 360, § 7036.
 Platte & C. Co. v. Dowell, 17 Colo. 6, § 5423.
 Platte Valley Bank v. Harding, 1 Neb. 461, §§ 518, 7658.
 Player v. Archer, 1 Sid. 121, § 1035.
 Playfair v. Birmingham & C. R. Co., 1 Railw. Cas. 640, § 1521.
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 Plemmons v. Southern Imp. Co., 108 N. C. 614, § 7495.
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 Plimpton v. Bigelow, 33 N. Y. 592; 66 How. Pr. (N. Y.) 131; 13 Abb. N. Cas. (N. Y.) 173; reversing 29 Hun (N. Y.), 382; 12 Abb. N. Cas. (N. Y.) 202; and affirming 11 Abb. N. Cas. (N. Y.) 180; 63 How. Pr. (N. Y.) 484, §§ 2766, 2786, 2787, 8120.
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 Plumb v. Fluit, 2 Anstr. 332, § 5190.
 Plumb v. Neild, 6 Jur. (N. S.) 529, §§ 2212, 2215.
 Plumley's Case, 156 Mass. 286, § 5483.
 Plumley v. Massachusetts, 155 U. S. 461, § 5483.
 Plummer v. Penobscot Lumber Assn., 67 Me. 363, §§ 5642, 5668.
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 Pochet v. Kemper, 14 La. An. 307, § 5277.
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 Polar Star Lodge v. Polar Star Lodge, 16 La. An. 53, §§ 6545, 6679, 6685, 6694, 7613.
 Polhemus v. Fitchburg R. Co., 123 N. Y. 502, § 6096.
 Polhill v. Walter, 3 Barn. & Adol. 114, § 5028.
 Police Jury v. Britton, 15 Wall. (U. S.) 566, § 5730.
 Police Jury v. Succession of McDonough, 8 La. An. 341, § 1113.
 Polk v. Gallant, 2 Dev. & Bat. Eq. (N. C.) 395, § 6841.
 Polk v. Plummer, 2 Humph. (Tenn.) 500, §§ 8, 7133.
 Pollard, Ex parte, 40 Ala. 59, § 610.
 Pollard v. Bailey, 20 Wall. (U. S.) 520, §§ 3020, 3035, 3421, 3429, 3431, 3432, 3437, 3440, 3453, 3455, 3484, 3494, 3835.
 Pollard v. Dwight, 4 Cranch (U. S.), 421, § 8064.
 Pollard v. Maddox, 28 Ala. 321, § 6747.
 Pollard v. Ogden, 2 El. & Bl. 459, § 5753.
 Pollard v. Stockholders & C., 4 J. J. Marsh. (Ky.) 52, § 2928.
 Polleys v. Ocean Ins. Co., 14 Me. 141, §§ 4919, 4920.
 Pollock, Re, Redf. (N. Y. Supp.) 100, § 2199.
 Pollock v. National Bank, 7 N. Y. 274, §§ 2425, 2501, 2556, 2567, 4701.
 Pollock v. Gantt, 69 Ala. 373, § 6287.
 Pomeroy v. Benton, 57 Mo. 531, § 3644.
 Pomeroy v. Benton, 77 Mo. 64, § 4532.
 Pomeroy v. Fifth Mass. Turap. Corp., 10 Pick. (Mass.) 35, § 5937.
 Pomeroy v. New York & C. R. Co., 14 Blatchf. (U. S.) 120, §§ 7450, 7890, 8022.
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 Pomeroy v. State Bank & C., 1 Wall. (U. S.) 23, § 8735.
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 Pond v. Bergh, 10 Paige (N. Y.), 140, § 6195.
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 Pondville Co. v. Clark, 25 Conn. 97, §§ 5278, 6666.
 Pontchartrain Co. v. Heiru, 2 La. An. 129, § 5189.
 Pontchartrain R. Co. v. Paulding, 11 La. 41, § 4733.
 Pook v. Lafayette Building Assn., 71 Ind. 357, § 6021.
 Poole's Case, 9 Ch. Div. 322, 328, §§ 1572, 4150, 4151.
 Poole v. West Point & C. Assn., 30 Fed. Rep. 513, §§ 2084, 3681, 4704, 5708, 6179.
 Pooley Hall Colliery Co., Re, 18 Week. Rep. 201, § 5702.
 Poor v. European & C. R. Co., 59 Me. 270, § 2527.
 Poor v. Willoughby, 64 Me. 379, § 3080.
 Pope's Case, 30 Fed. Rep. 169, § 7160.
 Pope v. Bank of Albion, 59 Barb. (N. Y.) 226, §§ 4815, 4818, 4820.
 Pope v. Bank of Albion, 57 N. Y. 126, § 4820.
 Pope v. Brandon, 2 Stew. (Ala.) 401, §§ 6466, 6467, 6476, 6484.

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 Pope v. Lewis, 4 Ala. 487. § 4168.
 Pope v. Salamanca Oil Co., 115 Mass. 286. § 3527.
 Pope v. Terre Haute Car & Co., 87 N. Y. 137; affirming 24 Hun (N. Y.), 238. § 8030.
 Poppenhusen v. Faulke, 4 Blatchf. (U. S.) 495. § 4140.
 Port v. Russell, 36 Ind. 60. §§ 4013, 4059, 4068, 6503.
 Port Edwards & Co. v. R. Co. v. Arpin, 80 Wis. 214. § 2088.
 Port Gibson v. Moore, 13 Smedes & M. (Miss.) 157. § 6718.
 Port of Mobile v. Louisville & C. R. Co., 84 Ala. 115. § 7771.
 Port Royal & Co. R. Co. v. Branch, 78 Ga. 113. § 7570.
 Port Royal Min. Co. v. Hagood, 30 S. C. 519. § 643.
 Port Royal R. Co. v. Hammond, 58 Ga. 523. § 7407.
 Port Whitby & Co. R. Co. v. Jones, 31 Up. Can. Q. B. 170. §§ 1228, 1580, 1900.
 Porter v. Androscoggin & Co. R. Co., 37 Me. 349. §§ 5070, 5081, 5084, 7393.
 Porter v. Baddeley, 5 Ch. Div. 542. § 2192.
 Porter v. Blakely, 1 Root (Conn.), 440. § 230.
 Porter v. Chicago & Co. R. Co., 1 Neb. 14. § 7512.
 Porter v. Clark, 12 How. Fr. (N. Y.) 107, 110. § 6477.
 Porter v. Ingraham, 10 Mass. 88. § 4184.
 Porter v. Kepler, 14 Ohio, 127. § 3543.
 Porter v. Nekervis, 4 Rand. (Va.), 359. §§ 280, 7589.
 Porter v. Parks, 49 N. Y. 564. § 2668.
 Porter v. Pittsburgh Bessemer Steel Co., 120 U. S. 649; 122 U. S. 267. §§ 6164, 6165, 7114.
 Porter v. Rockford & Co. R. Co., 76 Ill. 561, 563. §§ 2803, 2810, 2812, 2813, 2814, 2815, 2817.
 Porter v. Rummery, 10 Mass. 64, 68. § 7581.
 Porter v. Rutland Bank, 19 Vt. 410. §§ 5220, 5228.
 Porter v. Sabin, 36 Fed. Rep. 475. § 7577.
 Porter v. Sells, 23 Pa. St. 424. § 6379.
 Porter v. Sewall Safety Car-Heating Co., 7 N. Y. Supp. 165; 23 Abb. N. Cas. (N. Y.) 233; 17 Civ. Proc. Rep. (N. Y.) 385. §§ 8032, 8037, 8038.
 Porter v. State, 46 Wis. 375. § 7040.
 Porter v. Thomson, 22 Iowa, 381. § 620.
 Porter v. Trull, 30 N. J. Eq. 105. § 5337.
 Porter v. Williams, 9 N. Y. 142. §§ 6477, 6950.
 Porter v. Witham, 17 Me. 292. § 7777.
 Portland v. Richardson, 54 Me. 46. § 4676.
 Portland & Co. Ferry Co. v. Pratt, 2 Allen (N. B.) 17. § 7756.
 Portland & Co. R. Co. v. Boston & Co. R. Co., 65 Me. 122. §§ 5505, 5508.
 Portland & Co. R. Co. v. Graham, 11 Met. (Mass.) 1. § 1788.
 Portland & Co. R. Co. v. Saco, 60 Me. 196. § 2823.
 Portland & Co. Steamboat Co. v. Locke, 73 Me. 370. § 7096.
 Portland & Co. Turnp. Co. v. Bobb, 88 Ky. 226. § 240.
 Portland Bank v. Athorp, 12 Mass. 252, 255. §§ 2899, 5656, 5671, 8134.
 Portland Bank v. Stubbs, 6 Mass. 425. §§ 2619, 6331.
 Portland Dry Dock & Co. v. Portland, 12 B. Mon. (Ky.) 77. § 6679.
 Portland Lumbering & Co. v. East Portland, 18 Or. 21. § 5645.
 Portsmouth Livery Co. v. Watson, 10 Mass. 91. §§ 7703, 7977.
 Portsmouth Tramways Co., Re (1892), 2 Ch. 362. § 6849.
 Portuguese Consol. Copper Mines, Re, 45 Ch. Div. 16. § 1891.
 Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 361. § 5265.
 Post v. Supervisors, 105 U. S. 667. § 634.
 Post v. Toledo & Co. R. Co., 144 Mass. 341. §§ 3035, 3061, 3439, 7103.
 Post Express Printing Co. v. Coursey, 32 N. Y. St. Rep. 748; 10 N. Y. Supp. 497. § 3851.
 Postlethwaite v. Fort Phillip & Co. Gold Min. Co., 43 Ch. Div. 452. § 1262.
 Potter v. Egan, 3 C. B. 32. §§ 1377, 1909.
 Potter v. Dear, 95 Cal. 578. §§ 3379, 3455, 3531, 3536.
 Potter v. Hutchinson Man. Co., 79 Mich. 207. § 7538.
 Potter v. Merchants' Bank, 28 N. Y. 641. §§ 4789, 4797, 5133.
 Potter v. Parsons, 14 Iowa, 236. § 4943.
 Potter v. Stevens Machine Co., 127 Mass. 502. §§ 3446, 3448.
 Potter v. Thompson, 10 R. I. 1, 8. § 2664.
 Potter v. Yale College, 8 Conn. 62, 60. § 7595.
 Potts v. Bell, 8 T. R. 548. § 1094.
 Potts v. Delaware Water Power Co., 9 N. J. Eq. 592. § 512.
 Potts v. State, 26 Tex. App. 663. § 7738.
 Potts v. Wallace, 146 U. S. 659. §§ 4622, 4637.
 Potts v. Wallace, 32 Fed. Rep. 272. §§ 1541, 2933.
 Pottsman Gas Co. v. Murphy, 39 Pa. St. 257. § 6371.
 Poughkeepsie & Co. Plank R. Co. v. Griffin, 24 N. Y. 150. §§ 72, 1158.
 Poughkeepsie & Co. Plank Road Co. v. Griffin, 21 Barb (N. Y.) 454. § 1278.
 Poulsters Co. v. Phillips, 6 Bing. New Cas. 314. §§ 948.
 Poultney v. Bachman, 31 Hun (N. Y.), 49. §§ 938, 1034.
 Poultney v. Wells, 1 Alf. (Vt.) 180. §§ 5056, 7392.
 Poulton v. London & Co. R. Co. L. R. 2 P. B. 534. §§ 6279, 6303.
 Pound, Re, 42 Ch. Div. 402. § 6846.
 Powder Co. v. Finsheimer, 46 Md. 315. § 246.
 Powder River Cattle Co. v. Custer County, 9 Mont. 145. §§ 7979, 7980, 8135.
 Powell R. 5 Mo. App. 230. § 5338.
 Powell v. Abbott, 9 Week. Notes Cas. 231 (Philadelphia Court of Common Pleas). §§ 899, 909, 914.
 Powell v. Adams, 98 Mo. 598. § 4144.
 Powell v. Blair, 133 Pa. St. 550. §§ 6060, 6092.
 Powell v. Blow, 34 Mo. 385. § 1220.
 Powell v. Deveney, 3 Cush. (Mass.) 300, 304. §§ 4930, 6223.
 Powell v. Eldred, 39 Mich. 552. § 3161.
 Powell v. Jackson Common Council, 51 Mich. 129. § 624.
 Powell v. Jessopp, 18 C. B. 336. § 1067.
 Powell v. Newburg, 19 Johns. (N. Y.) 284. § 5045.
 Powell v. North Mo. R. Co., 42 Mo. 63. §§ 377, 6663, 6730.
 Powell v. Oregonian R. Co., 13 Sawy. (U. S.) 535; 36 Fed. Rep. 726. §§ 2024, 3112.
 Powell v. Oregonian R. Co., 38 Fed. Rep. 187. §§ 2024, 3393, 3770.
 Powell v. Pennsylvania, 127 U. S. 678; affirming 114 Pa. St. 265. § 5483.
 Powell v. Price, Comb. 41. § 838.
 Powell v. Sammons, 31 Ala. 552, 562. §§ 5925, 5930.
 Powell v. Thomas, 6 Hare, 300. § 5246.
 Powell v. Wallace, 44 Kan. 656. § 7738.
 Powell v. Willamette Valley R. Co., 15 Or. 393. § 2550.
 Powers' Appeal, 29 Mich. 504. § 5592.
 Powers v. Bergen, 6 N. Y. 358, 368. § 5596.
 Powers v. Boston & Co. R. Co., 153 Mass. 188. § 7750.
 Powers v. Briggs, 79 Ill. 493. §§ 5126, 5132, 5152, 5170.
 Powers v. Hamilton Paper Co., 60 Wis. 23. §§ 3476, 8835.
 Powers v. Inf. Court of Dougherty County, 23 Ga. 65. § 1113.
 Powers v. Russell, 26 Mich. 179. § 2928.
 Powhattan Steamboat Co. v. Potomac Steamboat Co., 36 Md. 233. § 7612.
 Powis v. Butler, 3 Com. B. (N. s.) 645; 4 Com. B. (N. s.) 469. §§ 3182, 3283.
 Powis v. Harding, 1 C. B. (N. s.) 533. §§ 1442, 3283.
 Powles v. Page, 3 C. B. 16. §§ 5203, 5211.
 Powrie v. Kansas Pacific Ry. Co., 1 Colo. 529. § 4858.
 Prall v. Tilt, 28 N. J. Eq. 479. §§ 2395, 2605.
 Pratt v. Adams, 7 Paige (N. Y.), 615. § 7942.
 Pratt v. Bacon, 19 Pick. (Mass.) 123, 127. §§ 3088, 3361, 3500, 4477.
 Pratt v. Beaufre, 13 Minn. 187. §§ 5131, 5132, 5166.
 Pratt v. Boston & Co. R. Co., 126 Mass. 443. § 2556.
 Pratt v. Goswell, 9 C. B. (N. s.) 706. § 4428.
 Pratt v. Hudson & Co. R. Co., 21 N. Y. 305. §§ 4899, 4935.
 Pratt v. Jewett, 9 Gray (Mass.), 34. § 6686.
 Pratt v. Manufacturing Co., 123 Mass. 110. § 2782.
 Pratt v. Meriden Cutlery Co., 35 Conn. 36. §§ 697, 4423.
 Pratt v. Munson, 84 N. Y. 582. §§ 258, 6247.
 Pratt v. Munson, 17 Hun (N. Y.), 475. § 1061.
 Pratt v. Pratt, 33 Conn. 446, 456. § 4545.
 Pratt v. Putnam, 13 Mass. 361, 363. § 5300.
 Pratt v. Short, 79 N. Y. 437. §§ 5948, 5952.
 Pratt v. Street Comm'rs, 139 Mass. 559. § 2824.
 Pratt v. Taunton Copper Co., 123 Mass. 110. §§ 2556, 2567, 2568, 2577, 2595, 4701.
 Pratt v. Thornton, 28 Me. 355. § 2677.

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- Pray v. Northern Liberties, 31 Pa. St. 69. §§ 1117, 5575.
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- Presbyterian Church v. City of New York, 5 Cow. (N. Y.) 538. § 2250.
- Presbyterian Church &c. v. Pickett, Wright (Ohio), 57, § 5441.
- Presbyterian Congregation v. Carlisle Bank, 5 Pa. St. 345. §§ 2338, 7395.
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- Prescott v. City of Chicago, 60 Ill. 121. § 624.
- Prescott v. Duquesne, 48 Pa. St. 118. § 6358.
- Prescott v. Gousser, 34 Iowa, 175. § 2012.
- Prescott v. Wells, 3 Nev. 82. § 2480.
- Prescott Nat. Bank v. Butler, 157 Mass. 548. §§ 5950, 6033, 6036.
- President &c. v. Browne, 34 Md. 450. § 5837.
- President &c. v. Hurlst, 9 Johns. (N. Y.), 217. § 1659.
- President &c. v. Myers, 6 Serg. & R. (Pa.), 12. § 294.
- President &c. v. State, 19 Md. 239. § 5391.
- President &c. v. Thompson, 20 Ill. 200. § 518.
- Press Printing Co. v. Assessors, 51 N. J. L. 75. § 2803.
- Pressely v. Lamb, 105 Ind. 171, 189. § 6387.
- Preston v. Cincinnati &c. R. Co., 36 Fed. Rep. 54. §§ 1622, 3720.
- Preston v. Fire Extinguisher Man. Co., 36 Fed. Rep. 721. § 7485.
- Preston v. Grand Collier Dock Co., 11 Sim. 327. §§ 1579, 3194, 4565, 4566.
- Preston v. Grand Collier Dock Co., 2 Rail. C. 335. § 1313.
- Preston v. Hill, 50 Cal. 43. § 4943.
- Preston v. Liverpool &c. R. Co., 17 Beav 114; 5 H. L. Cas. 605. § 5038.
- Preston v. Liverpool &c. R. Co., 7 Eng. L. & Eq. 124. § 484.
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- Preston v. McMillan, 58 Ala. 84. § 2421.
- Preston v. Melville, 16 Sim. 163. §§ 2199, 2212.
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- Preston Nat. Bank v. Smith Middlings Purifier Co., 84 Mich. 364. § 4638.
- Preston v. Strutton, 1 Anstr. 50. § 1255.
- Preston v. Tubbin, 1 Vern. 286. § 5193.
- Prestwich v. Poley, 15 C. B. (N. S.) 806. § 4943.
- Prestyman v. Tazewell County, 19 Ill. 406. § 1118.
- Price's Appeal, 106 Pa. St. 421. § 1708.
- Price v. Abbott, 17 Fed. Rep. 406. §§ 7270, 7284.
- Price v. Anderson, 15 Sim. 473. §§ 2199, 2212.
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- Price v. Grand Rapids &c. R. Co., 13 Ind. 58. §§ 1964, 3928.
- Price v. Grand Rapids &c. R. Co., 18 Ind. 137. §§ 1052, 1256, 7665, 7668.
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- Price v. Minot, 107 Mass. 49. § 2756.
- Price v. Neal, 3 Burr. 1354. § 5760.
- Price v. Price, 6 Dana (Ky.), 107. § 1066.
- Price v. St. Louis Mutual Life Ins. Co., 3 Mo. App. 262. §§ 5524, 5556.
- Price v. Taylor, 5 Hurlst. & N. 540. §§ 5126, 5129, 5131.
- Price v. Weaver, 13 Gray (Mass.), 272. § 5018.
- Price v. Whitney, 28 Fed. Rep. 297. §§ 3286, 7284.
- Price v. Wilson, 67 Barb. 9. §§ 4164, 4166.
- Price v. Yates, 19 Alb. L. J. 295. § 7281.
- Prickett v. Badger, 37 Eng. L. & Eq. 423. § 5183.
- Pridyman v. Wodry, Cro. Jac. 109. § 5776.
- Priest v. Citizens' &c. Ins. Co., 3 Allen (Mass.), 602. § 945.
- Priest v. Essex Hat &c. Co., 115 Mass. 380. §§ 3020, 3351, 3652, 4355.
- Priest v. Glenn, 51 Fed. Rep. 400. §§ 3652, 3658, 3779.
- Priest v. White, 89 Mo. 609. §§ 1605, 1636, 4137.
- Priestly v. Fernie, 34 L. J. Ex. 172. § 3205.
- Prieur v. Commercial Bank, 7 La. 509. § 829.
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- Prime's Estate, Re, 136 N. Y. 347. § 5346.
- Primm v. Carondelet, 23 Mo. 22. § 4869.
- Primrose, Matter of, 23 Md. 482. § 4479.
- Prince v. Bartlett, 8 Cranch (U. S.), 431. § 7070.
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- Prince v. Commercial Bank, 1 Ala. 241. §§ 7665, 7609.
- Prince v. Lynch, 38 Cal. 528. § 3796.
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- Prince of Wales Assn. Soc. v. Harding, El. Bl. & El. 183. §§ 3969, 5019.
- Princeton Bank v. Crozer, 22 N. J. L. 383. § 2788.
- Printing House v. Trustees, 104 U. S. 711. §§ 72, 3685.
- Printup v. Cherokee R. Co., 45 Ga. 365. § 7780.
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- Pritchard v. Keefer, 53 Ill. 117. § 6298.
- Pritchard v. Norton, 206 U. S. 124, 130. § 3570.
- Pritz, Ex parte, 9 Iowa, 30, 33. §§ 583, 585, 5342.
- Probst v. Board of Domestic Missions, 3 New Mex. 237. § 7979.
- Proctor v. Andover, 42 N. H. 348. § 5596.
- Proctor v. Baldwin, 82 Ind. 270. § 5240.
- Proctor v. Missouri &c. R. Co., 42 Mo. App. 124. § 3045.
- Proctor v. Webber, 1 D. Chip (Vt.) 371, 456, note. §§ 7392, 7594.
- Progress Assur. Co. L. R. 9 Eq. 370. § 3122.
- Prohurst's Case, Carth. 168. §§ 829, 904.
- Proprietors v. Call, 1 Mass. 483, 485. § 7613.
- Proprietors v. City of Lowell, 7 Gray (Mass.), 223, 226. § 5615.
- Proprietors v. Eastman, 32 N. H. 470. § 7669.
- Proprietors v. Horton, 6 Hill (N. Y.), 501. § 7665.
- Proprietors v. Nashua &c. R. Co., 10 Cush. (Mass.) 385. § 7406.
- Proprietors v. Newcomb, 7 Met. (Mass.) 276. §§ 5931, 5932.
- Prospect Park &c. R. Co., Matter of, 67 N. Y. 371. § 315.
- Protection Ins. Co. v. Dummer, 5 Paige (N. Y.) 612. § 4582.
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- Providence Institution v. Boston, 101 Mass. 575. § 2881.
- Providence Institution v. Gardiner, 4 R. I. 484. § 2813.
- Provident Institution v. Jersey City, 113 U. S. 506. § 5450.
- Provident Institution v. Massachusetts, 6 Wall. (U. S.) 611, affirming; 12 Allen, 312. §§ 5566, 5567, 5560, 8093.
- Provident Institution for Savings v. Burnham, 128 Mass. 458. § 7696.
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- Provident Sav. Inst. v. Jackson Place Rink, 52 Mo. 552. §§ 3035, 3040.
- Provident Savings Inst. v. Jackson Place Skating Rink, 52 Mo. 557. §§ 3255, 3259, 3260.
- Prouty v. Lake Shore &c. R. Co., 50 N. Y. 363, 368. § 404.
- Prouty v. Michigan &c. R. Co., 4 Thomp. & C. (N. Y.) 230, 233. §§ 2276, 2293, 2294.
- Prouty v. Michigan Southern R. Co., 1 Hun (N. Y.), 655. § 8007.
- Pruitt v. Hannibal &c. R. Co., 62 Mo. 527. § 4983.
- Pruyn v. Milwaukee, 18 Wis. 367. § 6111.
- Pryor v. Smith, 4 Bush (Ky.), 379. § 3187.
- Pryor v. Wood, 31 Pa. St. 142. § 6067.

TABLE OF CASES CITED. Publishing—Railroad

- Publishing Co. v. Jack, 6 Pac. Rep. 20. § 1172.
 Pudsey Coal Gas Co. v. Bradford, L. R. 15 Eq. 167. § 6030.
 Puget Sound Nat. Bank v. King County, 57 Fed. Rep. 433. § 2870.
 Pugh's Case, L. R. 13 Eq. 566. § 3204.
 Pugh v. Hurtt, 52 How. Pr. (N. Y.) 22. §§ 7837, 7338, 7339.
 Pugh v. Miller, 126 Ind. 189. §§ 4150, 7572, 7839.
 Pugh v. Raleigh & Co. R. Co., Phill. L. (N. C.) 359. § 5401.
 Pugh & Sharman's Case, L. R. 13 Ex. 566, 572. §§ 1441, 3201, 3202.
 Pulaski v. Stuart, 28 Gratt. (Va.) 872, 879. § 1166.
 Pulbrook v. Richmond Consolidated Min. Co., 9 Ch. Div. 610. §§ 1261, 2778, 3360.
 Pulford v. Fire Dept of Detroit, 31 Mich. 458. § 846.
 Pullan v. Cincinnati & Co., 4 Biss. (U. S.) 35. §§ 5354, 5686, 6134.
 Pulliam v. Taylor, 50 Miss. 581. § 2775.
 Pullman v. Upton, 96 U. S. 329. §§ 73, 1848, 1885, 2085, 3192, 3213, 3283, 7282.
 Pullman's Palace Car Co. v. Central Transportation Co., 139 U. S. 62. § 5882.
 Pullman's Palace Car Co. v. Com., 107 Pa. St. 148. § 8117.
 Pullman's Palace Car Co. v. Missouri & Co. R. Co., 115 U. S. 587. §§ 365, 405, 1109, 1667, 7770.
 Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 13. §§ 3094, 8095, 8096, 8097, 8107, 8125.
 Pullman Palace Car Co. v. Reed, 75 Ill. 125. § 6391.
 Pullman Southern Car Co. v. Gaines, 3 Tenn. (Ch.) 587. § 8125.
 Pulafor v. Richards, 22 L. J. (Ch.) 569; 17 Jur. 865; 19 Eng. L. & Eq. 387, 391. §§ 1382, 1383, 1384, 1385, 1388.
 Pumpelly v. Green Bay Co., 13 Wall. (U. S.) 166. § 7622.
 Purcell v. British Land & Co., 42 Fed. Rep. 465. § 7473.
 Purcell v. Hannibal & Co. R. Co., 50 Mo. 504. § 7547.
 Purcell v. Richmond & Co. R. Co., 108 N. C. 414. § 6398.
 Purchase v. New York Exchange Bank, 3 Rob. (N. Y.) 164. §§ 2425, 2460, 2512.
 Purdey's Case, 16 W. R. 650. §§ 1224, 1225.
 Purdy v. Doyle, 1 Paige (N. Y.) 558. § 2964.
 Purdy v. People, 4 Hill (N. Y.), 384; reversing 2 Hill (N. Y.), 31. §§ 582, 632.
 Purple v. Horton, 13 Wend. (N. Y.) 9. § 7756.
 Purcell v. Chicago & Co. Bolt Co., 74 Wis. 132. § 7758.
 Puryear v. Thompson, 5 Humph. (Tenn.) 397. §§ 6298, 6299.
 Pusey v. New Jersey & Co. R. Co., 14 Abb. Pr. (N. s.) (N. Y.) 434. § 779.
 Putnam v. Douglas County, 6 Or. 628. § 5626.
 Putnam v. Ingraham, 114 U. S. 57. § 7474.
 Putnam v. New Albany, 4 Biss. (U. S.) 365. §§ 1527, 1534.
 Putnam v. Ruch, 54 Fed. Rep. 216. § 5412.
 Putnam v. White, 87 Me. 551, 554. § 7591.
 Putnam Free School v. Fisher, 30 Me. 523. § 7665.
 Pozey v. Senior, 9 Wis. 30. § 457, 458.
 Proux v. Smith, 1 Ves. 193. § 2663.
 Pyle Works, Re, 44 Ch. Div. 534. § 3843.
 Pyles v. Furniture Co., 30 W. Va. 123. § 6494.
 Pyrolusite Manganese Co., Re, 29 Hun (N. Y.), 429. §§ 6692, 6693.
 Quackenbush v. Wisconsin & Co. R. Co., 71 Wis. 472; 62 Wis. 411. §§ 5453, 5504.
 Quade v. New York & Co. R. Co., 39 N. Y. St. Rep. 157; 14 N. Y. Supp. 875. § 8021.
 Quarrier v. Peabody Ins. Co., 20 W. Va. 507. § 7628.
 Quarry Co. v. Bliss, 12 Abb. Pr. (N. Y.) 470. § 4208.
 Quay v. Presidio & Co. R. Co., 82 Cal. 1. § 2439.
 Quebrada Ry. L. & Co. Co., Re, 40 Ch. Div. 363. § 2117.
 Queen v. Mayor & Co. of Pomfret, 10 Mod. 107. § 813.
 Queen v. Second Ave. Ry. Co., 3 Jones & Sp. (N. Y.) 154; 44 How. Pr. (N. Y.) 281. §§ 3951, 4622, 4847.
 Queen v. Victoria Park Co., 1 Ad. & El. (N. s.) 292. § 2959.
 Queen v. Ward, L. R. 8 Q. B. 210. § 780.
 Queen of Portugal v. Glyn, 7 Clark & Fin. 466. § 7409.
 Queensman v. Palmer, 117 Ill. 619. §§ 3095, 3097, 3431, 3435, 3490.
 Quick v. Lemon, 105 Ill. 578, 585. §§ 1164, 3526.
 Quigley v. Central Pac. R. Co., 11 Nev. 350. §§ 6304, 6298, 7462, 7464.
 Quigley v. Walter, 2 Sweeny (N. Y.), 175. §§ 4174, 3502 a.
 Quincy v. Steel, 120 U. S. 241. §§ 4500, 4502, 4503, 4508.
 Quincy v. White, 63 N. Y. 370. § 2679.
 Quincy & Co. R. Co. v. Morris, 84 Ill. 410. § 475.
 Quincy & Co. R. Co. v. Ridge, 57 Mo. 599. § 5625.
 Quincy Bridge Co. v. Adams County, 83 Ill. 615. §§ 320, 8128, 8129.
 Quincy Canal v. Newcomb, 7 Met. (Mass.) 276. §§ 6611, 7406.
 Quincy Coal Co. v. Hood, 77 Ill. 68. § 5235.
 Quinebaug Bank v. Leavens, 20 Conn. 87. § 7757.
 Quiner v. Marblehead & Co. Co., 10 Mass. 476. §§ 1028, 1031, 2389, 3283.
 Quinn v. Madigan, 65 N. H. 8. § 2240.
 Rabassa v. Orleans Nav. Co., 5 La. 461. § 6148.
 Rabb v. Ross County Bank, 4 Barb. (N. Y.) 586. § 4789.
 Racine & Co. Bank v. Ayers, 12 Wis. 512. §§ 1283, 1324, 1326, 1344.
 Racine & Co. R. Co. v. Farmers' & Co., 49 Ill. 331. §§ 317, 320, 324, 4479, 5045.
 Radcliffe v. Ruper, 10 Mod. 89, 230. § 5786.
 Radabaugh v. Tacoma & Co. R. Co., 8 Wash. 570. § 6186.
 Rader v. Union Township, 39 N. J. L. 599. §§ 609, 611, 619.
 Radnor v. Shafto, 11 Ves. 448, 455. § 6434.
 Radway v. Briggs, 37 N. Y. 258. § 6358.
 Raeder v. Bensberg, 6 Mo. App. 445. § 3145.
 Ragan v. Aiken, 9 Lea (Tenn.), 609. §§ 5543, 5548.
 Ragan v. McElroy, 98 Mo. 349. §§ 5795, 7647, 7643.
 Raggett v. Musgrave, 5 Car. & P. 556. § 915.
 Rahm v. King Wrought & Co. Man., 16 Kan. 277. §§ 4688, 5868.
 Raht v. Atrill, 106 N. Y. 423. § 7173.
 Railway Tax Assessors v. State, 44 N. J. L. 395. § 1126.
 Railroad Co., Re, 108 N. Y. 375. § 5600.
 Railroad Co. v. Alabama, 101 U. S. 832. § 5441.
 Railroad Co. v. Barnhill, 91 Tenn. 395. § 7422.
 Railroad Co. v. Barron, 5 Wall. (U. S.) 90, 104. § 6293.
 Railroad Co. v. Bate, 12 Lea (Tenn.), 573. § 5581.
 Railroad Co. v. Black, 79 Ill. 264. § 75.
 Railroad Co. v. Blocher, 27 Md. 277. § 6276.
 Railroad Co. v. Brown, 17 Wall. (U. S.) 445. §§ 5580, 5884, 6293.
 Railroad Co. v. Clinton County, 1 Ohio St. 77. § 1118.
 Railroad Co. v. Compton, 2 Gill (Md.), 20. § 7408.
 Railroad Co. v. Cummins, 8 Watts (Pa.), 450. § 7434.
 Railroad Co. v. Ellerman, 105 U. S. 166. §§ 5383, 6030, 6031, 6032.
 Railroad Co. v. Fort, 17 Wall. (U. S.) 553; affirming 2 Dill. (U. S.) 259. § 6350.
 Railroad Co. v. Fuller, 17 Wall. (U. S.) 560. § 5462.
 Railroad Co. v. Furnace Co., 37 Ohio St. 321. §§ 5359, 5901.
 Railroad Co. v. Garrett, 8 Lea (Tenn.), 439. § 6677.
 Railroad Co. v. Georgia, 98 U. S. 359. §§ 389, 390.
 Railroad Co. v. Hamilton, 40 Ohio St. 496. § 6293.
 Railroad Co. v. Hanning, 15 Wall. (U. S.) 649. § 6278.
 Railroad Co. v. Harris, 12 Wall. (U. S.) 65. §§ 47, 320, 2786, 7457, 7465, 7472, 7890, 7891, 7892, 7999, 8012, 8020, 8022.
 Railroad Co. v. Hecht, 95 U. S. 168; affirming 29 Ark. 661. §§ 69, 7538.
 Railroad Co. v. Howard, 7 Wall. (U. S.) 392. §§ 265, 266, 5724, 5867, 6054, 6526, 6537.
 Railroad Co. v. Howard, 131 U. S. Append L. XXXI. § 6826.
 Railroad Co. v. Husen, 95 U. S. 465. §§ 5460, 5481, 5487, 7878.
 Railroad Co. v. Iowa, 94 U. S. 155. § 592.
 Railroad Co. v. Ironworks, 31 W. Va. 710. § 5600.
 Railroad Co. v. James, 6 Wall. (U. S.) 750. § 7850.
 Railroad Co. v. Johnson, 72 Tenn. 333. § 110.
 Railroad Co. v. Koontz, 104 U. S. 5. §§ 7463, 7472, 7891.
 Railroad Co. v. Leach, 4 Jones & L. (N. C.) 340. § 1311.
 Railroad Co. v. Lockwood, 17 Wall. (U. S.) 337. § 5998.

- Railroad Co. v. Maine, 96 U. S. 499. §§ 389, 5410.
 Railroad Co. v. Mason, 16 N. Y. 45. § 1705.
 Railroad Co. v. McClure, 10 Wall. (U. S.) 511. § 5380.
 Railroad Co. v. Mississippi, 102 U. S. 135, 140. § 7477.
 Railroad Co. v. O'Harra, 48 Ohio St. 343. § 7571.
 Railroad Co. v. Pennsylvania, 15 Wall. (U. S.) 300. § 8025.
 Railroad Co. v. Parish of Ouachita, 11 La. An. 649. § 1118.
 Railroad Co. v. Peniston, 18 Wall. (U. S.); 5 Dill. (U. S.) 314. §§ 671, 8092, 7094, 8095.
 Railroad Co. v. Railroad Co., 1 Gray (Mass.), 340, 359. § 365.
 Railroad Co. v. Railroad Co., 44 Ohio St. 287. § 5898.
 Railroad Co. v. Rock, 4 Wall. (U. S.) 177. § 5425.
 Railroad Co. v. Rodriguez, 10 Rich. L. (S. C.) 278. § 1245.
 Railroad Co. v. Rollins, 82 N. C. 523. § 265.
 Railroad Companies v. Schutte, 103 U. S. 118. § 6098.
 Railroad Co. v. Skillman, 38 Ohio St. 444. § 5543.
 Railroad Co. v. Smith, 49 Ohio St. 219. §§ 3470, 3539, 3680, 3698, 3699.
 Railroad Co. v. Swasey, 23 Wall. (U. S.) 405. § 6245.
 Railroad Co. v. Tennessee, 101 U. S. 337. § 5441.
 Railroad Co. v. United States, 99 U. S. 420. § 2128.
 Railroad Co. v. Vance, 96 U. S. 450. §§ 320, 7890, 7892, 5127.
 Railroad Co. v. White, 10 S. C. 155. § 5669.
 Railroad Co. v. Yeiser, 8 Pa. St. 366. §§ 6343, 6346.
 Railroad Commission Cases, 116 U. S. 307. §§ 5500, 5540.
 Railroad Comm'rs v. Portland & C. R. Co., 63 Me. 269. §§ 5500, 6828.
 Railroad Commissioners v. Portland & C. R. Co., 63 Me. 269. § 7828.
 Railroad Tax Cases, 13 Fed. Rep. 722. § 8083.
 Railsback v. Liberty & C. Turnp. Co., 2 Ind. 656. § 7665.
 Railway Co. v. Ex parte, 103 U. S. 794. § 8064.
 Railway Co. v. Allerton, 18 Wall. (U. S.) 233, 235. §§ 72, 78, 1011, 2076, 2077, 2078, 2083, 2035, 3976, 3983.
 Railway Co. v. Combs, 51 Ark. 324. § 5626.
 Railway Co. v. Cronin, 38 Ohio St. 122. § 7623.
 Railway Co. v. Fire Association, 55 Ark. 163. §§ 7965, 7966.
 Railway Co. v. Fisher, 39 Oh. St. 330. § 1288.
 Railway Co. v. Gill, 54 Ark. 101. § 5411.
 Railway Co. v. Iron Co., 46 Ohio St. 44. §§ 2070, 5719, 7414.
 Railway Co. v. Lawrence, 38 Ohio St. 41. § 7772.
 Railway Co. v. Magnay, 25 Beav. 588. § 4060.
 Railway Co. v. McCarthy, 98 U. S. 258. § 5871.
 Railway Co. v. Railway Co., 3 Phil. (Pa.) 430. § 5381.
 Railway Co. v. Ryan, 31 W. Va. 364. § 7538.
 Railway Co. v. Sprague, 103 U. S. 756. §§ 6065, 6077, 6088.
 Railway Co. v. State, 49 Ohio St. 668. §§ 3857, 6404.
 Railway Co. v. State, 87 Tenn. 746. § 6424.
 Railway Co. v. Whitton, 13 Wall. (U. S.) 270. §§ 320, 7457, 7465, 7467, 7468, 7875.
 Railway Co. v. Wilson County, 89 Tenn. 597. § 5569.
 Rainey v. Maas, 51 Fed. Rep. 580. §§ 8064, 8069, 8070.
 Raleigh v. Fitzpatrick, 43 N. J. Eq. 501. §§ 4014, 4072, 4533.
 Raleigh & C. R. Co. v. Davis, 2 Dev. & B. (N. C.) 451. §§ 5407, 5600, 6342, 6371.
 Raleigh & C. R. Co. v. Reid, 64 N. C. 155. §§ 2826, 5659, 5677.
 Raleigh & C. R. Co. v. Reid, 13 Wall. (U. S.) 269, 270. § 2826.
 Raleigh & C. R. Co. v. Wake County, 87 N. C. 414, 427. §§ 2816, 2834, 2835, 2836, 2839, 2915, 2919.
 Raleigh & C. R. Co. v. Wicker, 74 N. C. 220. § 5626.
 Ralston v. Crittenden, 3 McCrary (U. S.), 332. § 6097.
 Ramage v. Clements, 4 Bush (Ky.) 161. § 3621.
 Ramey v. Anderson, 1 McMull. (S. C.) 300. § 7598.
 Ramsay's Case, 3 Ch. Div. 388. § 1550.
 Ramsden v. Boston & C. R. Co., 104 Mass. 117. §§ 6298, 6307, 6308.
 Ramsey's Appeal, 2 Watts (Pa.), 228. § 7045.
 Ramsey v. Erie R. Co., 7 Abb. Pr. (N. S.) 156, 184; 38 How. Pr. (N. Y.) 193. §§ 803, 3856, 4539, 4564.
 Ramsey v. Gould, 57 Barb. (N. Y.) 398. § 4554.
 Ramsey v. People, 142 Ill. 380. § 5493.
 Ramsey v. Peoria & C. Ins. Co., 55 Ill. 311. §§ 6733, 7647, 7651, 7675, 7689, 7696.
 Ramahay, Ex parte, 18 Ad. & El. (N. S.) 173, 189. §§ 881, 882, 886, 890, 897, 7784.
 Ramshire v. Bolton, L. R. 9 Eq. 295. § 1425.
 Rand v. Hale, 3 W. Va. 495. § 5126.
 Rand v. Hubbell, 115 Mass. 471. §§ 2167, 2204, 2207, 2209, 2210, 2218.
 Rand v. Mather, 11 Cush. (Mass.) 1. § 1048.
 Rand v. Proprietors, 3 Day (Conn.), 441. §§ 7521, 7583.
 Rand v. Rand, 78 N. C. 12. § 3520.
 Rand v. Wilder, 11 Cush. (Mass.) 294. § 718.
 Rand v. Wiley, 70 Iowa, 110. § 2756.
 Randall v. Cheshire Turnp., 6 N. H. 147. § 6360.
 Randall v. Cook, 17 Wend. 53, 56. § 2617.
 Randall v. Duff, 79 Cal. 115. § 6234.
 Randall v. Elwell, 52 N. Y. 521. § 8092.
 Randall v. Howard, 2 Black (U. S.), 585. § 7133.
 Randall v. Parker, 3 Sandf. (N. Y.) 69. § 2617.
 Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 65. §§ 5081, 5074, 5077, 5131, 5137, 5286, 5303.
 Randall v. Chesapeake & Canal Co., 1 Harr. (Del.) 233. § 4785.
 Randall v. Trimen, 18 C. B. 786. § 5028.
 Randfield v. Randfield, 3 De Gex, F. & J. 766; reversing 1 Drury & Sm. 310. § 7128.
 Randolph v. Larned, 27 N. J. Eq. 557. §§ 5362, 7012.
 Randolph v. Little, 62 Ala. 396. § 8076.
 Randolph v. Wilmington & C. R. Co., 11 Phila. (Pa.) 502. §§ 6156, 6196.
 Raney v. McKee, 14 Ga. 589. § 6857.
 Ranger v. Cary, 1 Met. (Mass.) 369. § 5752.
 Ranger v. Champion Cotton Press Co., 51 Fed. Rep. 61. § 4406.
 Ranger v. Champion Cotton Press Co., 52 Fed. Rep. 609. § 6826.
 Ranger v. Great Western R. Co., 5 H. L. Cas. 72. §§ 1462, 5297, 6321.
 Rankin v. East & West India Dock & C. R. Co., 12 Beav. 298. § 7772.
 Rankin v. Harper, 23 Mo. 579, 585. § 7797.
 Rankin v. Minor, 72 N. C. 424. § 3520.
 Rankin v. Sherwood, 33 Me. 509. §§ 3406, 6725, 7581, 7583, 7720.
 Rankine v. Elliott, 16 N. Y. 377. §§ 3519, 3520, 3551, 3836.
 Ransom v. Priam Lodge, 51 Ind. 60. §§ 518, 522.
 Ransom v. Stonington Sav. Bank, 13 N. J. Eq. 212. §§ 5044, 5054, 5070.
 Raoul v. Newman, 57 Ga. 408. § 4984.
 Rapaloe v. Stewart, 27 N. Y. 310. §§ 5477, 6955.
 Rapelje v. Bailey, 3 Conn. 433. § 4353.
 Raphael v. McFarlane, 18 Can. S. C. 183. § 2537.
 Raritan & C. R. Co. v. Delaware & C. Canal Co., 18 N. J. Eq. 546. §§ 5398, 5401, 5403, 5404.
 Raritan & C. R. Co. v. Delaware & C. Co., 18 N. J. Eq. 546. § 5403.
 Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463. § 6659.
 Rashdall v. Ford, L. R. 2 Eq. 750. §§ 1568, 2057, 4136.
 Rasmussen v. McCabe, 43 Wis. 471; rehearing, 46 Wis. 600. § 8076.
 Rastrick v. Derbyshire & C. R. Co., 9 Ex. 149. § 3357.
 Ratcliffe's Case, 1 Strange, 267. § 5786.
 Rathbone v. Badlong, 15 Johns. (N. Y.) 1. § 5135.
 Rathbone v. Gas Co., 31 W. Va. 798. § 4483.
 Rathbone v. Parkersburg Gas Co., 31 W. Va. 798. § 4500.
 Rathbone v. Tigua Nav. Co., 2 Watts & S. (Pa.) 74. §§ 5049, 5802.
 Rathbun v. Northern Cent. R. Co., 50 N. Y. 656. § 7841.
 Rathbun v. Snow, 3 N. Y. Supp. 925. §§ 4651, 4850, 4890.
 Ratterman v. Ingalls, 48 Ohio St. 468. § 2917.
 Ratterman v. Western Union Tel. Co., 127 U. S. 411. §§ 683, 5460, 5562.
 Ranch v. Oil Co., 3 W. Va. 36, 38. § 5074.
 Rawlings v. Bell, 1 O. B. 951. § 1462.
 Rawlins v. Wickham, 3 De Gex & J. 304. §§ 469, 1364, 1424, 1484.
 Rawnsley v. Trenton Mut. Life Ins. Co., 9 N. J. Eq. 95. §§ 4543, 4544, 7220.
 Ray v. Law, 3 Cranch (U. S.), 179. § 6245.
 Ray v. Underwood, 3 Pick. (Mass.) 302. §§ 7998, 8069.

- Ray v. West Pennsylvania Natural Gas Co., 138 Pa. St. 576. § 5425.
- Ray Co. v. Barr, 57 Mo. 290. § 644.
- Raymond v. Bearnard, 12 Johns. (N. Y.) 274. § 2646.
- Raymond v. Caton, 24 Ill. 123. § 1784.
- Raymond v. Holborn, 23 Wis. 57. § 3248.
- Raymond v. Johnson, 11 Johns. (N. Y.) 488. § 7339.
- Raymond v. Palmer, 35 La. An. 276. § 6947.
- Raymond v. Palmer, 41 La. An. 425. § 5300.
- Raymond v. Rockland Co., 40 Conn. 401. §§ 7805, 7806.
- Raymond v. Spring Grove R. Co., 21 Week. L. Bul. (Ohio) 103. §§ 6075, 6164.
- Rayner v. Alnuspin, 15 Jur. 1060. § 4423.
- Raynor v. Pacific Nat. Bank, 93 N. Y. 371. § 7276.
- Rayson v. Berkeley R. Co., 26 S. C. 610. § 4873.
- Read v. Buffum, 79 Cal. 77. § 4697.
- Read v. Dupper, 6 T. R. 361. § 7055.
- Read v. Frankfort Bank, 23 Me. 318. §§ 92, 6581, 6720, 6748, 7022, 7720.
- Read v. French, 28 N. Y. 285, 293. § 4943.
- Read v. Head, 6 Allen (Mass.), 274. § 1199.
- Read v. Memphis & Gas Co., 9 Heisk. (Tenn.) 545. §§ 1724, 1737, 1838.
- Read v. Spaulding, 30 N. Y. 630. § 6340.
- Reading v. Savage, 120 Pa. St. 198. § 591.
- Reading v. Wedder, 66 Ill. 80. §§ 82, 253.
- Reading F. Ins. Co. v. Reading Iron Works, 27 W. N. C. 91; 21 Pitts. L. J. (n. s.) 209. § 1600.
- Reading Fire Tr. & Co. v. Reading Iron Works, 137 Pa. St. 282. §§ 2147, 2330, 2336.
- Reading Industrial Man. Co. v. Graeff, 64 Pa. St. 395. § 3143.
- Reading Trust Co. v. Reading I. Works, 137 Pa. St. 298. § 1600.
- Ready v. Tuscaloosa, 6 Ala. 327. §§ 405, 7599.
- Reagan v. Farmers' & Co. of 154 U. S. 362. §§ 5405, 5500, 5530, 5531, 5533, 5535, 5540, 5543, 7778, 7779, 7780.
- Reagan v. Farmers' Loan & Trust Co., 154 U. S. 420. §§ 7779, 7780.
- Reagan v. Mercantile Trust Co., 154 U. S. 413, 418. §§ 7779, 7780.
- Real Estates Co., Re (1893), 1 Ch. 398. § 6556.
- Real Estate Savings Institution v. Fisher, 9 Mo. App. 593. §§ 518, 532.
- Realty Co. v. Apolono, 5 Wash. 437. § 7917.
- Reapers' Bank v. Willard, 24 Ill. 433. §§ 69, 632, 5437.
- Reardon v. St. Louis County, 36 Mo. 555. § 7362.
- Reaveley's Case, 1 de Ger & S. 550. § 3273.
- Reavely, Ex parte, 1 Hall & T. 118. § 3273.
- Rece v. Newport News & Co. of 32 W. Va. 164. §§ 319, 688, 7464, 7466, 7875, 7881, 7891.
- Receiver v. State Treasurer, 39 Vt. 92. § 6960.
- Reciprocity Bank, Matter of, 22 N. Y. 17. §§ 1377, 1878, 1883, 1890, 2054, 2055, 3002, 3034, 3103, 3255, 3275, 3284, 3377, 3538, 3719, 3752, 4171, 5392, 7035.
- Reciprocity Bank, Re, 29 Barb. (N. Y.) 369; 17 How. Pr. (N. Y.) 323. § 5466.
- Rector v. Pierce, 3 Thomp. & Co. (N. Y.) 416. § 6363.
- Rector & v. Philadelphia Co., 24 How. (U. S.) 300. § 5571.
- Rector & v. Vanderbilt, 98 N. Y. 170, 173. § 4187.
- Reddick v. Gressman, 40 Mo. 389, 392. § 6225.
- Redding v. Godwin, 44 Minn. 355. §§ 3658, 7740.
- Redding v. South Carolina R. Co., 5 S. C. 1. §§ 6276, 6277, 6309.
- Reddington v. Mariposa & Co., 19 Hun (N. Y.), 405. §§ 7503, 8037.
- Redington v. Cornwell, 90 Cal. 49. §§ 3816, 3825, 3829.
- Redmon v. Hoge, 3 Hun (N. Y.), 171. §§ 6862, 7991.
- Redmond v. Dickerson, 9 N. J. Eq. 507, 509. §§ 4022, 4024, 4032, 4043.
- Redmond v. Enfield Man. Co., 13 Abb. Pr. (n. s.) (N. Y.) 332. § 7904.
- Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176. §§ 5615, 5615.
- Red Wing Hotel Co. v. Friederich, 26 Minn. 112. § 1170.
- Read's Appeal, 122 Pa. St. 565. § 6025.
- Read's Appeal (Pa.), 18 & 19 Rep. 130. §§ 5386, 5473.
- Read v. Allegheny City, 79 Pa. St. 300. § 6348.
- Read v. Ashburnham R. Co., 120 Mass. 43. § 4643.
- Read v. Bank of Newburgh, 6 Paige (N. Y.), 337. §§ 739, 4672.
- Read v. Benton & R. Co., 4 How. (Miss.) 257. § 7665.
- Read v. Boston Machine Co., 141 Mass. 4. § 2253.
- Read v. Bradley, 17 Ill. 321. §§ 5105, 5106, 5176, 6192.
- Reed v. Head, 6 Allen (Mass.), 174. § 2202.
- Reed v. Home Sav. Bank, 130 Mass. 443. §§ 6276, 6298, 6312.
- Reed v. Keese, 37 N. Y. Super. 269; affirmed, 60 N. Y. 616. §§ 3901, 4208, 4358.
- Reed v. Penrose, 36 Pa. St. 214. § 7849.
- Reed v. Richmond Street R. Co., 50 Ind. 342. § 1161.
- Reed v. Snodgrass, 55 Mo. 180. § 7681.
- Reed v. State, 15 Ohio, 217. § 5813.
- Reed v. Stouffer, 56 Md. 236. § 5813.
- Reeder v. Maranda, 66 Ind. 485. §§ 1432, 3159.
- Rees v. Conococheague Bank, 5 Rand. (Va.) 326. § 7665, 7977.
- Reese v. Bank of Commerce, 14 Md. 271. §§ 2326, 2332.
- Reese v. Bank of Montgomery County, 81 Pa. St. 78. §§ 2040, 2094.
- Reese v. Medlock, 27 Tex. 120. § 5298.
- Reese River & Co. v. Atwell, L. R. 7 Eq. 347. § 3485.
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- Reformed Presbyterian Church, Re, 7 How. Pr. (N. Y.) 476. §§ 3363, 6602.
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- Regents of University v. Williams, 9 Gill & J. 365. §§ 794, 5044, 5381, 5383, 5419, 6584.
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- Reid v. Bank of Mobile, 70 Ala. 199. §§ 5189, 6064.
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- Renick v. Ludington, 16 W. Va. 378. § 7055.
- Rennie v. Clarke, 5 Erch. 292. § 435.
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Republic Ins. Co., Re, 3 Biss. (U. S.) 457. § 1707.
 Republic Life Ins. Co. v. Pollak, 75 Ill. 292. §§ 2813, 2815, 2819.
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 Republica v. Duquet, 2 Yeates (Pa.), 493. § 5485.
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 Kettenhouse v. Winch, 11 N. Y. St. Rep. 122; 32 N. Y. St. Rep. 506; affirmed, 133 N. Y. 678. § 6173.
 Reusens v. Mexican Nat. Construction Co., 22 Fed. Rep. 522. § 1334.
 Reuter v. Telegraph Co., 6 El. & Bl. 341. §§ 943, 5059.
 Revere v. Boston Copper Co., 15 Pick. (Mass.) 351. §§ 6466, 6577, 6679, 6685.
 Rew v. Petet, 1 Ad. & El. 196. § 7840.
 Rex v. Aldborough, 10 Mod. 101, 199. § 833.
 Rex v. Allard, 4 Barn. & C. 772. § 1349.
 Rex v. Amery, 1 T. R. 575; 2 T. R. 515; 4 T. R. 122. §§ 5045, 5286, 6598, 6789.
 Rex v. Archbishop of Canterbury, 1 El. & El. 545, § 881, 887.
 Rex v. Arnaud, 9 Ad. & El. (n. s.) 806. §§ 1092, 2810.
 Rex v. Askew, 4 Ld. Raym. 2186, 2202. § 4393.
 Rex v. Athay, 2 Burr. 653. § 928.
 Rex v. Bailiffs of Ipswich, 2 Ld. Raym. 1232, 1239; 2 Salk. 434. §§ 286, 290, 726, 811, 813, 820, 839.
 Rex v. Bailiffs of Malden, 2 Salk. 431; 1 Ld. Raym. 481. § 833.
 Rex v. Bailiffs of Morpeth, 1 Strange, 58. § 833.
 Rex v. Bank of England, 2 Barn. & Ald. 620. § 4431.
 Rex v. Bank of England, 1 Doug. 508. § 7392.
 Rex v. Bank of England, 2 Doug. (Eng.) 546. § 2445.
 Rex v. Barker, 2 Burr. 1266. § 829.
 Rex v. Barker, 3 Burr. 1265; 1 W. Black. 300. § 829.
 Rex v. Barnard, Comb. 416. § 5646.
 Rex v. Baylis, 3 Burr. 1318. § 928.
 Rex v. Beardwell, 2 Keb. 52. §§ 15, 499, 6800.
 Rex v. Beeston, 3 T. R. 592. §§ 3914, 4959.
 Rex v. Bellringer, 4 T. R. 810. §§ 3514, 3916.
 Rex v. Bernstead, 2 Barn. & Ald. 699. § 1011.
 Rex v. Bigg, 3 P. Wms. 419. § 5045.
 Rex v. Birmingham & C. R. Co., 3 Ad. & El. (n. s.) 223; 9 Car. & P. 469; 2 Gale & D. 236. §§ 6418, 6423, 6429, 6436, 6439.
 Rex v. Birmingham Canal Nav., 2 W. Black. 708. § 6361.
 Rex v. Bishop of Ely, 5 T. R. 475. §§ 881, 887.
 Rex v. Bond, 2 T. R. 767, 771. § 6784.
 Rex v. Boscawen, cited 2 Burr. 1021, note. § 752.
 Rex v. Bower, 1 Barn. & C. 492. § 3914.
 Rex v. Bower, 1 Barn. & C. 585. § 7509.
 Rex v. Brayfield, 2 Keb. 488. § 820.
 Rex v. Bridge, 1 Maule & S. 76. § 783.
 Rex v. Bristol & C. R. Co., 2 Eng. Rail. Cas. 99. § 6345.
 Rex v. Bristol Dock Co., 12 East, 429, 432. § 7781.
 Rex v. Brown, 7 Cox C. C. 442. § 4998.
 Rex v. Brown, 4 Durnf. & E. 276. § 772.
 Rex v. Buller, 8 East, 389. § 3916.
 Rex v. Bumstead, 2 Barn. & Ald. 699. § 790.
 Rex v. Burch, 1 Fost. & Fin. 407. § 4998.
 Rex v. Burder, 4 T. R. 778. § 7509.
 Rex v. Cambrian R. Co., L. R. 6 Q. B. 422. § 5399.
 Rex v. Carlisle, 1 Strange, 385. § 813.
 Rex v. Carmarthen, 2 Burr. 869; 1 W. Black. 187. § 6774.
 Rex v. Carmarthen, 1 Maule & S. 696. § 720.
 Rex v. Carnatic R. Co., L. R. 8 Q. B. 239. §§ 1097, 3276.
 Rex v. Chalk, Comb. 396. §§ 16, 808.
 Rex v. Chalk, 1 Ld. Raym. 225; 5 Mod. 257. §§ 808, 811, 817, 820.
 Rex v. Chipping Norton, 5 East, 239. §§ 1066, 5045.
 Rex v. Chitty, 5 Ad. & E. 609; 2 Har. & W. 399; 1 Nev. & P. 78. § 790.
 Rex v. Church Wardens, Cowp. 413. § 834.
 Rex v. Clark, 1 East, 38. § 787.
 Rex v. Clark, 1 Sid. 272. § 5338.
 Rex v. Clifton, 5 T. R. 498. § 6418.
 Rex v. Cluworth, 1 Salk. 359; 6 Mod. 163; Holt, 239. §§ 6418, 6443.
 Rex v. Colchester, 2 Keb. 188. § 836.
 Rex v. College of Physicians, 5 Burr. 2740. §§ 4393, 4497.

Rex v. Corporation of Bedford Level, 6 East, 356. §§ 788, 792.
 Rex v. Corporation of Cornwall, 11 Mod. 174. § 833.
 Rex v. Corporation of Wells, 4 Burr. 1999. § 810.
 Rex v. Croke, Cowp. 29. § 294.
 Rex v. Cumberland, 5 Eng. Rail. Cas. 332. § 5059.
 Rex v. Cutbush, 4 Burr. 2204. § 1011.
 Rex v. Darlington Free Grammar School, 6 Ad. & El. (n. s.) 682. § 7784.
 Rex v. Davie, Dougl. 567, 568. § 928.
 Rex v. Dawes, 4 Burr. 2120. §§ 6783, 6784.
 Rex v. Day, 9 Barn. & C. 702; 4 Mann. & R. 541. § 775.
 Rex v. Deighton, 2 Keb. 656. § 820.
 Rex v. Derbyshire & C. R. Co., 3 El. & Bl. 784. §§ 3357, 3594.
 Rex v. Devonshire, 1 Barn. & C. 609, 614. §§ 3916, 3917.
 Rex v. Doncaster, Barnard, 264. § 802.
 Rex v. Doncaster, 2 B. & J. 744. § 708.
 Rex v. Durham, 10 Mod. 146. § 3851.
 Rex v. East & West India Docks & C. R. Co., 22 Eng. L. & Eq. 113; 22 L. J. (Q. B.) 380; 17 Jur. 1181. § 5942.
 Rex v. Eastern Archipelago Co., 1 El. & Bl. 310; affirmed, 23 L. J. (Q. B.) 82. § 6623.
 Rex v. Ecclesville, 1 Barn. & Ald. 348. § 6442.
 Rex v. Elkins, 4 Burr. 2129. § 3363.
 Rex v. Ellis, 2 Strange, 994. § 815.
 Rex v. Ely, 15 Ad. & El. (n. s.) 827. § 6282.
 Rex v. Escaille, 1 Fost. & Fin. 213. § 4998.
 Rex v. Exeter, Comb. 197; 4 Mod. 33. § 815.
 Rex v. Faversham, 3 T. R. 352. § 708.
 Rex v. Fraternity of Hostmen, 2 Strange, 1223. § 4421.
 Rex v. Gaborian, 11 East, 77. § 712.
 Rex v. Gardner, Cowp. 79; 2 Inst. 703. §§ 7366, 7790.
 Rex v. Ginever, 6 T. R. 594. § 6789.
 Rex v. Goodwin, Dougl. 397, note 22. § 794.
 Rex v. Government Stock Invest. Co., 3 Q. B. Div. 442. § 3876.
 Rex v. Governors of Darlington School, 6 Q. B. 682. § 802.
 Rex v. Grand Canal Co., 1 Ir. L. R. 337. §§ 4414, 4428.
 Rex v. Gravesend, 4 Dowl. & Ry. 117. § 3945.
 Rex v. Great Broughton, 5 Burr. 2700. § 6418.
 Rex v. Great North of England R. Co. 9 Ad. & El. (n. s.) 315, 327. §§ 6418, 6419, 6424, 6425.
 Rex v. Greene, 2 Ad. & El. (n. s.) 460. § 5263.
 Rex v. Griffiths, 5 Barn. & Ald. 731. §§ 833, 841.
 Rex v. Grimes, 5 Burr. 2601. § 708.
 Rex v. Guardians of Thame, 1 Strange 115. § 829.
 Rex v. Guilford, 1 Lev. 162. § 810.
 Rex v. Hann, 3 Burr. 1716. § 928.
 Rex v. Harris, 1 Barn. & Ald. 936. §§ 813, 815.
 Rex v. Hawkins, 10 East, 211. § 783.
 Rex v. Heaven, 2 Durnf. & E. 772. §§ 766, 817.
 Rex v. Hendon, 4 Barn. & Ald. 628. §§ 6429, 6436.
 Rex v. Hereford, 1 Keb. 655. § 838.
 Rex v. Hertford, 1 Salk. 374; 1 Ld. Raym. 426. § 6809.
 Rex v. Hill, 4 Barn. & Cressa. 441. §§ 707, 708, 772.
 Rex v. Hiorns, 7 Ad. & El. 960; 3 Nev. & P. 148. § 783.
 Rex v. Hodge, 12 Price, 537. § 1084.
 Rex v. Ingram, 1 W. Bl. 50. § 811.
 Rex v. Jones, 2 Strange, 1146. § 7509.
 Rex v. Jordan, Cas. temp. Hardw. 225. § 788.
 Rex v. Justices of Norfolk, 1 Nev. & M. 67. § 1240.
 Rex v. Kendall, 1 Ad. & El. (n. s.) 366. § 4433.
 Rex v. Kent, 13 East, 220. §§ 6282, 6358, 6373.
 Rex v. Kent, 2 Maule & Sel. 513. § 6282.
 Rex v. Kerrison, 3 Maule & Sel. 526. § 6282.
 Rex v. Knopion, 2 Keb. 445. § 763.
 Rex v. Langhorn, 4 Ad. & El. 538. § 708.
 Rex v. Larwood, Carth. 306. §§ 948, 1044.
 Rex v. Larwood, Comb. 315, 316. § 67.
 Rex v. Ledgard, 1 Ad. & El. (n. s.) 616. § 3537.
 Rex v. Leicester, 4 Burr. 2087, 2089. §§ 815, 820.
 Rex v. Leigh, 4 Burr. 2143. § 777.
 Rex v. Lichfield, 10 Ad. & El. (n. s.) 534. § 4867.
 Rex v. Lindsey, 14 East, 317. §§ 6282, 6358, 6373.
 Rex v. Lisle, 2 Strange, 1090. § 788.
 Rex v. Liverpool, 3 East, 86. §§ 6418, 6429, 6430, 6436, 7625.
 Rex v. Liverpool & C. R. Co., 21 L. J. (Q. B.) 284. § 2445.
 Rex v. London, City of, 3 Harg. St. Tr. 545. § 6806.
 Rex v. London, 2 Lev. 201. § 810.

- Rex v. London & Co., 1 Dowl. & Ry. 510; 5 Barn. & Ald. 890. §§ 2445, 4431.
- Rex v. London & Co. Docks Co., 44 L. J. (Q. B.) 4, § 4428.
- Rex v. Lone, 2 Strange, 920. § 7509.
- Rex v. Lucas, 10 East, 235. § 4421.
- Rex v. Mallinson, 20 L. J. (M. O.) 33; 1 Eng. L. & Eq. 239, § 929.
- Rex v. Mariquita Mining Co., 1 El. & El. 239. § 4428.
- Rex v. Martin, 2 Camp, 100. § 7737.
- Rex v. Master & Co. of St. John's College, Skinn. 546 § 815.
- Rex v. May, 5 Burr. 2651. §§ 707, 708, 713.
- Rex v. Mayor & Co. of Abingdon, 2 Salk. 431; Carth. 490. §§ 833, 837.
- Rex v. Mayor & Co. of Abingdon, 2 Salk. 699; 1 Ld. Raym. 559. § 832.
- Rex v. Mayor & Co. of Andover, 3 Salk. 229. § 815.
- Rex v. Mayor & Co. of Ayrbridge, Cowp. 523. § 841.
- Rex v. Mayor & Co. of Bristol, 1 Dowl. & R. 389. § 841.
- Rex v. Mayor & Co. of Cambridge, 2 Burr. 2008. § 700.
- Rex v. Mayor & Co. of Cambridge, 2 T. R. 456. § 834.
- Rex v. Mayor & Co. of Canterbury, 11 Mod. 403; 1 Strange, 674. §§ 817, 820.
- Rex v. Mayor & Co. of Chester, Comb. 307. § 830.
- Rex v. Mayor of Colchester, Comb. 324. § 838.
- Rex v. Mayor & Co. of Coventry, 1 Ld. Raym. 391; 2 Salk. 430. §§ 820, 833.
- Rex v. Mayor & Co. of Derby, Cas. temp. Hardw. 153, § 810.
- Rex v. Mayor & Co. of Doncaster, 2 Burr. 738. §§ 708, 715, 717, 820.
- Rex v. Mayor & Co. of Doncaster, 2 Ld. Raym. 1564, 1566; 1 Barn. 264. §§ 802, 810, 904, 906.
- Rex v. Mayor & Co. of Doncaster, Say. 37. §§ 815, 904, 906.
- Rex v. Mayor & Co. of Exeter, Comb. 197. §§ 815, 821.
- Rex v. Mayor & Co. of Liverpool, 2 Burr. 723; 2 Esp. 324. §§ 708, 715, 717, 806, 815, 820, 833, 856, 873, 881, 893, 906.
- Rex v. Mayor & Co. of Liverpool, 2 Burr. 734. § 708.
- Rex v. Mayor & Co. of London, 3 Barn. & Ad. 271. § 1240.
- Rex v. Mayor & Co. of London, 2 Durnf. & E. 177. §§ 803, 841.
- Rex v. Mayor & Co. of Lyme Regis, 1 Dougl. 79. § 814.
- Rex v. Mayor & Co. of Lyme Regis, 1 Dougl. 144. §§ 815, 835, 840.
- Rex v. Mayor & Co. of Lyme Regis, Dougl. 149. §§ 802, 804, 833, 836.
- Rex v. Mayor & Co. of Newbury, 1 Q. B. 751, 762. § 810.
- Rex v. Mayor & Co. of Norwich, 2 Salk. 436; 2 Ld. Raym. 1244; Holt, 444. §§ 834, 837.
- Rex v. Mayor & Co. of Oxon, 2 Salk. 428. §§ 805, 815, 820.
- Rex v. Mayor & Co. of Pomfret, 10 Mod. Rep. 107. § 833.
- Rex v. Mayor & Co. of Rippon, 1 Ld. Raym. 563; 2 Salk. 433. §§ 704, 817, 832, 833.
- Rex v. Mayor & Co. of Shrewsbury, Cases temp. Hardw. 147. § 708.
- Rex v. Mayor & Co. of Stafford, 2 Keb. 264. § 833.
- Rex v. Mayor & Co. of Tiverton, 8 Mod. 186. § 807.
- Rex v. Mayor & Co. of Truro, 3 Barn. & Ad. 590. § 766.
- Rex v. Mayor & Co. of Wilton, 2 Salk. 428. §§ 820, 840.
- Rex v. Mayor & Co. of York, 5 T. R. 66. §§ 833, 834, 840.
- Rex v. Medley, 6 Car. & P. 292. §§ 6276, 6283.
- Rex v. Mein, 3 T. R. 596. §§ 6786, 6787.
- Rex v. Merchant Tailors' Co., 2 Barn. & Ad. 115, 129. §§ 4418, 4421, 4428.
- Rex v. Miller, 6 T. R. 268, 278. §§ 3914, 3916.
- Rex v. Mills, 1 Keb. 623. § 836.
- Rex v. Monday, Cowp. 530, 536. § 3914.
- Rex v. Morris, 4 East, 17, 27. §§ 3916.
- Rex v. Morris, 1 Ld. Raym. 337. § 286.
- Rex v. Mothersell, 1 Strange 93. §§ 1931, 7734, 7737.
- Rex v. Newdigate, Comb. 10. §§ 849, 1036.
- Rex v. Newling, 3 T. R. 310. § 8786.
- Rex v. Nicholson, 12 East, 330. § 1549.
- Rex v. North Curry, 4 Barn. & C. 953. § 1349.
- Rex v. North of England R. Co., 9 Ad. & El. (N. S.) 315. § 6429.
- Rex v. Ogden, 10 Barn. & C. 230, 233. § 6774.
- Rex v. Oxford Canal Co., 4 Barn. & C. 74. § 5107.
- Rex v. Oxfordshire, 4 Barn. & C. 194. § 6282.
- Rex v. Parry, 6 Ad. & El. 810; 2 Nev. & P. 414. § 6783.
- Rex v. Parry, 14 East, 549. § 783.
- Rex v. Passmore, 3 T. R. 199, 241. § 256.
- Rex v. Pateman, 2 Durnf. & E. 779. §§ 794, 814.
- Rex v. Patrick, 1 Keb. 810, 183; 2 Keb. 65, 68. § 829.
- Rex v. Pease, 4 Barn. & Adol. 30. §§ 6342, 6433.
- Rex v. Philips, 1 Strange, 394. § 6802.
- Rex v. Ponsonby, 2 Bro. P. C. 311. §§ 766, 817.
- Rex v. Prest, 15 Jur. 554; 20 L. J. (N. S.) Q. B. 17; 1 Eng. L. & Eq. 250. § 4889.
- Rex v. Registrar, 10 Ad. El. (N. S.) 839. §§ 286, 288.
- Rex v. Richardson, 1 Burr. 517, 539; 2 Ld. Ken. 85. §§ 804, 806, 807, 808, 813, 820, 847, 856, 858, 859, 1021.
- Rex v. Rock, 2 Price, 198. § 1084.
- Rex v. Rogers, 2 Ld. Raym. 777. § 810.
- Rex v. Rowlands, 17 Q. B. 671, 686 note a. § 1030.
- Rex v. Saddler's Company, 10 L. H. Cas. 404. § 881.
- Rex v. Saintiff, 6 Mod. 255. § 6418.
- Rex v. Sanderson, Withtwg. 50. § 1084.
- Rex v. Sandwich, 2 Keb. 92. § 3887.
- Rex v. Sargent, 5 T. R. 466. § 6783.
- Rex v. Severn & E. Co., Barn. & Ald. 646. §§ 6361, 6360.
- Rex v. Sheffield, 2 T. R. 106. § 6442.
- Rex v. Shropshire Union Railways, L. R. 8 Q. B. 420. § 2445.
- Rex v. Slatford, Comb. 419. § 805.
- Rex v. Slythe, 6 Barn. & C. 240. § 6786.
- Rex v. South Wales R. Co., 14 Ad. & El. (N. S.) 902. § 5373.
- Rex v. Soutter (C. A.) [1891], 1 Q. B. 57. § 6808.
- Rex v. Spencer, 3 Burr. 1827. §§ 790, 1011, 1021.
- Rex v. Stamford, 6 Ad. & El. (N. S.) 433. § 5058.
- Rex v. Stead, 8 T. R. 142. § 6443.
- Rex v. Stephens, L. R. 1 Q. B. 701. § 6283.
- Rex v. St. John's College, Comb. 238. § 829.
- Rex v. St. John's College, Comb. 279. §§ 762, 838.
- Rex v. St. Katharine Dock Co., 4 Barn. & Ad. 360. § 3537.
- Rex v. St. Paul, 7 Ad. & El. (N. S.) 232. §§ 5069, 5070.
- Rex v. Stratford-upon-Avon, 14 East, 348. §§ 6418, 6430.
- Rex v. Stretford, 2 Ld. Raym. 1169. § 6429.
- Rex v. Sutton, 10 Mod. 74. § 819.
- Rex v. Swyer, 10 Barn. & C. 486. § 792.
- Rex v. Symmons, 4 T. R. 223. § 6785.
- Rex v. Taylor, 3 Salk. 231. §§ 815, 818.
- Rex v. Theodorick, 8 East, 543. §§ 703, 712, 715, 717.
- Rex v. Thomas, 8 Ad. & E. 183; 3 Nev. & P. 288; 2 Jur. 317. § 817.
- Rex v. Thornton, 4 East, 284, 307. § 3916.
- Rex v. Tiddlerley, Siderfin, 14. § 806.
- Rex v. Town of Rippon, 2 Keb. 15. § 836.
- Rex v. Townsend, 1 Keb. 659. § 829.
- Rex v. Trevenen, 2 Barn. & Ad. 479. § 6784.
- Rex v. Truebody, 2 Ld. Raym. 1275; 11 Mod. 75; Holt, 449. §§ 815, 821.
- Rex v. Twitty, 7 Mod. 83. § 833.
- Rex v. University of Cambridge (Dr. Bentley's Case), 1 Strange, 557; 2 Ld. Raym. 1334. §§ 858, 868, 881, 884.
- Rex v. Varlo, Cowp. 248, 250. §§ 3912, 3938.
- Rex v. Victoria Park Co., 1 Ad. & El. (N. S.) 288. § 3537.
- Rex v. Wardroper, 4 Burr. 1963, 1964. § 6783.
- Rex v. Warlon, 2 Maule & S. 75. § 773.
- Rex v. Wells, 4 Burr. 1999. § 813.
- Rex v. West, 6 Mod. 180. § 3944.
- Rex v. Westminster, Comb. 244. § 829.
- Rex v. West Riding of Yorkshire, 5 Burr. 2594. §§ 6282, 6442.
- Rex v. West Riding of Yorkshire, 2 East, 342. § 6442.
- Rex v. West Riding of York, 7 East, 588. § 6442.
- Rex v. West Riding of Yorkshire, 2 W. Black. 685. § 6418.
- Rex v. Westwood, 2 Dow. & Cl. 21, 36. §§ 53, 728, 849, 955, 956, 959.
- Rex v. Weymouth, 7 Mod. 373. § 1011.
- Rex v. Whitaker, 9 Barn. & C. 648. § 3914.
- Rex v. White, 5 Ad. & El. 613. § 6774.
- Rex v. Whitwell, 5 Durnf. & E. 85. § 778.
- Rex v. Williams, 1 Burr. 402; 1 W. Black. 93; 2 Ld. Raym. 68. § 6809.
- Rex v. Williams, 3 Burr. 1317. § 928.
- Rex v. Wilsa, 1 Salk. 359. § 6418.
- Rex v. Wils & Co. Canal Co., 3 Ad. & El. 477. § 4414.
- Rex v. Windham, Cowp. 377; Story Eq. Pl. 874; 1 Vern. 117. § 5064.

- Rex v. Withers, 2 Burr. 1020. § 752.
 Rex v. York, 5 T. R. 66, 74. § 4398.
 Rex v. York & R. Co., 1 El. & Bl. 178. § 6361.
 Rex v. Young, 1 Burr. 556. § 928.
 Rex and Middleton's Case, 1 Keb. 625, 629. § 762.
 Reynell v. Lewis, 15 Mees. & W. 517. §§ 421, 422, 423, 434, 435, 1908.
 Reynolds v. Adden, 136 U. S. 348, 353. § 7346.
 Reynolds v. Baldwin, 1 La. An. 162. § 6809.
 Reynolds v. Bank, 112 U. S. 405. § 502.
 Reynolds v. Commissioner & Co., 5 Ohio, 204. § 5645.
 Reynolds v. Continental Ins. Co., 36 Mich. 131. § 4978.
 Reynolds v. Crawfordville Bank, 112 U. S. 405. § 7964.
 Reynolds v. Douglass, 12 Pet. (U. S.) 497. § 2015.
 Reynolds v. Everett, 144 N. Y. 189. § 7782.
 Reynolds v. Feliciano & Co., 17 La. 397-406. §§ 3088, 3502, 3531, 3544.
 Reynolds v. Glasgow Academy, 6 Dana (Ky.), 37. §§ 5070, 5080.
 Reynolds v. Hindman, 33 Iowa, 146. § 6362.
 Reynolds v. Kenyon, 42 Barb. (N. Y.) 485. §§ 5210, 5226, 5229.
 Reynolds v. La Crosse & C. Packet Co., 10 Minn. 178. §§ 7553, 7555.
 Reynolds v. Lounsburg, 6 Hill (N. Y.) 534. § 1500.
 Reynolds v. Myers, 51 Vt. 444. §§ 7695, 7697, 7702.
 Reynolds v. New Salem, 6 Met. (Mass.) 340. § 718.
 Reynolds v. Shuller, 5 Cow. (N. Y.) 323. § 2454.
 Reynolds v. Skelton, 2 Tex. 516. § 7695.
 Reynolds v. Smith (D. C.), 17 Wash. L. Rep. 117. § 7522.
 Reynolds v. Stark County, 5 Ohio, 204. § 5770.
 Reynolds v. State, 61 Ind. 392. § 6794.
 Reynolds v. Stockton, 43 N. J. Eq. 211. §§ 7334, 7353.
 Reynolds & Co. Constr. Co. v. Police Jury, 44 La. An. 863. §§ 4622, 4637, 4874.
 Rhawn v. Pearce, 110 Ill. 350. § 7344.
 Rhea v. Powell, 24 Ill. App. 77. § 2765.
 Rheel v. Hicks, 25 N. Y. 291. § 1717.
 Rheem v. Naugatuck Wheel Co., 33 Pa. St. 356. § 7655.
 Rheem v. Naugatuck Wheel Co., 33 Pa. St. 358, 363. § 1816.
 Rhey v. Ebensburg & C. Plank Road Co., 27 Pa. St. 261. §§ 1318, 1703.
 Rhodes v. Cleveland, 10 Ohio, 159, 161. § 6275.
 Rhodes v. Cousins, 6 Rand. (Va.) 188. § 6339.
 Rhodes v. Dutcher, 6 Hun (N. Y.), 453. § 7162.
 Rhodes v. Salem Turnp. & C. Corp., 98 Mass. 95. §§ 5942, 7425, 7998.
 Rhodes v. Webb, 24 Minn. 192. §§ 4048, 5206.
 Rhoner v. First Nat. Bank, 14 Hun (N. Y.), 126. § 7275.
 Ribon v. Railroad Co., 16 Wall. (U. S.) 446. §§ 4581, 4593, 4595, 4597.
 Rice's Appeal, 79 Pa. St. 168. §§ 4053, 6097, 6127, 6229, 6265.
 Rice v. Alley, 1 Sneed (Tenn.), 51. § 5596.
 Rice v. Foster, 4 Harr. (Del.) 479. § 643.
 Rice v. Cove, 22 Pick. (Mass.) 158. §§ 5127, 5146, 5153.
 Rice v. Merrimack Hosiery Co., 56 N. H. 114. §§ 3018, 3050, 3064.
 Rice v. Nat. Bank, 126 Mass. 300. §§ 296, 6775.
 Rice v. Pacific Railroad, 55 Mo. 143. § 2022.
 Rice v. Peninsular Club, 52 Mich. 87. §§ 4455, 4875.
 Rice v. Railroad Co., 1 Black (U. S.), 858. § 5670.
 Rice v. Rock Island R. Co., 21 Ill. 93. §§ 73, 77, 518, 531, 1278, 1852, 1853, 1858, 1870, 4354.
 Rice v. Southgate, 16 Gray (Mass.), 142. §§ 3124, 4184.
 Rice v. Stearns, 3 Mass. 225. §§ 5135, 5136.
 Rice v. Stone, 1 Allen (Mass.), 566. § 6141.
 Rich v. Flanders, 39 N. H. 304. § 6182.
 Rich v. Levy, 16 Md. 74. § 6839.
 Rich v. Loutrel, 9 Abb. Pr. (N. Y.) 356; 18 How. Pr. (N. Y.) 121. § 6959.
 Rich v. Packard National Bank, 138 Mass. 527. §§ 2847, 2-50.
 Rich v. Shaw, 23 Me. 343. § 4302.
 Rich v. State Nat. Bank, 7 Neb. 201. §§ 1651, 5308, 6281.
 Richard Thompson Co. v. Brooks, 37 N. Y. St. Rep. 506; 14 N. Y. Supp. 370. § 4381.
 Richards v. Attleborough Nat. Bank, 148 Mass. 187. § 3859, 7754.
 Richards v. Beach, 19 Abb. N. C. 79, 84. §§ 3142, 3351.
 Richards v. Beach, 5 N. Y. Supp. 574. § 3382.
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 Richards v. Crocker, 19 Abb. N. Cas. (N. Y.) 73. §§ 3786, 4254, 4372.
 Richards v. Davies, 2 Russ. & Myl. 347. § 4482.
 Richards v. Hammer, 42 N. J. L. 435, 440. §§ 593, 595.
 Richards v. Home Assn., L. R. 6 C. P. 591. § 4154.
 Richards v. Kingsley, 14 Daly (N. Y.), 334; 12 N. Y. St. Rep. 125; 14 N. Y. St. Rep. 701. §§ 3615, 3670, 3810.
 Richards v. Merrimack & C. R. Co., 44 N. H. 127, 136. §§ 512, 5353, 5355, 5361, 5730, 5731, 6131, 6133, 6140, 6154, 6162, 6171, 6183, 6188, 6187.
 Richards v. New Hampshire Ins. Co., 43 N. H. 263. §§ 4150, 4151, 4479, 5222, 6503, 6504.
 Richards v. Osceola Bank, 79 Iowa, 707. §§ 4688, 4899.
 Richards v. People, 81 Ill. 551. §§ 6834, 6927, 6928, 6929.
 Richards v. Rock Rapids, 31 Fed. Rep. 505. §§ 2868, 2872.
 Richardson's Case, L. R. 19 Eq. 588. §§ 3202, 3204, 3271, 3272.
 Richardson, Ex parte, 1 Buck. 209. § 3330.
 Richardson v. Abendroth, 43 Barb. (N. Y.) 162. §§ 3146, 3148, 3153, 3446.
 Richardson v. Akin, 87 Ill. 138. § 5437.
 Richardson v. Buhl, 77 Mich. 632. § 6403.
 Richardson v. Burlington & C. R. Co., 38 Iowa, 260. §§ 7424, 7425.
 Richardson v. Green, 133 U. S. 30. §§ 1582, 2952, 4026, 4068.
 Richardson v. Hastings, 7 Beav. 323; 7 Beav. 301; 11 Beav. 17. §§ 4482, 4557, 4565, 4583.
 Richardson v. Insurance Co., 27 Gratt. (Va.) 749. §§ 2660, 2675.
 Richardson v. Larsent, 2 Younge & C. 507. § 4565.
 Richardson v. Mann, 30 La. An. 1080. § 2679.
 Richardson v. Massachusetts Charitable & C. Assn., 131 Mass. 174. § 5821.
 Richardson v. Merrimack & C. R. Co., 44 N. H. 137. § 5731.
 Richardson v. Pitts, 71 Mo. 128. §§ 240, 2972.
 Richardson v. Richardson, 75 Me. 570. §§ 2201, 2210.
 Richardson v. Royalton & C. Turnp. Co., 5 Vt. 580. § 6360.
 Richardson v. Scott River & C. Co., 22 Cal. 150. §§ 5074, 5076, 5079, 5080, 5084, 5086.
 Richardson v. Sibley, 11 Allen (Mass.) 65. §§ 5353, 5355, 5362, 5373, 5880, 5970, 6137, 6138, 5140, 6157, 6158, 7858.
 Richardson v. St. Joseph Iron Co., 5 Blackf. (Ind.) 146. §§ 4891, 5175, 5176, 7658.
 Richardson v. Vermont & C. R. Co., 44 Vt. 613. §§ 3156, 2238.
 Richardson v. Western Home Ins. Co., 8 N. Y. Supp. 873. § 8025.
 Richardson v. Williamson, L. R. 6 Q. B. 276. §§ 4135, 5028.
 Richardson-Gardner v. Fremantle, 24 L. T. (N. s.) 81. §§ 913, 914.
 Richmond's Case, 4 K. & J. 305. §§ 1523, 1550, 1802.
 Richmond's Executor's Case, 3 De Gex & S. 96. §§ 1523, 2054, 2055.
 Richmond v. Irons, 121 U. S. 27. §§ 3026, 3119, 3132, 3136, 3152, 3284, 3285, 3319, 3320, 3321, 3771, 6567, 7040, 7284, 7286, 7282.
 Richmond v. Long, 17 Gratt. (Va.) 375. § 79.
 Richmond v. Niagara Fire Ins. Co., 28 N. Y. 237. § 5265.
 Richmond v. Richmond & C. R. Co., 21 Gratt. (Va.) 604. § 5574.
 Richmond v. Scott, 48 Ind. 568. §§ 2870, 2874.
 Richmond v. Willis, 13 Gray (Mass.), 142. § 2789.
 Richmond & C. R. Co. v. Alamance Comms., 81 N. C. 504. § 5574.
 Richmond & C. R. Co. v. Louisa R. Co., 13 How. (U. S.) 71. § 5615.
 Richmond & C. R. Co. v. Richmond, 26 Gratt. (Va.) 83, 95. § 5640.
 Richmond & C. R. Co. v. Sneed, 19 Gratt. (Va.) 354. §§ 4617, 4618, 4621, 4622, 4641, 5132, 5730.
 Richmond & C. R. Co. v. Vance, 83 Ala. 144. § 6373.
 Richmond & C. Turnp. Road Co. v. Rogers, 1 Duval (Ky.), 135. § 5399.

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- Richmondville Man. Co. v. Prall**, 9 Conn. 487, § 2376.
- Richmondville Seminary v. McDonald**, 34 N. Y. 379, §§ 1202, 1941, 1946.
- Richter v. Jerome**, 123 U. S. 233, §§ 6126, 6876.
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- Ricker v. Larkin**, 27 Bradw. (Ill.) 625, §§ 239, 243, 4529.
- Ricketts v. Bennett**, 4 Com. B. 686, §§ 5957, 5979.
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- Riddell v. Animas Canon Toll R. Co.**, 5 Colo. 230, § 5907.
- Riddell v. Harmony Fire Co.**, 3 Phila. (Pa.) 310, § 856.
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- Riddle v. County of Bedford**, 7 Serg. & R. (Pa.) 392, § 738.
- Riddle v. First Nat. Bank**, 27 Fed. Rep. 503, § 7388.
- Riddle v. New York R. Co.**, 39 Fed. Rep. 290, §§ 7488, 7896.
- Riddle v. Proprietors of Locks, &c.**, 7 Mass. 169, 187, § 20, 59, 6275, 6305, 6378, 6362, 7362.
- Ridenour v. Mayo**, 40 Ohio St. 9; 29 Ohio St. 138, § 2939.
- Rider v. Bagley**, 84 N. Y. 461, § 6823.
- Rider v. Fritchey**, 49 Ohio St. 285, §§ 3112, 3626, 3255, 3261.
- Bider v. Morrison**, 54 Md. 429, §§ 1579, 2954.
- Rider v. Nelson & Union Factory**, 7 Leigh (Va.), 154, §§ 7630, 7720.
- Rider v. Union India Rubber Co.**, 5 Bosw. (N. Y.) 85, §§ 4068, 5181, 5183.
- Rider Life-Raft Co. v. Roach**, 97 N. Y. 378, § 5967.
- Ridgefield & C. R. Co. v. Brush**, 43 Conn. 86, §§ 1149, 1254, 1322, 1400.
- Ridgely v. Dobson**, 3 Watts & S. (Pa.) 118, § 5167.
- Ridge Turnp. Co. v. Peddle**, 4 Pa. St. 490, §§ 6494, 6571, 7797.
- Ridge Turnpike Co. v. Stoever**, 2 Watts & S. (Pa.) 548; 6 Watts & S. (Pa.) 378, § 5912.
- Ridgeway v. Bank of Tennessee**, 11 Humph. (Tenn.) 623, § 3363.
- Ridgeway v. Farmers' Bank**, 12 Serg. & R. (Pa.) 256, 258, §§ 3947, 3967, 3988, 4749, 5730, 7733, 7737.
- Ridgeway Township v. Griswold**, 1 McCrary (U. S.) 151, §§ 349, 355, 365, 395, 1290.
- Ridley v. Lyons**, 11 Heisk. (Tenn.) 251, § 4595.
- Ridley v. Plymouth & C. Grinding Co.**, 2 Ex. 711, §§ 3914, 3978, 5065.
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- Rieper v. Rieper**, 79 Mo. 352, 350, § 2964.
- Rigby v. Connot**, 14 Ch. Div. 462, § 1763.
- Rigby v. Bowater**, 3 Bro. Ch. 365, § 4369.
- Riggin v. Union Bank**, 13 La. An. 677, § 6772.
- Riggs v. Goodrich**, 74 Mo. 112, § 1657.
- Riggs v. Johnson Co.**, 6 Wall. (U. S.) 166, §§ 1118, 1119, 6211.
- Riggs v. Pennsylvania & C. R. Co.**, 16 Fed. Rep. 804, § 6078.
- Riggs v. Taylor**, 2 Cranch C. C. (U. S.) 687, § 2733.
- Riggs v. Whitney**, 15 Abb. Pr. (N. Y.) 388, §§ 6935, 6999.
- Rignold Settlement, Re**, L. R. 7 Ch. 223, § 693.
- Riker v. Alsop**, 27 Fed. Rep. 251, §§ 260, 6246.
- Riker v. Leo**, 133 N. Y. 519, § 5345.
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- Riley v. Packington**, L. R. 2 C. P. 536, § 435.
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- Ringling v. Kohn**, 4 Mo. App. 69, § 6064.
- Ringling v. Kohn**, 6 Mo. App. 333, §§ 4748, 5698, 5706.
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- Ripley v. Evans**, 87 Mich. 217, §§ 3357, 3363, 3761.
- Ripley v. Gage County**, 3 Neb. 397, § 7758.
- Ripley v. Sampson**, 10 Pick. (Mass.) 371, §§ 1550, 1794, 3013, 3020, 3047, 3319, 4344, 4345.
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- Rising Sun Ins. Co. v. Slaughter**, 20 Ind. 520, § 7950.
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- Risley v. McNiece**, 71 Ind. 434, § 5815.
- Ritchie v. Franklin County**, 22 Wall. (U. S.) 67, § 590.
- Ritter v. Scannell**, 11 Cal. 238, 248, § 7507.
- Rivanna Nav. Co. v. Dawsons**, 3 Gratt. (Va.) 19, §§ 3277, 6457, 5770, 5771, 5772, 5783.
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- River Dun Nav. Co. v. North Midland R. Co.**, 1 Eng. R. Cas. 135, § 7768.
- River Nav. Co. v. Neal**, 3 Hawks (N. C.), 520, § 2991.
- Rives v. Dudley**, 3 Jones Eq. (N. C.) 126, § 5791.
- Rives v. Plank Road Co.**, 30 Ala. 92, §§ 1311, 1367, 1424, 1462, 1705, 4486, 6323, 6335.
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- Roach v. Ostler**, 1 Man. & Ry. 646, § 5124.
- Road v. Crigger**, 5 Har. & J. (Md.) 122, § 5113.
- Road Co. v. Lancaster**, 79 Ky. 552, § 1172.
- Road in Phoenixville, Re**, 109 Pa. St. 44, §§ 610, 619.
- Roads v. Symmes**, 1 Ohio 281, § 2771.
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- Robb v. Ross County Bank**, 41 Barb. (N. Y.) 586, §§ 4748, 4791, 4802, 4804, 5158.
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- Robbins v. Chicago**, 4 Wall. (U. S.) 657, § 4376.
- Robbins v. Justices**, 12 Gray (Mass.), 225, § 5382.
- Robbins v. Milwaukee & C. R. Co.**, 6 Wis. 636, § 5926.
- Robbins v. Omnibus R. Co.**, 32 Cal. 472, § 5516.
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- Robbins v. Suffolk County**, 12 Gray (Mass.), 225, § 7520.
- Robbins v. Waldo Lodge**, 78 Me. 565, § 4485.
- Robbins v. Wells**, 1 Rob. (N. Y.) 666, §§ 2806, 2926.
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- Robert's Appeal**, 85 Pa. St. 84, § 2377.
- Robert's Case**, 2 Keb. 102, § 829.
- Robert's Case**, 2 Mac. & G. 192; affirming 3 De Geor. & S. 205, §§ 421, 426, 434, 1320, 1332, 1577, 1908.
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- Roberts v. Hill**, 22 Fed. Rep. 571, § 7273.
- Roberts v. Hill**, 23 Fed. Rep. 311, §§ 7272, 7294.
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- Roberts v. Mobile & C. R. Co.**, 32 Miss. 373, §§ 1308, 1325, 1332, 1351, 1577.
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- Roberts v. Peake**, 1 Burr. 323, § 1829.
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- Robertson v. Bullions**, 11 N. Y. 243, §§ 927, 4009, 4554, 5222.
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- Robertson v. Sibley**, 10 Minn. 323, §§ 1185, 2933, 3578, 3632, 3637, 3638.
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- Robinson v. Bland, 2 Burr. 1077. §§ 5124, 5714.
- Robinson v. Chamberlain, 34 N. Y. 389. § 6313.
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- Robinson v. Jewett, 116 N. Y. 40. § 4072.
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- Robinson v. Pittsburgh & C. R. Co., 32 Pa. St. 334. §§ 1155, 1311, 1367, 1400, 1513, 1579.
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- Robinson v. Robinson, 1 Duv. (Ky.) 162. § 5626.
- Robinson v. Smith, 3 Paige (N. Y.), 222. §§ 4009, 4477, 4479, 4480, 4482, 4499, 4545, 4565, 4578, 4602, 7411.
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- Robison v. Carey, 8 Ga. 530. §§ 1569, 2951, 3437.
- Robson v. Bennett, 2 Taunt. 395. § 4814.
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- Rochester Sav. Bank v. Averell, 96 N. Y. 467. § 6172.
- Rochester Water Comm'rs. Re, 66 N. Y. 413. § 5619.
- Rockford & C. R. Co. v. Boody, 56 N. Y. 456, 461. § 4060.
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- Rockford & C. R. Co. v. Shunick, 65 Ill. 223. §§ 4933, 7740.
- Rockland & C. Steamboat Co. v. Sewall, 78 Me. 167. §§ 1235, 1848, 3896.
- Rockland Water Co. v. Camden & C. Water Co., 80 Me. 544. §§ 5345, 5401.
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- Rodemacher v. Milwaukee & C. R. Co., 41 Iowa, 297. §§ 70, 5506.
- Rodgers v. Mutual Endowment & C. Asso., 17 S. C. 406. § 7970.
- Rodney v. South R. Asso., 3 N. Y. St. Rep. 564. § 4704.
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- Roe v. Rawlings, 7 East, 279, 290. § 7733.
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- Roehler v. Mechanics' Aid Society, 22 Mich. 86. § 581.
- Roemer v. Simon, 91 U. S. 149. § 6232.
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- Rogers v. Dougherty, 20 Ga. 271. § 6880.
- Rogers v. Goswell, 51 Mo. 466. § 5815.
- Rogers v. Hastings & C. R. Co., 22 Minn. 25. §§ 4387, 5181, 5183.
- Rogers v. Huntington Bank, 12 Serg. & R. (Pa.) 77. §§ 2320, 2327, 3246.
- Rogers v. Jones, 1 Wend. (N. Y.) 237, 260. § 1048.
- Rogers v. Lafayette Agricultural Works, 52 Ind. 296. §§ 4480, 4504.
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- Rogers v. March, 33 Me. 106. § 5165.
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- Rogers v. New York & C. Land Co., 17 N. Y. St. Rep. 131; 1 N. Y. Supp. 908. §§ 4509, 4568, 4597.
- Rogers v. Oxford & C. R. Co., 2 De Gex & J. 662. § 4569.
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 Sanborn v. Lefferts, 16 Abb. Pr. (N. Y.) 42; 58 N. Y. 179. §§ 3901, 4228, 4233, 4325.
 Sanborn v. Neal, 4 Minn. 126. §§ 5126, 5132.
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 Sandelands, Re, L. R. 6 C. P. 411. § 5070.
 Sander v. Edling, 13 Daly (N. Y.), 238. §§ 4733, 7602.
 Sanders v. Page, 11 Colo. 518. § 4673.
 Sanders v. St. Neots Union, 8 Ad. & El. (N. s.) 810. § 5059.
 Sanford v. McArthur, 13 B. Mon. (Ky.) 411. § 4135.
 Sanford v. Tremlett, 42 Mo. 384. §§ 5048, 5098.
 San Diego v. San Diego & C. R. Co., 44 Cal. 106. §§ 4043, 4046, 4060.
 Sands v. Boutwell, 26 N. Y. 233. § 5853.
 Sands v. Hill, 59 N. Y. 18. § 7219.
 Sands v. Hill, 42 Barb. (N. Y.) 651. §§ 7247, 7253, 7651.
 Sands v. Hildreth, 14 Johns. (N. Y.) 493. § 2775.
 Sands v. Kinbark, 27 N. Y. 147. § 6989.
 Sands v. Manistee River Imp. Co., 123 U. S. 288. §§ 5460, 8133.
 Sands v. Sanders, 28 N. Y. 416. §§ 7233, 7235, 7242.
 Sands v. Sweet, 44 Barb. (N. Y.) 108. §§ 7233, 7286.
 Sandusky City Bank v. Wilbor, 7 Ohio St. 481. § 5569.
 Sandval v. Ford, 55 Iowa 461. § 7758.
 Sanford v. Eighth Ave. R. Co., 23 N. Y. 343. § 6903.
 Sanford v. Eighth Ave. R. Co., 7 Bosw. (N. Y.) 122. § 6308.
 Sanford v. Kentucky Trust Co. Bank, 1 Met. (Ky.) 106. § 6901.
 Sanford v. Nichols, 14 Minn. 324. § 3863.
 Sanford v. Sinclair, 8 Paige (N. Y.) 373. § 6*80.
 San Francisco v. Certain Real Estate, 42 Cal. 513. § 590.
 San Francisco v. Flood, 64 Cal. 504. §§ 2803, 2804, 2913.
 San Francisco v. Fry, 63 Cal. 470. § 2803.
 San Francisco v. Liverpool & C. Ins. Co., 74 Cal. 113; §§ 7877, 7928, 8090.
 San Francisco v. Spring Valley Water Works, 48 Cal. 493, 518. §§ 574, 578, 579, 580, 581, 587, 589, 647, 659, 5312.
 San Francisco v. Spring Valley Water Works, 63 Cal. 524. § 2815.
 San Francisco & C. R. Co. v. Bee, 48 Cal. 398. §§ 265, 4043.
 San Francisco & C. R. Co. v. Caldwell, 31 Cal. 367, 372. §§ 5538, 5603, 5626.
 San Francisco Gas Co. v. San Francisco, 9 Cal. 453, 471. §§ 5046, 5182, 5303.
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 Sanger v. Upton, 91 U. S. 56. §§ 518, 1063, 1138, 1450, 1573, 1684, 1703, 2952, 3386, 3395, 3404, 3417, 3419, 3537, 3552, 3692, 3752, 6469.
 Sanilac County v. Auditor-General, 68 Mich. 659. § 611.
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 San Jose Savings Bank v. Sierra Lumber Co., 63 Cal. 179. § 3895.
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 Sankey Brook Coal Co. v. Marsh, L. R. 6 Exch. 185. § 3786.
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 Santa Clara County v. Southern Pac. R. Co., 18 Fed. Rep. 385. §§ 8088, 8092.
 Santa Clara Female Academy v. Sullivan, 116 Ill. 375. §§ 203, 7894, 7913, 7914.
 Santa Clara Mining Asso. v. Meredith, 49 Md. 389. §§ 4395, 4397.
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 Santa Cruz R. Co. v. Schwartz, 53 Cal. 106. §§ 1235, 1335.
 Santa Eulalia Min. Co., Re, 4 N. Y. St. Rep. 174. § 6688.
 Santa Fe County v. New Mexico & C. R. Co., 3 N. M. 116. § 5569.
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 Sargeant, Ex parte, 17 Vt. 425. §§ 4618, 4629.
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 Sargent v. Kansas & C. R. Co., 48 Kan. 672. § 4022.
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 Sasser v. State, 13 Ohio, 453. § 7713.
 Sater v. Burlington & Plank Road Co., 1 Iowa, 386. § 6343.
 Satterlee v. Matthewson, 2 Pet. (U. S.) 380. § 590.
 Satterlee v. San Francisco, 23 Cal. 314. § 3920.
 Saunders v. Bartlett, 12 Heisk. (Tenn.) 316. § 1084.
 Saunders Case, L. R. 20 Eq. 506. § 7154.
 Saunders Case, 2 De Gex, J. & S. 101. §§ 3196, 3277.
 Saunders v. Sioux City Nursery & S. Co., 6 Utah, 431. § 7518.
 Saunders v. Williams, 5 N. H. 213. § 7337.
 Savage v. Ball, 17 N. J. Eq. 142. §§ 4001, 5730.
 Savage v. Medbury, 19 N. Y. 32. §§ 7234, 7244.
 Savage v. Pickard, 14 Lea (Tenn.), 46. § 4708.
 Savage v. Putnam, 32 Barb. (N. Y.) 420. §§ 2927, 3231, 3816.
 Savage v. Rix, 9 N. H. 263. §§ 5126, 5129, 5152, 5153.
 Savage v. Russell, 84 Ala. 103. §§ 7675, 7712.
 Savage v. Walshe, 26 Ala. 619. §§ 5127, 5754, 5758, 6678, 6681.
 Savage Man. Co. v. Armstrong, 17 Me. 34. §§ 7665, 7977.
 Savage Man. Co. v. Worthington, 1 Gill (Md.), 284. § 5165.
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 Savannah & C. R. Co. v. Lancaster, 62 Ala. 555. § 6177.
 Savannah Cotton Exchange v. State, 54 Ga. 663, 670. §§ 869, 870, 899, 904, 1047, 1035.
 Savannah Nat. Bank v. Haskins, 101 Mass. 370. § 2014.
 Saveland v. Green, 40 Wis. 431. §§ 5300, 5311.
 Savin v. Hoylelake R. Co., L. R. 1 Exch. 9; 4 Hurl. & Colt. 67. § 416.
 Savings Asso. v. O'Brien, 51 Hun (N. Y.), 45. §§ 3020, 6469.
 Savings Bank v. Allen, 28 Conn. 97. §§ 506, 590.
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 Savings Bank v. Davis, 8 Conn. 191. §§ 715, 717, 3914, 3936, 5015, 5046, 5074, 5176, 6191.
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 Sawyer, Re, 14 Nat. Bank Reg. 241. § 1402.
 Sawyer v. Corse, 17 Gratt. (Va.) 230. § 6363.
 Sawyer v. Dubuque Printing Co., 77 Iowa, 242. § 4485.
 Sawyer v. Hoag, 17 Wall. (U. S.) 610. §§ 1568, 1569, 1575, 1579, 1585, 1586, 1590, 2951, 2952, 2957, 3277, 3552, 3562, 3564, 3718, 3786, 3787, 3797, 3804, 4126, 7282, 7302.
 Sawyer v. Methodist Epis. Soc., 18 Vt. 405. §§ 3950, 4063, 4462.
 Sawyer v. North American Life Ins. Co., 46 Vt. 697. § 8003.

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- Scarlett v. Academy of Music, 43 Md. 205. § 1749.
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- Schofield v. Henderson, 67 Ind. 286. §§ 4210, 4359.
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- Schofield v. Union Bank, 2 Cranch C. C. (U. S.) 115. § 732.
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- School District v. Aldrich, 13 N. H. 139. § 7669.
- School District v. Atherton, 12 Met. (Mass.) 105. §§ 704, 718.
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- Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 75. §§ 3104, 3119, 3403, 3734, 7304.
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- Schrick v. St. Louis Mut. House Building Co., 34 Mo. 423. §§ 949, 950.
- Schrieker v. Ridings, 65 Mo. 208. §§ 2930, 3006, 3087.
- Schroder's Case, L. R. 11 Eq. 131. §§ 1578, 1605, 1618.
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- Schumacher v. Tobeman, 56 Cal. 508. § 590.
- Schumm v. Seymour 24 N. J. Eq. 143. § 3905.
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- Schwartz v. Gillett, 1 Chand. (Wis.) 207. § 7958.
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- Scotland County v. Hill, 112 U. S. 183. § 6234.
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- Scots Charitable Soc. v. Shaw, 8 Mass. 532. § 7365.
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- Scott v. Avery, 5 H. L. Cas. 611. §§ 1034, 7465.
- Scott v. Baker, 3 W. Va. 285. §§ 5126, 5129, 5132.
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- Scott v. Crews, 2 S. C. 522. § 2656.
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- Scott v. Johnson, 5 Bosw. (N. Y.) 213. §§ 4633, 5126, 5133, 5754, 5755, 5757, 5978.
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- Scott v. Scholey, 8 East, 467. § 2771.

- Scott v. Surman, Willes, 400. § 7034.
 Scott v. Texas Land & Co., 41 Fed. Rep. 225. § 7463, 7473.
 Scottish Commercial Ins. Co. v. Plummer, 70 Me. 540. § 7961.
 Scottish Petroleum Co., Re, 23 Ch. Div. 413. §§ 1529, 1736.
 Scovill v. Geddings, 7 Ohio, 211. § 6275.
 Scovill v. Thayer, 105 U. S. 143. §§ 1513, 1579, 1586, 1676, 1885, 1936, 2044, 2080, 3104, 3538, 3552, 3580, 3779, 3786.
 Scoville v. Canfield, 14 Johns. (N. Y.) 338. §§ 3050, 4168.
 Scoville v. City of Cleveland, 1 Ohio St. 126. § 815.
 Scranton, Re, 74 Ill. 161, 162. § 5838.
 Scranton Electric Light and Heat Co., Appeal of, 122 Pa. St. 154. § 246.
 Scripture v. Francetown Soapstone Co., 50 N. H. 571, 539, 855. §§ 2109, 2410, 2416, 2770, 5210.
 Scruggs v. Scottish Mortgage Co., 54 Ark. 566. §§ 7936, 7957.
 Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694. §§ 5583, 7771.
 Scully, Ex parte, 6 Ir. Ch. 72. §§ 3194, 3204.
 Seaber v. Hawkes, 5 Moo. & P. 549. § 5141.
 Seabourn v. Powell, 15 Vern. 10. § 6141.
 Seacord v. Pendleton, 55 Hun (N. Y.), 579. § 1909.
 Seagraves v. Alton, 13 Ill. 366, 371. §§ 5046, 7391, 7392.
 Seaman v. Goodnow, 20 Wis. 27. §§ 4208, 4338.
 Seaman v. New York, 3 Daly (N. Y.), 147. § 6358.
 Seamans v. Carter, 15 Wis. 548. § 5021.
 Searcy v. Little Rock & Co., 5 Dill. (U. S.) 348. §§ 3004, 3772.
 Searcy v. Stabbs, 12 Ga. 437. § 6987.
 Searcy, Town of, v. Yarnell, 47 Ark. 269. §§ 501, 518, 533, 4074, 6667, 7642, 7647, 7648.
 Searight v. Payne, 6 Lea (Tenn.), 283. §§ 1644, 5962.
 Searbourn v. Stokes, 3 How. (U. S.) 151. § 1518.
 Searing v. Butler, 69 Ill. 575, 578. § 5311.
 Searle v. Choat, 25 Ch. Div. 723. § 7128.
 Sears v. Ames, 117 Mass. 413. § 2733.
 Sears v. Hotchkiss, 25 Conn. 171. §§ 4518, 4519, 4566, 4578.
 Sears v. Illinois Wesleyan University, 28 Ill. 183. §§ 4697, 5123.
 Sears v. King's Co. Elevated R. Co., 152 Mass. 151. § 4706.
 Sears v. King's Co. Elevated R. Co., 156 Mass. 440. § 4705.
 Sears v. Waters, 44 Hun (N. Y.), 101. § 4197.
 Sears v. Wingate, 3 Allen (Mass.), 103. §§ 6331, 6332.
 Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 323. §§ 503, 532, 1846, 7652, 7689, 7696, 7697.
 Seaton v. Chicago & E. R. Co., 55 Mo. 416. § 7645.
 Seaver v. Coburn, 10 Cush. (Mass.) 324. §§ 5076, 5171.
 Secombe v. Railroad Co., 23 Wall. (U. S.) 108. § 5600.
 Second Avenue R. Co. v. Colman, 21 Barb. (N. Y.) 300. § 4715.
 Second Avenue R. Co. v. Mehrbach, 49 N. Y. Super. Ct. 267. § 4675.
 Second Cong. Soc. v. Waring, 24 Pick. (Mass.) 304. § 7382.
 Second Nat. Bank v. Burt, 93 N. Y. 233. §§ 4928, 4929.
 Second Nat. Bank v. Caldwell, 13 Fed. Rep. 429. §§ 2865, 2883.
 Second Nat. Bank v. Lovell, 2 Cin. (Ohio) 397. § 7895.
 Second Nat. Bank v. Manufacturing Co., 13 W. N. C. (Pa.) 174. § 7758.
 Second Nat. Bank v. Potter & Co. Man. Co., 56 N. Y. Super. 216; 2 N. Y. Supp. 644. § 5250.
 Second Nat. Bank v. Wells, 53 How. Pr. (N. Y.) 242. § 7661.
 Second Universalist Soc. v. Dugan, 65 Md. 460. § 5818.
 Secor v. Law, 4 Abb. App. Dec. (N. Y.) 188. § 381.
 Secor v. Singleton, 35 Fed. Rep. 376. § 6452.
 Secor v. Singleton, 41 Fed. Rep. 725. § 4479.
 Security Bank v. National Bank, 67 N. Y. 453. §§ 4817, 4833.
 Security Life Ins. Co., Re, 11 Hun (N. Y.), 96. § 7254.
 Security Loan Asso. v. Lake, 69 Ala. 456. §§ 938, 3323.
 Sedalia & Co. R. Co. v. Wilkerson, 83 Mo. 235. §§ 1157, 1158, 1159.
 Seddon v. Connell, 10 Sim. 59. § 1483.
 Seddon v. Virginia & Co. Co., 36 Fed. Rep. 6. § 7474.
 Seeley v. New York National Exchange Bank, 8 Daly (N. Y.), 400; affirmed, 78 N. Y. 608. § 2118.
 Seeley v. San Jose Independent Mill Co., 59 Cal. 22. §§ 4623, 4627, 4643, 4958, 5251, 5327.
 Seeligson v. Brown, 61 Tex. 114. §§ 2412, 2413.
 Seely v. Alden, 61 Pa. St. 302. § 6377.
 Seibert v. Lewis, 122 U. S. 284, 294. § 3035.
 Seibert v. Minneapolis & Co. R. Co., 52 Minn., 246. § 6148.
 Seibrecht v. New Orleans, 12 La. An. 129. § 4874.
 Seidenbender v. Charles, 4 Serg. & K. (Pa.) 151. § 7959.
 Seiders' Appeal, 46 Pa. St. 57. §§ 3144, 3145.
 Seighorther v. Weissenborn, 20 N. J. Eq. 172, 177. § 4547.
 Seignouret v. Home Ins. Co., 24 Fed. Rep. 332. § 2079.
 Seiser v. Mali, 41 N. Y. 619; reversing 32 Barb. (N. Y.) 76. § 2740.
 Seixas v. Citizens' Bank, 38 La. An. 424. § 5212.
 Seizer v. Mali, 32 Barb. (N. Y.) 76. § 1504.
 Selby v. McCullough, 26 Mo. App. 72. §§ 1657, 1879 a.
 Selby v. Portland, 14 Or. 243. § 4708.
 Selden v. Cashman, 20 Cal. 56. § 6377.
 Sellen v. Norman, 4 Car. & P. 80. § 4855.
 Sellersville Nat. Bank v. Banks, 9 Pa. Co. Ct. 92. § 3027.
 Selma v. Mullen, 46 Ala. 411, 414. § 5046.
 Selma & R. Co., Ex parte, 45 Ala. 696. §§ 1116, 1118.
 Selma & R. Co. v. Anderson, 51 Miss. 829. § 1237.
 Selma & R. Co. v. Harbin, 40 Ga. 706. §§ 365, 402.
 Selma & R. Co. v. Keith, 53 Ga. 178. § 6343.
 Selma & R. Co. v. Tipton, 5 Ala. 787. §§ 496, 497, 498, 501, 1138, 1185, 1209, 1228, 1511, 1550, 1784, 1794, 1823, 1852, 1853, 1879, 2391, 5107, 5176, 5246, 5247, 6598, 7661.
 Selma & R. Co. v. Tyson, 48 Ga. 351. §§ 7811, 7998, 8069.
 Selma & R. Co. v. Webb, 49 Ala. 240. § 6304.
 Selman v. Wolfe, 27 Tex. 68. § 5934.
 Semmes v. Hartford Ins. Co., 13 Wall. (U. S.) 158. § 3375.
 Semmes v. Mott, 27 Ga. 92. § 3484.
 Semple v. Bank of British Columbia, 5 Sawy. (U. S.) 88. §§ 7887, 7888, 7950.
 Semple v. Glenn, 91 Ala. 245. §§ 2005, 3657, 3659, 3687, 3774, 3775, 7736.
 Semple v. London & Co. R. Co., 1 Railw. Cas. (Eng.) 120, 133. § 7774.
 Senate Bill, Re, 12 Colo. 188. § 645.
 Seneca County Bank v. Lamb, 26 Barb. (N. Y.) 595. §§ 1013, 3973.
 Seneca County Bank v. Neass, 5 Denio (N. Y.), 329. §§ 4276, 5208.
 Sennott v. St. Johnsbury & Co. R. Co., 59 Vt. 226. § 6239.
 Sercomb v. Catlin, 128 Ill. 556. §§ 6927, 7334, 7335, 7350.
 Serrell v. Derbyshire & Co. R., 9 C. B. 811. §§ 5027, 5170.
 Serrell v. Derbyshire & Co. R. Co., 10 C. B. 910; 19 L. J. C. P. 371. § 5730.
 Sessions v. Block, 40 Mo. App. 569. § 3205.
 Settlement v. Sullivan, 97 U. S. 444. § 7503.
 Severin v. Eddy, 52 Ill. 189. § 4337.
 Sewall v. Allen, 6 Wend. (N. Y.) 335. § 3476.
 Sewall v. Boston Water Power Co., 4 Allen (Mass.), 277. §§ 2478, 2501, 2556, 2557, 2566, 2567, 2587, 4701.
 Sewall v. Chamberlain, 16 Gray (Mass.), 581. § 2356.
 Sewall v. Eastern R. Co., 9 Cush. (Mass.) 5. § 1778.
 Sewall v. Lancaster Bank, 17 Serg. & R. (Pa.) 285. §§ 2436, 3239, 3246, 3248.
 Sewall's Falls Bridge v. Fisk, 23 N. H. 171. §§ 6598, 6600.
 Seward v. Baker, 1 T. R. 616. § 5930.
 Seward v. Rising Sun, 79 Ind. 351. §§ 1036, 2847, 2848.
 Sewell's Case, L. R. 3 Ch. 131. §§ 63, 1833, 3204.
 Sewell v. East Cape May Beach Co., 50 N. J. Eq. 717. §§ 6541, 6226.
 Sewing Machine Companies' Case, 18 Wall. (U. S.) 553. §§ 7453, 7457.
 Seybel v. National Currency Bank, 54 N. Y. 288. §§ 4724, 6064.
 Seybert v. Pittsburg, 1 Wall. (U. S.) 273. § 1118.
 Seymour v. Bennet, 14 Mass. 266. § 5182.

- Seymour v. Canandaigua & C. R. Co., 25 Barb. (N. Y.) 284, 304. §§ 6141, 6194, 6199.
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- Seymour v. Greenwood, 6 Hurlst. & N. 359; 4 L. T. (N. s.) 835; 30 L. J. (Ex.) 327. § 6299.
- Seymour v. Greenwood, 7 Hurlst. & N. 355. § 6308.
- Seymour v. Milford & C. Turnp. Co., 10 Ohio, 476. § 6837.
- Seymour v. Milford & C. Turnp. Co., 10 Ohio, 476. § 7853.
- Seymour v. Spring Forest Cemetery Assn., 45 N. Y. St. Rep. 520; 19 N. Y. Supp. 94. §§ 5286, 5289, 6050.
- Seymour v. Sturgess, 26 N. Y. 134. §§ 1138, 1259, 1568, 1577, 2925, 3046, 3047, 3048, 3051.
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 Sheridan Electric Light Co. v. Chatham Nat. Bank, 5 N. Y. Supp. 529; 52 Hun, 575. §§ 3955, 3961, 5736.
 Sheriff v. Lowndes, 16 Md. 357. §§ 5386, 5440.
 Sheriff v. Oil Co., 7 Phila. (Pa.) 4. § 3483.
 Sherley v. Billings, 8 Bush (Ky.), 147. §§ 6298, 6307, 6309.
 Sherman v. Beacon Const. Co., 11 N. Y. Supp. 369. § 7760.
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 Sherman v. Commercial Printing Co., 29 Mo. App. 31. §§ 5986, 7396.
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 Sherman v. Fitch, 98 Mass. 59. §§ 5078, 5087, 5089, 6105, 6176, 6190.
 Sherman v. New York & R. Co., 22 Barb. (N. Y.) 239. §§ 5074, 5087.
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 Sherman v. Smith, 1 Black (U. S.), 587. §§ 3034, 3527, 3633, 4171, 5411.
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 Sherrill v. Chesapeake & R. Co., 89 Ky. 302. §§ 7435, 7439.
 Sherry v. Perkins, 147 Mass. 212. § 7782.
 Sherwood v. Alvis, 83 Ala. 115. §§ 521, 522, 6007, 7935, 7950, 7957, 7958, 7959.
 Sherwood v. American Bible Soc., 4 Abb. App. Dec. (N. Y.) 227. §§ 5770, 5790, 5827, 5829.
 Sherwood v. Buffalo & C. R. Co., 12 How. Pr. (N. Y.) 136. § 3519.
 Sherwood v. Meadow Valley Min. Co., 50 Cal. 412. §§ 2687, 2592.
 Sherwood v. Saratoga & R. Co., 15 Barb. (N. Y.) 650. § 7426.
 Sherwood v. Whiting, 54 Conn. 330. § 5115.
 Shaw v. Beebe, 35 Mt. 205. § 519.
 Shewalter v. Pirner, 55 Mo. 218. §§ 5797, 5799, 7406.
 Shewell's Case, L. R. 2 Ch. 37. § 3274.
 Shibley v. Angle, 37 N. Y. 626. §§ 1175, 3824.
 Shickle v. Watts, 94 Mo. 410. §§ 1517, 1616, 1669, 1670, 2952, 3030, 3222, 3345, 3444, 3468, 3766.
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 Shields v. Barrow, 17 How. (U. S.) 130. § 4579.
 Shields v. Ohio, 95 U. S. 319, 324. §§ 5410, 5413, 5530, 5545.
 Shields v. State, 26 Ohio St. 86. § 5411.
 Shillaber v. Robinson, 97 U. S. 68. § 6243.
 Shimmel v. Erie R. Co., 5 Daly (N. Y.), 396. §§ 4624, 4662.
 Shinkle v. Essex Road Board, 47 N. J. L. 93. § 5383.
 Ship's Case, 2 De Gex J. & S. 544. §§ 1390, 1444, 1445.
 Ship v. Crosskill, L. R. 10 Eq. 73. §§ 1469, 1482.
 Shipley v. Baltimore & C. R. Co., 34 Md. 336. § 5626.
 Shipley v. Continental R. Co., 13 Phila. (Pa.) 128. § 5891.
 Shipley v. Fifty Associates, 101 Mass. 254. § 6373.
 Shipley v. Mechanics' Bank, 10 Johns. (N. Y.) 484. § 2445.
 Shipman v. Aetna Ins. Co., 29 Conn. 245. §§ 2392, 2405, 2409, 2413, 2634.
 Shipman v. Bank, 126 N. Y. 318. § 7098.
 Shippen v. Paul, 34 N. J. Eq. 314. § 5907.
 Shirley v. Lunenburg, 11 Mass. 379, 384. § 7581.
 Shirts v. Irons, 37 Ind. 69. § 7184.
 Shober v. Lancaster Park Assn., 68 Pa. St. 429, 431. §§ 1163, 1174, 1542, 1893.
 Shockley v. Fisher, 75 Mo. 498. §§ 3417, 3419, 3553, 6466, 6468, 6485.
 Shoe and Leather Asso. v. Bailey, 17 Jones & Sp. (N. Y.) 385. § 4428.
 Shoe & Leather Bank v. Brown, 9 Abb. Pr. (N. Y.) 218; 18 How. Pr. (N. Y.) 308. § 7658.
 Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148. §§ 5126, 5132.
 Shoemaker v. Goshen Township, 14 Ohio St. 569. § 1118.
 Shoemaker v. Harrisburg, 4 Pa. County Ct. 86. § 611.
 Shoenberger v. School Directors, 32 Pa. St. 34. § 5448.
 Shook v. Singer Man. Co., 61 Ind. 520. § 7943.
 Shorb v. Beaudry, 66 Cal. 446. § 1889.
 Short, Re, 47 Kan. 250. § 7642.
 Short v. Medberry, 23 Hun (N. Y.), 39. § 3147.
 Shorter v. Smith, 9 Ga. 517. §§ 5399, 5616.
 Shortridge v. Bosanquet, 16 Beav. 84. §§ 3285, 3291, 7733.
 Shotwell v. Mali, 38 Barb. (N. Y.) 445. §§ 1472, 1503, 1504.
 Shotwell v. McKown, N. J. L. 828. §§ 5126, 5149.
 Shouler v. Bonander, 80 Mich. 531. § 7738.
 Showalter v. Laredo Imp. Co., 83 Tex. 162. §§ 3368, 3551, 3553, 3567, 6884.
 Shreveport v. Levy, 26 La. An. 671. §§ 1013, 1024.
 Shrewsbury v. Blount, 2 Man. & Gr. 475. §§ 1462, 1463, 1464.
 Shrewsbury & R. Co. v. Northwestern & R. Co., 6 H. L. Cas. 113. §§ 5356, 5358.
 Shrewsbury & R. Co. v. Stour Valley Co., 21 Eng. L. & Eq. 628; 2 De Gex, M. & G. 966. §§ 327, 328, 329.
 Shrieker v. Ridings, 65 Mo. 208. § 3095.
 Shropshire v. Behrens, 77 Tex. 275. § 6474.
 Shunk v. Schuykill Nav. Co., 14 Serg. & R. (Pa.) 71. §§ 6342, 6370, 6371.
 Shryock v. Baschore, 82 Pa. St. 159. § 4757.
 Shuck v. Lebanon & C. Turnp. Road Co., 9 Bush (Ky.), 168. § 5907.
 Shuetz v. Bailey, 40 Mo. 69. § 5030.
 Shufeldt v. Abernathy, 12 N. Y. Leg. Obs. 176. § 6477.
 Shultz v. Christman, 6 Mo. App. 335. § 4122.
 Shultz v. Sutter, 3 Mo. App. 137. §§ 3620, 5716, 6468, 6469, 6470.
 Shurr v. Investment Co., 18 N. Y. Supp. 454. § 5724.
 Shurtz v. Schoolcraft & R. Co., 9 Mich. 269. §§ 1151, 1724.
 Shute v. Harder, 1 Yerg. (Tenn.) 3. § 2771.
 Shute v. Keyser (Ariz.), 29 Pac. Rep. 366. § 7561.
 Shuttleworth v. Howarth, & Mylne & C. 482. § 4565.
 Sias v. Badger, 6 N. H. 353. § 7507.
 Silbald v. United States, 12 Fed. (U. S.) 488. § 6232.
 Silbert v. Thorp, 77 Ill. 45. § 7507.
 Sibley v. Carteret Club, 40 N. J. L. 295. § 904.
 Sibley v. Quinsigamond Bank, 133 Mass. 515. § 2546.
 Sicardi v. Keystone Oil Co., 149 Pa. St. 148. §§ 6503, 6529.
 Sichell, Ex parte, 1 Sim. (N. s.) 187. § 428.
 Sickles v. Morton, 44 Hun (N. Y.), 623. § 1606.
 Sickles v. Richardson, 21 Hun (N. Y.), 110. § 2656.
 Sickles v. Richardson, 23 Hun (N. Y.), 559. § 6263.
 Sidney's Case, L. R. 13 Eq. 228. §§ 1960, 1543, 4154.
 Siebe v. Joshua Hendy Machine Works, 86 Cal. 390. §§ 4613, 4617, 4643, 4645, 4655.
 Siebert v. Supreme Council, 23 Mo. App. 268. § 4393.
 Sieger v. Culyer, 2 Abb. N. Cas. (N. Y.) 347; affirmed, 67 N. Y. 601. § 4133.
 Sieger v. Culyer, 2 Abb. N. C. (N. Y.) 347. § 5167.
 Siemens Gas Lamp Co. v. Horstmann, 16 Atl. Rep. 490; 24 Week. Not. Conn. 396. § 4893.
 Sigouney v. Munn, 7 Conn. 11. § 4548.
 Sikes v. Columbus, 55 Miss. 115. § 590.
 Silber Light Co. v. Silber, 12 Ch. D. 717. §§ 4565, 4578.
 Silk Co. v. Anderson, 1 McMull. (S. C.) 300. § 1815.
 Silk Man. Co. v. Campbell, 27 N. J. L. 539. § 1080.
 Silkstone and Dodworth Iron Co., Re, 17 Ch. Div. 158. § 3122.
 Silkstone Fall Colliery Co., Re, 1 Ch. Div. 38. § 6688.
 Silk Throusters v. Fremantee, 2 Keb. 309. § 1029.
 Sill v. Bank of United States, 5 Conn. 102. § 7542.
 Silliman v. Cummins, 13 Ohio, 116. § 590.
 Silsbee v. Quincy Hotel Co., 30 Ill. App. 204. § 8030.
 Silsbury v. McCoon, 3 N. Y. 379. § 7103.
 Silva v. Greenwald, 2 Pa. County Ct. 131. § 8019.
 Silver v. Barnes, 6 Bing. N. C. 180. § 5167.
 Silver Hook Road v. Greene, 12 R. I. 164. §§ 1206, 3946, 4743, 4752.
 Silver Lake Bank v. North, 4 Johns. Ch. 370. §§ 1969, 5795, 5799, 5975, 6033, 7722, 7905, 7915, 7942, 7977, 7978.
 Silverman, Re, 1 Sawy. (U. S.) 410. §§ 7041, 7273.
 Silver Valley Min. Co. v. Baltimore Gold & C. Smelting Co., 99 N. C. 455. § 7582.

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 Simeral v. Dubuque & Co. Ins. Co., 18 Iowa, 319. §§ 941, 5987.
 Simis v. Davidson, 54 N. Y. Super. 235. § 5303.
 Simini v. Anglo-American Tel. Co., 5 Q. B. Div. 188. § 2561.
 Simmons v. Hill, 96 Mo. 679. §§ 2420, 2777, 3192, 3198, 3212, 3213, 3283, 3301, 3302, 3313.
 Simmons v. Troy Iron Works, 92 Ala. 427. § 5963.
 Simon v. Sevier Assn., 54 Ark. 58. §§ 4938, 6480, 7792.
 Simonds v. Estate of Powers, 28 Vt. 354. § 3021.
 Simonds v. Heard, 23 Pick. (Mass.) 120. §§ 3953, 5126, 5132, 5165, 5166.
 Simons v. Vulcan Oil & Co. Co., 61 Pa. St. 202. §§ 457, 458, 466, 468, 472, 475, 1475, 3968, 4009, 4027, 4029, 4119, 4128.
 Simonson v. Spencer, 15 Wend. (N. Y.) 548. §§ 3077, 3078, 3415, 3446, 3469.
 Simpkins v. Smith & Co. Gold Co., 50 How. Pr. (N. Y.) 56. § 7343.
 Simpson's Case, L. R. 9 Eq. 91. § 1446.
 Simpson v. Bloss, 7 Taunt. 246. § 7959.
 Simpson v. Denison, 10 Harv. 511. §§ 72, 75, 4527.
 Simpson v. Garland, 72 Me. 40. §§ 5146, 5147.
 Simpson v. Leach, 86 Ill. 286. § 1084.
 Simpson v. Mansfield & Co. R. Co., 3 Mich. 626. § 7547.
 Simpson v. Moore, 30 Barb. (N. Y.) 638. § 2199.
 Simpson v. Reynolds, 71 Mo. 594. §§ 3578, 3587.
 Simpson v. State, 10 Yerg. (Tenn.) 525. § 6442.
 Simpson Centenary College v. Bryan, 50 Iowa, 293. § 5749.
 Simon v. Brown, 68 N. Y. 360. § 381.
 Sims v. Bonner, 42 N. Y. St. Rep. 14; 16 N. Y. Supp. 801. § 2430.
 Sims v. Brooklyn St. R. Co., 37 Ohio St. 556. § 1741.
 Sims v. Butler County, 49 Ala. 110. § 7362.
 Sims v. Canfield, 2 Ala. 555. § 2619.
 Sims v. State Ins. Co., 47 Mo. 54. § 1776.
 Sims v. Thomas, 12 Ad. & El. 536. § 2719.
 Sims v. Yazoo & Co. Plank Road Co., 33 Miss. 23. §§ 6358, 6360.
 Sinclair v. Jackson, 8 Cow. (N. Y.) 543, 585. § 5028.
 Siney v. New York & Co. Stage Co., 28 How. Pr. (N. Y.) 491; 18 Abb. Pr. (N. Y.) 435. § 7194.
 Singer v. Given, 61 Iowa, 93. §§ 1517, 1524.
 Singer Man. Co. v. Belgart, 84 Ala. 519. § 4941.
 Singer Man. Co. v. Bennett, 28 W. Va. 16. § 518.
 Singer Man. Co. v. Brown, 64 Ind. 548. §§ 7956, 7966.
 Singer Man. Co. v. Effinger, 79 Ind. 264. § 7672.
 Singer Man. Co. v. Holdroth, 86 Ill. 455. §§ 6383, 6398, 6399.
 Singer Man. Co. v. Wright, 33 Fed. Rep. 121. §§ 8038, 8091, 8101, 8109.
 Singleton v. Commissioners, 2 Nott & McC. (S. C.) 526. § 5596.
 Singleton v. Southwestern R. Co., 70 Ga. 464. §§ 5884, 6293.
 Singleton v. Tomlinson, 3 App. Cas. 404. § 5790.
 Sinking Fund Cases, 99 U. S. 700. §§ 91, 679, 5409, 5410, 5413, 5442, 5475.
 Sinking Fund Commrs v. Northern Bank & Co., 1 Met. (Ky.) 174. §§ 6266, 7360.
 Sinnickson v. Johnson, 17 N. J. L. 129. §§ 6342, 6371.
 Sioux City & Co. R. Co. v. First Nat. Bank, 10 Neb. 555. § 6331.
 Sioux City Street R. Co. v. Sioux City, 148 U. S. 98; affirming 73 Iowa, 367. §§ 5411, 5428, 5441.
 Siren, The, 7 Wall. (U. S.) 152. § 7321.
 Sir James Smith's Case, Carth. 217; Skin. 293, 310; 4 Mod. 62; 1 Show. 263, 274. § 2.
 Sisson v. Matthews, 20 Ga. 848. §§ 1462, 2943, 2603.
 Sistare v. Best, 16 Hun (N. Y.) 611. §§ 4621, 4659.
 Sitgreaves v. Farmers & Co. Bank, 49 Pa. St. 359. § 2656.
 Stitler v. Walker, 1 Freeman. Ch. (Miss.) 77. § 1084.
 Sixth Avenue E. Co. v. Kerr, 45 Barb. (N. Y.) 138; 72 N. Y. 330. §§ 5400, 5615, 5617.
 Skeddy v. Railroad Co., 3 Hughes (U. S.), 320. § 7116.
 Skelly v. Jefferson Branch Bank, 9 Ohio St. 606. §§ 5693, 5670.
 Skiddy v. Atlantic & Co. R. Co., 3 Hughes (U. S.), 320. § 7114.
 Skiles v. Houston, 110 Pa. St. 254. § 6964.
 Skillman v. Chicago & Co. R. Co., 78 Iowa, 404. §§ 5436, 5441.
 Skinker v. Taylor 11 Mo. App. 592. § 4291.
 Skinner v. Anderson, 12 Barb. (N. Y.) 648. § 5922.
 Skinner v. Dayton, 19 Johns. (N. Y.) 513. §§ 5109, 5295.
 Skinner v. Lambert, 4 Man. & Gr. 477. § 1815.
 Skinner v. Maxwell, 68 N. C. 400. §§ 6898, 6931.
 Skinner v. Merchants' Bank, 4 Allen (Mass.) 290. § 4619.
 Skinner v. Smith, 134 N. Y. 240, affirming 56 Hun (N. Y.), 437. §§ 4059, 4064, 6509.
 Skinner v. Smith, Moquette Loom Co. 56 Hun (N. Y.), 437. §§ 1514, 1604.
 Skinner v. White, 1 Hopk. Ch. (N. Y.) 107. §§ 3794, 3823, 3825.
 Skinner v. Wilhelm, 63 Mich. 568. § 617.
 Skinners' Company v. Irish Society, 1 Mylne & Cr. 162. § 6826.
 Skipp v. Harwood, 2 Swanst. 586. § 1084.
 Skouten v. Wood, 57 Mo. 380. § 3608.
 Skowhegan & Co. R. Co. v. Kinsman, 77 Me. 370. § 1739.
 Skowhegan Bank v. Cutler, 49 Me. 315. §§ 2397, 2409, 3192, 3283, 3301.
 Skowhegan Bank v. Cutler, 52 Me. 509. §§ 2304, 2376.
 Skrainka v. Allen, 7 Mo. App. 534; 76 Mo. 384, 885. §§ 1579, 1582, 1586, 1588, 1590, 1672, 1681, 3185, 3608, 3827.
 Slack v. Maysville & Co. R. Co., 13 B. Mon. (Ky.) 1, 17. §§ 475, 1118, 5434, 5438.
 Slack v. Wood, 9 Gratt. (Va.) 40. § 7819.
 Slackman v. West, Cro. Jac. 673. § 5778.
 Slaflyton v. Scott, 13 Ves. Jr. 427. § 1568.
 Slark v. Highgate Archway Co., 5 Taunt. 792. §§ 5735, 5742, 7392.
 Slater's Case, 35 Beav. 391. §§ 3255, 3256.
 Slater Woolen Co. v. Lamb, 143 Mass. 420. §§ 5950, 5951.
 Slattery v. St. Louis & Co. Trans. Co., 91 Mo. 217. §§ 4477, 4479, 4490, 4552, 4581, 4585.
 Slaughterhouse Cases, 16 Wall. (U. S.) 36. §§ 650, 5470, 5471.
 Slauson v. Racine, 13 Wis. 398. § 658.
 Slaughter v. Favorite, 107 Ind. 291. § 4014.
 Slaven v. South Pac. R. Co., 51 Mo. 303. §§ 7424, 7425, 7426, 7993.
 Slawson v. Loring, 5 Allen (Mass.), 340. §§ 5126, 5140, 5156.
 Slayden v. Seip, 25 Mo. App. 439, 446. §§ 2135, 2152, 4295.
 Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373. §§ 1070, 2390, 3231, 3317.
 Slaymaker v. Grandacker, 10 Serg. & R. (Pa.) 75. § 4376.
 Slaymaker v. Jeffray, 82 Va. 346. §§ 4293, 4295.
 Slayton v. Chester, 4 Mass. 478. § 3363.
 Slee v. Bloom, 19 Johns. (N. Y.) 456. §§ 1033, 1063, 1560, 1569, 1573, 1579, 1801, 1894, 2925, 2951, 2960, 2961, 3345, 3346, 3787, 5339, 6618, 963, 6666, 6670, 6681.
 Slee v. Bloom, 20 Johns. (N. Y.) 669. §§ 1082, 3095, 3392, 3396, 4331.
 Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366. §§ 531, 3450, 4360, 4482, 6577, 6655.
 Sleeper v. Franklin Lyceum, 7 R. I. 523. §§ 904, 906, 907.
 Sleeper v. Goodwin, 67 Wis. 577. §§ 1902, 3142, 3147, 3158, 3161, 3355, 3414, 3476, 6848.
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 Slevin v. Morrow, 4 Ind. 425. § 2861.
 Slipper v. Earhart, 83 Ind. 173, 179. §§ 1140, 1336, 1962.
 Slim v. Oroucher, 1 De Gex F. & J. 518. §§ 1423, 1467, 1468.
 Sloan v. Central Iowa R. Co., 62 Iowa, 728. § 7160.
 Sloan v. Pacific R. Co., 61 Mo. 24. §§ 756, 5533, 5536.
 Sloane v. Anderson, 117 U. S. 275, 278. § 7474.
 Slocum v. Providence & Co. Co., 10 R. I. 112. §§ 1849, 1858, 1860, 4354.
 Slocum v. Warren, 10 R. I. 116. §§ 1869, 1870, 1871.
 Sloan v. Bank of England, 14 Sim. 475. §§ 2567, 4701.
 Sly v. Penn. R. Co., 65 Pa. St. 209. § 262.
 Small v. Herkimer Man. Co., 2 N. Y. 330; overruling 21 Wend. 273; 2 Hill, 127. §§ 1137, 1185, 1550, 1786, 1790, 1794, 1806.
 Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264. §§ 4520, 4532, 4533.

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- Smart v. Com., 27 Pratt. (Va.) 950. § 5935.
- Smart v. Western Union, 10 Ex. 367. § 5058.
- Smead v. Indianapolis &c. R. Co., 11 Ind. 104. §§ 97, 5721, 5730, 5737, 5740, 5868.
- Smedley v. Erwin, 51 Pa. St. 445. §§ 5592, 5595.
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- Smiley v. Chattanooga, 6 Heisk. (Tenn.) 504. §§ 4881, 4891, 5175.
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- Smith's Case, Carth. 217; Skin. 293, 310; 4 Mod. 52; 1 Show. 263, 274. § 2, 6598.
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- Smith v. Atlas Steam Cordage Co., 41 La. An. 1. § 4874.
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- Smith v. Boston &c. Railroad, 33 N. H. 337. §§ 7817, 8073.
- Smith v. Branch Bank, 5 Ala. 26. §§ 4963, 7590, 7592.
- Smith v. Bromley, Doug. 696, note. § 5745.
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- Smith v. Burley, 9 N. H. 423, 427. §§ 2814, 2828, 2847.
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- Smith v. Coale, 12 Phila. (Pa.) 177. § 2656.
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- Smith v. Co-operative Dress Assn., 12 Daly (N. Y.), 304. § 4890.
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- Smith v. Dunlap, 12 Ill. 184. § 2479.
- Smith v. Eastern Railroad, 35 N. H. 356. § 5504.
- Smith v. Eaton, 36 Me. 298. § 8069.
- Smith v. Elliott, 9 Pa. St. 345. § 6443.
- Smith v. Erb, 4 Gill (Md.). 437. §§ 717, 788, 3861.
- Smith v. Eureka Flour Mills, 6 Cal. 1. §§ 5045, 5638, 5645, 5730, 5734, 5745.
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- Smith v. First Nat. Bank, 99 Mass. 605. §§ 4824, 5951.
- Smith v. Frye, 5 Cranch C. C. (U. S.) 515. § 7720.
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- Smith v. Lau, 21 N. Y. 296, 298, 299. § 5697.
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- Smith v. Law, 5 Ired. L. (N. C.) 197. § 3363.
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- Smith v. Mercer, 6 Taunt. 76. § 5760.
- Smith v. Morrill, 54 Me. 48. § 4378.
- Smith v. Morse, 2 Cal. 524. §§ 2556, 5026, 5638.
- Smith v. Mosby, 9 Heisk. (Tenn.) 501. §§ 3797, 7251.
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 Smith v. Sheeley, 12 Wall. (U. S.) 358. §§ 502, 519, 514, 7984.
 Smith v. Silver Valley Mining Co., 64 Md. 85. § 55, 56.
 Smith v. Skeary, 47 Conn. 47. §§ 4059, 6498.
 Smith v. Smith, 62 Ill. 453. §§ 4617, 4618, 4687, 5107.
 Smith v. Smith, 2 Pick. (Mass.) 621. § 6372.
 Smith v. Smith, 117 Mass. 72. §§ 4903, 6179.
 Smith v. Smith, 5 Ired. Eq. (N. C.) 34. § 6841.
 Smith v. Smith, 2 Desau. (S. C.) 557. §§ 737, 847, 4010, 6653, 6682.
 Smith v. Smith, 2 Vern. 178. § 4369.
 Smith v. South Royalton Bank, 32 Vt. 341. §§ 5200, 5219, 5221.
 Smith v. State, 28 Ind. 321. § 7713.
 Smith v. State Bank, 18 Ind. 327. § 766.
 Smith v. Steamboat Co., 1 How. (Miss.) 479. § 1931.
 Smith v. Steele, 8 Neb. 115. § 4448.
 Smith v. St. Louis Mut. Life Ins. Co., 6 Lea (Tenn.), 564. § 6706.
 Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 727. § 5856.
 Smith v. Stokes, 1 East. 363. § 1984.
 Smith v. Strong, 2 Hill (N. Y.) 241. § 4747.
 Smith v. Strout, 63 Me. 205. § 6566.
 Smith v. Tallasee & Co. Plankroad Co., 30 Ala. 650. §§ 1149, 1311, 1315, 1395, 1513, 1754, 1968, 1970.
 Smith v. Tracy, 36 N. Y. 79. § 5310.
 Smith v. Traders' Nat. Bank, 7 Tex. 457. § 2777.
 Smith v. Trenton Delaware Falls Co., 4 N. J. Eq. 505. § 7039.
 Smith v. Union Pac. R. Co., 2 Dill. (U. S.) 278, 279. §§ 7363, 7475.
 Smith v. Virginia & R. Co., 33 Gratt. (Va.) 617. § 374.
 Smith v. Washington, 20 How. (U. S.) 135. § 6370.
 Smith v. Washington City & R. Co., 33 Gratt. (Va.) 617. § 7083.
 Smith v. Water Comm'rs, 38 Conn. 208. § 5189.
 Smith v. Watson, 14 Vt. 332. § 4865.
 Smith v. Weed Sewing Machine Co., 26 Ohio St. 562. §§ 7661, 7984.
 Smith v. West Derby Local Board, 3 C. P. Div. 423. § 6363.
 Smith v. Whittingham, 6 Car. & P. 78. § 4914.
 Smith v. Woodville & Mining Co., 66 Cal. 398. § 4683.
 Smith v. Wright, 1 Caines (N. Y.) 43. § 5036.
 Smith v. Wright, 24 Barb. (N. Y.) 170. § 6363.
 Smith v. Wright, 27 Barb. (N. Y.) 621. §§ 6363, 6442.
 Smith & Co. Implement Co. v. Thurman, 29 Mo. App. 186. § 6534.
 Smith Bridge Co. v. Bowman, 41 Ohio St. 37. § 7758.
 Smith v. Campbell, 41 Ark. 471. §§ 634, 636.
 Smith v. Garth, 33 Ark. 17. § 634.
 Smith Middlings Purifier Co. v. McGroarty, 136 U. S. 237. §§ 1673, 6492.
 Smithurst v. Edmunds, 14 N. J. Eq. 408, 413. § 6141.
 Smock v. Henderson, 1 Wilson (Ind.), 241. §§ 1503, 2356, 2593.
 Smout v. Ilbery, 10 Mees. & W. 1. §§ 2057, 5028, 5033.
 Smucker v. Duncan (Pa. C. P.), 10 Pa. Co. Ct. 430. § 3115.
 Smyth v. Darley, 2 H. L. Cas. 789. §§ 703, 893.
 Snell's Case, 1 R. 5 Ch. 22. §§ 1530, 1533, 1550, 1795.
 Snell v. Buresh, 123 Ill. 151. § 5911.
 Snell v. Pells, 113 Ill. 145. § 7828.
 Snider v. Coleman, 72 Mo. 568. § 3644.
 Snider's Sons Co. v. Troy, 91 Ala. 224, 233. §§ 2992, 7642, 7647, 7648.
 Snodgrass v. Bradley, 2 Grant Cas. (Pa.) 43. § 6298.
 Snodgrass v. Ricketts, 13 Cal. 359. § 519.
 Snook v. Georgia Imp. Co., 83 Ga. 61. §§ 1274, 1275, 1284, 5417.
 Snooks' Petition, 2 Hill. (N. Y.) 575. § 2971.
 Snow v. Goodrich, 14 Me. 235. § 5137.
 Snow v. Peacock, 2 Car. & P. 215. § 1846.
 Snow v. Russell Coe Fertilizer Co., 58 Hun, 134; 11 N. Y. Supp. 492. § 4381.
 Snow v. Weber, 39 Mich. 143. § 1496.
 Snow v. Wheeler, 113 Mass. 179, 186. § 1030.
 Snow v. Winslow, 54 Iowa, 200. § 7187.
 Snyder v. Hannibal & R. Co., 60 Mo. 413. § 6347.
 Snyder v. Rockport 5 Ind. 237. § 5595.
 Snyder v. State Bank, 1 Ill. (Bresse) 122. § 654.
 Snyder v. Studebaker, 19 Ind. 462. §§ 505, 519, 523, 5803, 5806.
 Snyder v. Wiley, 59 Tex. 448. § 4133.
 Snyders' Sons Co. v. Armstrong, 37 Fed. Rep. 18. § 7289.
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 Société des Metaux v. Companhia Portuqueira & C. Huilva, Weekly Notes (1889). 32. § 7992.
 Société des Mines d'Argent & v. Mackintosh, 7 Utah, 35. § 4127.
 Société Foncière v. Milliken, 135 U. S. 304. §§ 8019, 8038.
 Société Générale v. Walker, 11 App. Cas. 29. § 2384.
 Society v. Abbott, 2 Beav. 559. § 458.
 Society v. Morris Canal & Co., 1 N. J. Eq. 157. §§ 6599, 7641.
 Society & v. Wheeler, 2 Gall. (U. S.) 105. § 7977.
 Society & v. New Haven, 8 Wheat. (U. S.) 464. §§ 5384, 5386, 5813, 5956.
 Society & v. Town of Pawlet, 4 Pet. (U. S.) 490. §§ 1848, 7613, 7665.
 Society & v. Wheeler, 2 Gall. (U. S.) 105. § 3035.
 Society & v. Young, 2 N. H. 510. §§ 286, 294, 7665, 7712.
 Society for Savings v. Coite, 6 Wall. (U. S.) 594, 606; affirming 32 Conn. 173. §§ 5556, 5557, 5560, 8093.
 Society for Savings v. New London, 29 Conn. 174. §§ 1118, 5262, 6084.
 Society for Visitation of the Sick v. Com., 52 Pa. St. 125. §§ 219, 857, 863, 904, 914.
 Society of Middlesex v. Davis, 3 Met. (Mass.) 133. § 512, 3927.
 Society of Practical Knowledge v. Abbott, 2 Beav. 559. §§ 18, 469, 2956, 3967, 4875.
 Society Perun v. Cleveland, 43 Ohio St. 481. §§ 246, 6672, 6761.
 Sodus Bay & R. Co. v. Hamlin, 24 Hun (N. Y.), 390. §§ 1150, 1269.
 Soeding v. Bonner & Co. Iron Co., 35 Mo. App. 349. § 2233.
 Sohler v. Burr, 127 Mass. 225. § 2208.
 Sohler v. Trinity Church, 109 Mass. 1. § 927.
 Sohn v. Waterson, 17 Wall. (U. S.) 598. §§ 1994, 3036.
 Soldiers' Orphans' Home v. Shaffer, 63 Ill. 243. § 4705.
 Solebury Mut. Protection Asso., 3 Pa. County Ct. 637. § 208.
 Solinger v. Earle, 82 N. Y. 393. § 1402.
 Solomon v. Penoyar, 89 Mich. 11. § 4135.
 Solomon's Lodge v. Montmolinn, 58 Ga. 547. §§ 5104, 5106.
 Solomons v. Laing, 12 Beav. 339. §§ 4565, 4566, 4585.
 Solon v. Williamsburg Saving Bank, 114 N. Y. 122; affirming 47 Hun, 632. §§ 1132, 5052, 5056.
 Somerby v. Bunlin, 118 Mass. 279. § 2719.
 Somerset & R. Co. v. Cushing, 45 Me. 524. § 1733.
 Somerset Bank v. Veghte, 42 N. J. Eq. 39. § 4823.
 Somerset R. Co. v. Clark, 61 Me. 379. § 1733.
 Sonoma Valley Bank v. Hill, 59 Cal. 107. §§ 2656, 3077, 3388, 3744, 3842.
 Sonoma Valley Wine & Co. v. Heyman, 11 Week Dig. (N. Y.) 327. § 7661.
 Soon Hing v. Crowley, 113 U. S. 703. § 5454.
 Soper v. Buffalo R. Co., 19 Barb. (N. Y.) 310, 312. § 4920.
 Souch v. Strawbridge, 2 C. B. 808, 813. § 5182.
 Soudenschlager v. Benton, 3 Grant Cas. (Pa.) 390. § 7849.
 South & R. Co. v. Chappell, 61 Ala. 527. § 6279.
 South & North Alabama R. Co. v. Brown, 53 Ala. 651. § 5245.
 South & North Ala. R. Co. v. Morris, 65 Ala. 193. § 658.
 Southampton & Co. Bridge Co. v. Local Board, 8 El. & Bl. 801. § 6363.
 South Baptist Soc. v. Clapp, 18 Barb. (N. Y.) 36. § 5070.
 South Bay Meadow Dam Co. v. Gray, 30 Me. 547. §§ 792, 1187, 1784, 4693, 5275, 5417, 7369.
 South Bend Toy Man. Co. v. Dakota F. & M. Ins. Co., 2 S. Dak. 17. § 4858.
 South Blackpool Hotel Co., Re, L. R. 8 Eq. 225. § 3800.
 Southbold v. Horton, 6 Hill (N. Y.), 501. §§ 508, 7667.
 South Carolina v. Gallard, 101 U. S. 433. § 5441.
 South Carolina Man. Co. v. Bank, 6 Rich. Eq. (S. C.) 227. §§ 2011, 2984.
 South Carolina R. Co. v. McDonald, 5 Ga. 531. §§ 6285, 7790.

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- Southerland v. Lake Superior & Co. R. Co., MS. § 7176.
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- Southern Cal. Motor Road Co. v. Union Loan and Trust Co., 64 Fed. Rep. 450. § 6186.
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- Southern Ex. Co. v. Carroll, 42 Ala. 437. § 7507.
- Southern Ex. Co. v. Craft, 43 Miss. 508. § 7503.
- Southern Ex. Co. v. Craft, 49 Miss. 480. § 7595.
- Southern Ex. Co. v. Fitzner, 59 Miss. 581. § 6311.
- Southern Ex. Co. v. Mobile, 49 Ala. 404. § 1025.
- Southern Ex. Co. v. Skipper, 85 Ga. 565. §§ 7511, 8042.
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- Southern Life Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606. § 4858.
- Southern Life Ins. Co. v. Gray, 3 Fla. 262. §§ 4963, 7590, 7592.
- Southern Life Ins. Co. v. Lanier, 5 Fla. 110. §§ 1970, 5019, 5047, 6033, 6039.
- Southern Life Ins. & Co. v. Packer, 17 N. Y. 51. § 7901.
- Southern Loan Co. v. Morris, 2 Pa. St. 175. § 5760.
- Southern Minn. R. Co. v. Coleman, 94 U. S. 181. § 5543.
- Southern Mut. Ins. Co. v. Pike, 32 La. An. 483. § 4675.
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- Southern Pacific R. Co. v. Orton, 6 Sawy. O. C. (U. S.) 157. §§ 279, 580, 584, 587, 5795, 5796.
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- South Mountain Consolidated Min. Co., Re, 8 Sawy. (U. S.) 366; 14 Fed. Rep. 347. § 1695.
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- Southport Plank Road Co. v. Russell, 44 Hun (N. Y.) 626; 7 N. Y. St. Rep. 596. § 5914.
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- South Norwalk Bank v. Fenton, 23 Hun (N. Y.), 309. § 4233.
- Southwalk Bank v. Com. 27 Pa. St. 446. § 634.
- Southwalk Bridge Co. v. Sills, 2 Car. & P. 371. § 7381.
- Southwalk R. Co. v. Philadelphia, 47 Pa. St. 314. § 5435.
- Southwestern Freight & Co. Co. v. Standard, 44 Mo. 71. § 5038.
- Southwestern R. Co. v. Georgia, 92 U. S. 876. § 368.
- Southwestern R. Co. v. Papot, 67 Ga. 675. § 2184.
- Southwestern R. Co. v. Paulk, 24 Ga. 356. §§ 5470, 7423.
- Southwestern R. Co. v. State, 54 Ga. 401. § 337.
- Southwestern R. Co. v. Thomason, 40 Ga. 408. §§ 1066, 2231.
- Southwest Natural Gas Co. v. Fayette Fuel Gas Co., 145 Pa. St. 13. §§ 4472, 4476, 4479.
- Southwick v. Eates, 7 Cush. (Mass.) 385. §§ 4930, § 283.
- Southwick v. First Nat. Bank, 9 Hun (N. Y.), 96. § 7275.
- Southworth v. Lathrop, 5 Day (Conn.), 237. § 6358.
- Southworth v. Palmyra & Co. R. Co., 2 Mich. 287. § 3920.
- South Yorkshire & Co. R. Co. v. Great Northern R. Co., 3 De Gex, M. & G. 576. §§ 315, 5358, 5359.
- South Yuba Water & Co. Co. v. Rosa, 80 Cal. 333. §§ 7661, 7664, 7666, 7901.
- Sowles v. Witters, 39 Fed. Rep. 403. §§ 3786, 3789.
- Spackman's Case, 11 Jur. (N. S.) 207. § 1550.
- Spackman's Case, 34 L. J. (Ch.) 321. §§ 1798, 1799.
- Spackman v. Evans, L. R. 3 H. L. 171, 249. §§ 1523, 1550, 1552, 1553, 1572, 1797, 1798, 1800, 3718.
- Spader v. Davis, 5 Johns. Ch. (N. Y.) 280. § 3494.
- Spader v. Mural Decoration Man. Co., 47 N. J. Eq. 18. § 7062.
- Spahr v. Farmers' Bank, 94 Pa. St. 429. § 521.
- Spaulding v. Bank of Susquehanna County, 9 Pa. St. 28. §§ 4656, 4917.
- Spaulding v. Com., 85 Ky. 135. § 7001.
- Spangler v. Butterfield, 6 Colo. 356. § 4643.
- Spangler v. Indiana & Co. R. Co., 21 Ill. 276. §§ 1333, 1577, 1700, 1714, 7661, 7675.
- Sparger v. Cumption, 54 Ga. 355. §§ 3342, 4170, 6731.
- Spargo's Case, L. R. 3 Ch. 407. §§ 1578, 1604, 1605, 1608, 1615, 1618, 3712, 3792.
- Sparks v. Dispatch Transfer Co., 104 Mo. 531. §§ 4617, 4621, 4623, 4624, 4627, 4643, 4663, 5030, 5290.
- Sparks v. Farmers Bank, 3 Del. Oh. 274. § 792.
- Sparks v. Liverpool Waterworks Co., 13 Ves. 428. § 1000.
- Sparks v. Lower Payette Ditch Co., 2 Idaho, 1030. § 3037.
- Sparks v. State Bank, 7 Blackf. (Ind.) 469. § 5741.
- Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294. § 239.
- Sparling v. Parker, 9 Beav. 450. § 1084.
- Sparrow v. Evansville & Co. R. Co., 7 Ind. 369. §§ 71, 75, 81, 346, 1290.
- Spartanburg & Co. R. Co. v. De Graffenreid, 12 Rich. L. (S. C.) 675. §§ 1335, 1353.
- Spartanburg & Co. R. Co. v. Ezell, 14 S. C. 281. § 247.
- Spaulding v. Andrews, 48 Pa. St. 411. § 5154.
- Spaulding v. New York Life Ins. Co., 61 Me. 329. § 4873.
- Spaulding v. Nourse, 143 Mass. 490. § 590.
- Spaulding v. Oakes, 42 Vt. 343. §§ 4095, 4376.
- Spaulding v. Paine, 81 Ky. 416. § 2383.
- Spaulding v. Strang, 38 N. Y. 9. 12. § 6477.
- Spaulding v. Suss, 4 Mo. App. 541. §§ 2043, 5672.
- Spear v. Crawford, 14 Wend. (N. Y.) 20-24. §§ 1138, 1139, 1140, 1142, 1185, 1224, 1577, 3684, 5812.
- Spear v. Grant, 18 Mass. 9. §§ 1063, 1569, 1573, 1576, 2951, 2956, 2963, 3423, 3430, 3466.
- Spear v. Hart, 3 Rob. (N. Y.) 420. §§ 2175, 2176.
- Spear v. Lead, 11 Mass. 94. §§ 3947, 3994, 4633, 4659, 5049, 5060, 6474.
- Spears v. Attorney-General, 6 Clark & F. 180. § 1084.
- Spears v. Ledergerber, 56 Mo. 465. § 4943.
- Spears v. Ward, 48 Ind. 541. § 1034.
- Speeding v. Nevell, L. R. 4 C. P. 212. § 5028.
- Speed v. May, 17 Pa. St. 91. § 7347.
- Speer v. Atlanta & Co. Railroad, 30 Ga. 135. § 7423.
- Speight v. Gaunt, 22 Ch. Div. 727; 9 App. Cas. 1, 15. § 2863.
- Spellier Electric Time Co. v. Geiger, 147 Pa. St. 399. §§ 3387, 3753.
- Spelman v. Fisher Iron Co., 56 Barb. (N. Y.) 151. §§ 4914, 6350.

- Spence's Case, 17 Beav. 203. § 3330.
 Spence v. Mobile & C. R. Co., 79 Ala. 576. §§ 6072, 6096, 6258.
 Spence v. Shapard, 57 Ala. 598. §§ 3359, 3454.
 Spence's Patent Non-conducting & Co. Co., Re, L. R. 9 Eq. 9. § 6588.
 Spencer v. Champion, 9 Conn. 536. § 6598.
 Spencer v. Clark, 15 N. Y. St. Rep. 949; 1 N. Y. Supp. 533. § 4598.
 Spencer v. Cooks, 16 La. An. 153. § 227.
 Spencer v. Hartford, 4 Wend. (N. Y.) 381. § 1787.
 Spencer v. Hartford & C. R. Co., 10 R. I. 14. §§ 6343, 6344.
 Spencer v. Pierce, 5 R. I. 63. § 6114.
 Spense v. Iowa Valley Con. Co., 36 Iowa, 407. §§ 2925, 2929, 3711.
 Spring's Appeal, 71 Pa. St. 11. §§ 2037, 3858, 4102, 4103, 4104, 4107, 4128, 4295, 4479.
 Spillman v. Payne, 84 Va. 435. § 7098.
 Spinks v. Davis, 32 Miss. 152, 156. § 4022.
 Splahn v. Gillespie, 48 Ind. 397. § 3363.
 Spofford v. Harlow, 3 Allen (Mass.), 176. § 7959.
 Spooner v. Bay St. Louis Syndicate, 47 Minn. 464. §§ 3431, 3529, 3676.
 Spooner v. Bay St. Louis Syndicate, 48 Minn. 313. §§ 6702, 6567.
 Spooner v. Delaware & C. R. Co., 115 N. Y. 22. § 7746.
 Spooner v. Holmes, 102 Mass. 503. §§ 6064, 6107.
 Spooner v. Phillips, 62 Conn. 62. §§ 2164, 2210.
 Spottiswoode's Case, 6 De Gex, M. & G. 345. § 428.
 Sprague v. Cochecho Mas. Co., 10 Blatchf. (U. S.), 173. § 2433.
 Sprague v. Cutler & Lumber Co., 106 Ind. 242. § 7965.
 Sprague v. Hartford & C. R. Co., 5 R. I. 233. §§ 7799, 7890, 7891.
 Sprague v. Illinois & C. R. Co., 19 Ill. 174. §§ 73, 77, 86.
 Sprague v. Smith, 99 Vt. 421. § 7128.
 Sprague v. Steam Nav. Co., 52 Me. 592. §§ 4733, 7805.
 Sprague-Brimmer Man. Co. v. Murphy Furnishing Goods Co., 26 Fed. Rep. 572. § 6503.
 Sprigg v. Western U. Tel. Co., 46 Md. 67. §§ 68, 89, 103.
 Springer v. Kleinsorge, 83 Mo. 152. § 5818.
 Springer Trans. Co. v. Smith, 16 Lea (Tenn.), 489. §§ 6307, 6383.
 Springfield v. First Nat. Bank, 87 Mo. 441. §§ 2857, 2876.
 Springfield v. Miller, 12 Mass. 415. § 39.
 Springfield v. Walker, 42 Ohio St. 543. § 7754.
 Springfield & Turp. Co. v. Springfield, 27 Ohio St. 584. § 5928.
 Springfield Bank v. Merrick, 14 Mass. 322. §§ 5743, 7942.
 Springfield Engine & Threshing Co. v. Green, 23 Ill. App. 108. § 6312.
 Spring Valley Water Co., Ex parte, 17 Cal. 132, 136. §§ 224, 6623.
 Spring Valley Water Co. v. San Francisco, 22 Cal. 434, 440. §§ 224, 240, 507, 578, 6598, 7642.
 Spring Valley Water Works v. Bartlett, 8 Saw. (U. S.) 555; 16 Fed. Rep. 615. § 5441.
 Spring Valley Water Works v. San Francisco, 52 Cal. 111. § 5559.
 Spring Valley Water Works v. Schottler, 110 U. S. 347. §§ 5410, 5530.
 Spring Valley Water Works v. Supervisors, 61 Cal. 3. § 5441.
 Sprout v. Porter, 9 Mass. 300, 303. § 437.
 Sproule v. Bouch, 29 Oh. Div. 635. § 2210.
 Spurlock v. Missouri Pac. R. Co., 90 Mo. 199, 200. §§ 1071, 5096.
 Spurlock v. Pacific R. Co., 61 Mo. 319, 326. §§ 849, 1031, 1032, 2321.
 Spurlock v. Sproule, 72 Mo. 503. § 626.
 Spyker v. Spence, 8 Ala. 333. §§ 3968, 4614, 4622, 4637.
 Squair v. Shea, 26 Ohio St. 645. § 8070.
 Squair v. Lookout Mountain Co., 42 Fed. Rep. 729. § 4502.
 Squires v. Brown, 22 How. Pr. (N. Y.) 35. §§ 3052, 3399, 3685, 3901, 4208, 4209.
 St. Albans v. Bush, 4 Vt. 58. § 3671.
 St. Albans v. National Car Co., 57 Vt. 68. § 2849.
 St. Andrew's Bay Land Co. v. Mitchell, 4 Fla. 192. § 6040.
 St. Aubyn v. Smart, L. R. 5 Eq. 183. § 1475.
 St. Charles v. Nolle, 51 Mo. 122. § 1017.
 St. Charles Man. Co. v. Britton, 2 Mo. App. 290. §§ 1335, 1903, 1906, 1907.
 St. Clair v. Cox, 106 U. S. 360. §§ 7995, 8030, 8031.
 St. Clair County & Co. v. People, 82 Ill. 174. §§ 5642, 5643, 5687.
 St. Croix Lumber Co. v. Mittlestadt, 43 Minn. 91. § 4496, 5249, 5289.
 St. George's Building Soc., Re, 4 Drew. 154. § 5167.
 St. Helen Mill Co., Re, 3 Saw. (U. S.) 89. § 5079.
 St. James' Church v. Church of the Redeemer, 45 Barb. (N. Y.) 856. §§ 4030, 4043, 5317.
 St. James' Club, Re, 2 De Gex, M. & G. 383. § 5167.
 St. James Parish v. Newburyport & C. R. Co., 141 Mass. 500. §§ 5313, 5326.
 St. John v. Erie R. Co., 10 Blatchf. (U. S.) 271; affirmed, 22 Wall. 136. §§ 2268, 2278, 2285.
 St. John v. Tombeckbee Bank, 3 Stew. (Ala.) 146. § 3363.
 St. John's College v. Purnell, 23 Md. 629. § 101.
 St. John's College v. State, 15 Md. 330. § 5386.
 St. Johns v. Central Vermont R. Co. (Eng. Privy Council), 7 Ball. & Corp. L. J. 16. § 5574.
 St. Joseph & C. R. Co. v. Buchanan County, 39 Mo. 485. §§ 1118, 1123.
 St. Joseph & C. R. Co. v. Dryden, 11 Kan. 186. § 6303.
 St. Joseph & C. R. Co. v. Shambaugh, 106 Mo. 557. §§ 5465, 7703.
 St. Joseph & C. R. Co. v. Smith, 19 Kan. 225. § 7128.
 St. Joseph Fire & C. Ins. Co. v. Hauck, 71 Mo. 466. § 6035.
 St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644. § 590.
 St. Lawrence Steamboat Co., Re, 44 N. J. L. 529. §§ 749, 752, 765, 781, 790.
 St. Louis v. Alexander, 23 Mo. 483, 524. §§ 1118, 3101, 3329, 3680, 6494.
 St. Louis v. Bell Telephone Co., 96 Mo. 623, 628. § 5530.
 St. Louis v. Bentz, 11 Mo. 61. § 1025.
 St. Louis v. Bircher, 7 Mo. App. 189. § 1028.
 St. Louis v. Boatmen's Ins. Co., 47 Mo. 150. §§ 1028, 5571.
 St. Louis v. Cafferata, 24 Mo. 94. § 1025.
 St. Louis v. Ferry Co., 11 Wall. (U. S.) 423. §§ 7999, 8094, 8095, 8096, 8126.
 St. Louis v. Foster, 52 Mo. 513. § 3101.
 St. Louis v. Grone, 46 Mo. 574. § 1028.
 St. Louis v. Jackson, 25 Mo. 37. § 1028.
 St. Louis v. Manufacturers' Savings Bank, 49 Mo. 574. §§ 5571, 5572.
 St. Louis v. Marine Ins. Co., 47 Mo. 163. § 1028.
 St. Louis v. Missouri R. Co., 13 Mo. App. 524. § 5559.
 St. Louis v. Russell, 9 Mo. 503, 507. § 5542.
 St. Louis v. Shields, 62 Mo. 247, 252. §§ 503, 518, 594, 1855.
 St. Louis v. St. Louis Gaslight Co., 70 Mo. 69. §§ 3983, 5248, 5247, 5248, 7405, 7754.
 St. Louis v. St. Louis R. Co., 14 Mo. App. 221. §§ 658, 849, 1022.
 St. Louis v. St. Louis R. Co., 89 Mo. 44; affirming 14 Mo. App. 221. § 5517.
 St. Louis v. Weber, 44 Mo. 547. §§ 849, 1021, 1022, 1025, 1028, 5647.
 St. Louis v. Western Union Tel. Co., 39 Fed. Rep. 59. §§ 8107, 8122.
 St. Louis v. Wiggins Ferry Co., 49 Mo. 580. §§ 7424, 7993, 7998, 8126.
 St. Louis v. Wiggins Ferry Co., 15 Mo. App. 227. § 5815.
 St. Louis v. Withaus, 16 Mo. App. 247; affirmed, 90 Mo. 646. § 718.
 St. Louis & C. Asso. v. Lightner, 42 Mo. 421. §§ 2810, 2811.
 St. Louis & C. Asso. v. Lightner, 47 Mo. 393. § 2811.
 St. Louis & C. Co. v. Harbine, 2 Mo. App. 134. § 3007.
 St. Louis & C. Co. v. Sandoval & C. Co., 116 Ill. 170. §§ 6651, 6555, 6618, 6663.
 St. Louis & C. Ins. Co. v. Cohen, 9 Mo. 416, 446. § 7989.
 St. Louis & C. Ins. Co. v. Goodfellow, 9 Mo. 149. § 3238.
 St. Louis & C. Loan Asso. v. Augustin, 2 Mo. App. 123. § 6655.
 St. Louis & C. Mining Co. v. Jackson, 5 Cent. L. J. 317. § 457.

TABLE OF CASES CITED. St. Louis—Standifer

- St. Louis &c. Min. Co. v. Sandoval Coal & Min. Co., 111 Ill. 32. §§ 6881, 6897.
- St. Louis &c. Mining Co. v. Sandoval &c. Mining Co., 116 Ill. 170. §§ 4497, 4498.
- St. Louis &c. R. Co. v. Blackwood, 14 Ill. App. 503. § 5540.
- St. Louis &c. R. Co. v. Chenault, 36 Kan. 51. § 4730.
- St. Louis &c. R. Co. v. Dalby, 19 Ill. 353. §§ 4849, 4883, 6276, 6288, 6298, 6299, 6306, 6308, 7394.
- St. Louis &c. R. Co. v. Dorsey, 47 Ill. 288. §§ 7530, 7545.
- St. Louis &c. R. Co. v. Drennan, 26 Ill. App. 263. § 4894.
- St. Louis &c. R. Co. v. Eakins, 30 Iowa, 279. § 1838.
- St. Louis &c. R. Co. v. De Ford, 33 Kan. 299. § 7520.
- St. Louis &c. R. Co. v. Hill, 11 Ill. App. 248. § 5549.
- St. Louis &c. R. Co. v. Hill, 14 Ill. App. 579. § 5543.
- St. Louis &c. R. Co. v. Johnston, 133 U. S. 586. §§ 7087, 7095.
- St. Louis &c. R. Co. v. Loftin 30 Ark. 693. §§ 5380, 5570.
- St. Louis &c. R. Co. v. Mathers, 71 Ill. 592. §§ 4020, 7823.
- St. Louis &c. R. Co. v. McAuliff, 43 Kan. 185. § 5625.
- St. Louis &c. R. Co. v. McBride, 141 U. S. 127. § 7554.
- St. Louis &c. R. Co. v. Miller, 43 Ill. 199. §§ 267, 293, 365.
- St. Louis &c. R. Co. v. Richardson, 45 Mo. 466. § 5626.
- St. Louis &c. R. Co. v. Ryan, 56 Ark. 245. § 5411.
- St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274. § 5615.
- St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S. 393. §§ 5998, 6001.
- St. Louis &c. R. Co. v. Tiernan, 37 Kan. 606. §§ 458, 469, 1645, 4053, 4079, 4128, 5142, 5318, 5320.
- St. Louis &c. R. Co. v. Traweck, 84 Tex. 65. § 7426.
- St. Louis &c. R. Co. v. Whitley, 74 Tex. 126. §§ 7556, 7981.
- St. Louis Bridge Co. v. East St. Louis, 121 Ill. 238. § 8123.
- St. Louis Bridge Co. v. People, 125 Ill. 226. § 8123.
- St. Louis Carriage Man. Co. v. Hilbert, 24 Mo. App. 338. § 1514.
- St. Louis Coffin Co. v. Rubelman, 15 Mo. App. 280. §§ 1048, 5981.
- St. Louis Colonization Assn. v. Hennessy, 11 Mo. App. 555. §§ 652, 1854, 3911, 3913.
- St. Louis County Court v. Sparks, 10 Mo. 117. §§ 762, 766.
- St. Louis Domicile &c. Assn. v. Augustin, 2 Mo. App. 123. § 3956.
- St. Louis Drug Co. v. Robinson, 81 Mo. 18; affirming 10 Mo. App. 588. §§ 6033, 6035, 6038.
- St. Louis Gas Light Co. v. St. Louis, 11 Mo. App. 55. § 518.
- St. Louis Gas Light Co. v. St. Louis, 84 Mo. 202; affirming 11 Mo. App. 55. §§ 530, 7728.
- St. Louis Gaslight Co. v. St. Louis, 12 Mo. App. 573; affirmed, 86 Mo. 495. §§ 223, 7737.
- St. Louis Gas Light Co. v. St. Louis Gas, Fuel &c. Co., 16 Mo. App. 52. § 649.
- St. Louis Hospital v. Williams, 19 Mo. 609. § 294.
- St. Louis Institute, Re, 27 Mo. App. 633. §§ 124, 652.
- St. Louis Mut. Life Ins. Co. v. Assessors, 56 Mo. 503. § 5577.
- St. Louis Mut. Life Ins. Co. v. Charles, 47 Mo. 462. § 5577.
- St. Louis Nat. Bank v. Papin, 1 Nat. Bk. Cas. 326; 4 Dill. 29. §§ 2860, 2883.
- St. Louis Paint Man. Co. v. Mepharn, 30 Mo. App. 15. § 7581.
- St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 416, 445. §§ 4760, 4769, 7804, 7977.
- St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149. §§ 2321, 2327, 2369, 2417, 2471, 3237, 3239, 3285.
- St. Louis Public Schools v. Risle, 28 Mo. 415. §§ 4835, 5104, 5106.
- St. Louis Public Schools v. St. Louis, 26 Mo. 468. § 5575.
- St. Louis R. Co. v. Fire Assn., 55 Ark. 163. § 7936.
- St. Louis R. Co. v. Pacific R. Co., 52 Fed. Rep. 770. § 7451.
- St. Louis R. Co. v. South St. Louis R. Co., 72 Mo. 67. § 5517.
- St. Louis Railway Supplies Co. v. Harbina, 2 Mo. App. 134. § 3040.
- St. Louis Sav. Assn. v. O'Brien, 51 Hun (N. Y.), 45. §§ 3046, 3050, 3063, 3064.
- St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217. §§ 6020, 6028, 6029.
- St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 579. §§ 2391, 4013, 5770.
- St. Louis Wire Mill Co. v. Consolidated Barb-wire Co., 32 Fed. Rep. 802. §§ 7486, 7487.
- St. Luke's Church v. Matthews, 4 Deaussy. (S. C.) 578. §§ 788, 1021.
- St. Luke's Church v. Slack, 7 Cush. (Mass.) 226, 239. § 4433.
- St. Mary's Church, Case of, 6 Serg. & R. (Pa.) 493. § 127.
- St. Mary's Church, Case of, 7 Serg. & R. 517, 538. §§ 118, 126, 927, 3916, 5222.
- St. Mary's Church v. Cagger, 6 Barb. (N. Y.) 576. §§ 5175, 7402, 7747.
- St. Michael's &c. Church v. Behrens, 13 Daly (N. Y.), 548. § 7423.
- St. Nicholas Ins. Co. v. Howe, 7 Bosw. (N. Y.) 450. §§ 4615, 4622.
- St. Paul v. Colter, 12 Minn. 41. § 1028.
- St. Paul v. Smith, 27 Minn. 364. § 1025.
- St. Paul v. Traeger, 25 Minn. 248. §§ 1024, 1028.
- St. Paul &c. R. Co., Re, 34 Minn. 227. §§ 5591, 5600.
- St. Paul &c. R. Co., Re, 35 Minn. 85. §§ 320, 7932, 8020.
- St. Paul &c. R. Co. v. Robbins, 23 Minn. 439. §§ 1141, 1177, 1202, 1827, 3639.
- St. Paul &c. R. Co. v. St. Paul, 21 Minn. 526. §§ 5575.
- St. Paul Division v. Brown, 9 Minn. 157. § 7661.
- St. Paul Division v. Brown, 11 Minn. 356. § 61.
- St. Paul Fire &c. Ins. Co., Re, 24 Minn. 75. § 7697.
- St. Paul Land Co. v. Dayton, 37 Minn. 364. § 7617.
- St. Paul Trust Co. v. Wampach Man. Co., 50 Minn. 93. § 5962.
- St. Peters Church v. Beach, 26 Conn. 356. § 2480.
- St. Philip's Church v. Zion Presb. Church, 23 S. C. 297. § 255.
- St. Rimes v. Levee Steam Cotton Press, 20 La. An. 381. § 2229.
- St. Rimes v. Levee Steam Cotton Press Co., 127 U. S. 614. § 2464.
- St. Tamany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64. § 5398.
- St. Vincent's College v. Schaefer, 104 Mo. 261. § 5570.
- Staats v. Bristow, 73 N. Y. 264. § 1084.
- Stabler v. Alexandria, 42 Fed. Rep. 490. § 7503.
- Stacey v. Worth's Case, L. R. 4 Ch. 682. § 1887.
- Stack v. Bangs, 6 Lans. (N. Y.) 262. § 6363.
- Stack v. East St. Louis, 85 Ill. 377. § 1017.
- Stackhouse v. O'Hara, 14 Pa. St. 88. § 4943.
- Stackpole v. Seymour, 127 Mass. 104. § 2445.
- Stacy v. Bank of Illinois, 5 Ill. 91. § 4385.
- Stafford v. American Mills Co., 13 R. I. 310. § 7904.
- Stafford v. Bolton, 1 Bos. & P. 40. §§ 7609, 7613, 7666.
- Stafford v. Ingersoll, 3 Hill (N. Y.), 38. § 3054.
- Stafford v. Till, 4 Bing. 75. §§ 5059, 5286.
- Stafford Nat. Bank v. Palmer, 47 Conn. 443. § 3992.
- Stage Co. v. American Society, 15 Abb. Pr. (N. S.) (N. Y.) 51. § 7776.
- Stainbank v. Fernley, 9 Sim. 556, 558. §§ 1483, 4144.
- Stainton v. Chadwick, 1 Macn. & G. 575. § 4427.
- Stalker v. McDonald, 6 Hill (N. Y.), 93. § 4760.
- Stall v. Catskill Bank, 18 Wend. (N. Y.) 466. § 5740.
- Stamford Bank v. Benedict, 15 Conn. 437. §§ 3998, 5175, 5177.
- Stamford Bank v. Ferris, 17 Conn. 259. §§ 2793, 4802, 5132.
- Stamp's Case, Comb. 348. § 829.
- Standard Oil Co. v. Scofield, 16 Abb. N. Cas. (N. Y.) 372. § 6026.
- Standard Underground Cable Co. v. Attorney-General, 48 N. J. Eq. 270, 273. §§ 2893, 5555, 5557, 5560, 7774, 8102.
- Standifer v. Swann, 78 Ala. 88. § 5016.

- Stanhilber v. Mutual Mill Ins. Co., 76 Wis. 285. §§ 7901, 7940.
 Stanhope's Case, 3 De Gex & S. 198. §§ 1523, 1550, 1552, 1797.
 Stanhope's Case, L. R. 1 Ch. 161. §§ 1523, 1550, 1552, 1553, 1579, 1802, 4110.
 Staniels v. Raymond, 4 Cush. (Mass.) 314. § 8076.
 Staniland v. Hopkins, 9 Mees. & W. 178. § 814.
 Stanley's Case, 33 L. J. Ch. 335; 4 De Gex, J. & S. 407. § 6150.
 Stanley v. Bank of Mobile, 23 Ala. 652. § 7760.
 Stanley v. Brunswick & Co. Hotel Corp., 13 Me. 51. § 5049.
 Stanley v. Chester & Co. R. Co., 9 Sim. 254. § 5297.
 Stanley v. Chicago & Co. R. Co., 62 Mo. 505. § 7462.
 Stanley v. Colt, 5 Wall. (U. S.) 119. § 590.
 Stanley v. Farmers & Co. Bank, 17 Kan. 592. § 7681.
 Stanley v. Sheffield & Co. R. Co., 83 Ala. 260. §§ 4967, 5290.
 Stanley v. Stanley, 26 Me. 191. §§ 1923, 1927, 3033, 3042, 3192, 3283, 7739.
 Stanley v. Board of Supervisors, 6 Fed. Rep. 561. § 2883.
 Stanley v. Supervisors, 121 U. S. 535. § 2884.
 Stanley v. Richmond & Co. R. Co., 89 N. C. 331. §§ 7659, 7664, 7666.
 Stanton v. Alabama & Co. R. Co., 2 Woods (U. S.), 506. §§ 7168, 7170, 7171, 7183.
 Stanton v. Alabama & Co. R. Co., 2 Woods (U. S.), 523. §§ 6073, 6074.
 Stanton v. Andrews, 18 Ill. App. 552. § 6941.
 Stanton v. Butten, 2 Conn. 527. § 5992.
 Stanton v. Camp, 4 Barb. (N. Y.) 274. § 5074.
 Stanton v. Embrey, 93 U. S. 548, 554. § 6211.
 Stanton v. Hodges, 6 Vt. 64. § 7507.
 Stanton v. New York & Co. R. Co., 59 Conn. 272. § 5321.
 Stanton v. Wilkeson, 8 Ben. (U. S.) 357. § 6962, 6984, 7270, 7280.
 Stanton v. Wilson, 2 Hill (N. Y.) 153. §§ 1542, 1815, 1958.
 Stanwood v. Stanwood, 17 Mass. 57. §§ 1070, 2748.
 Staple of England v. Bank of England, 21 Q. B. Div. 160. §§ 2562, 2563.
 Star Brick Co. v. Ridsdale, 36 N. J. L. 293. § 7746.
 Starbuck v. Mercantile Trust Co., 9 Rail. & Corp. L. J. 203. § 6527.
 Starin v. Edison, 112 N. Y. 206; 42 Hun (N. Y.), 549. §§ 6030, 6031.
 Starin v. Genoa, 23 N. Y. 439. §§ 643, 1118, 1120.
 Starin v. New York, 115 U. S. 48. §§ 7474, 7477.
 Starin v. New York, 42 Hun (N. Y.), 549. § 5890.
 Startit v. National Harrow Co., 13 N. Y. Supp. 224. § 6406.
 Stark v. Burke, 5 La. An. 740. § 3493.
 Stark v. Burke, 9 La. An. 341. §§ 2014, 3980.
 Stark v. Highgate Archway Co., 5 Taunt. 792. § 5735.
 Stark v. Soule, 45 Hun (N. Y.), 588; 9 N. Y. St. Rep. 5. § 4034.
 Stark Bank v. United States Pottery Co., 34 Vt. 144. §§ 3968, 3990, 4013, 4717, 5968.
 Starks v. Redfield, 52 Wis. 345, 352. § 6189.
 Starkweather v. American Bible Soc., 72 Ill. 50. §§ 5784, 7913, 7914, 7919, 7920.
 Star Line v. Van Vliet, 43 Mich. 361. § 5997.
 Starr v. Bennett, 5 Hill (N. Y.), 303. § 1568.
 Starr v. Gregory & Co. Min. Co., 6 Mont. 485. §§ 4853, 4858.
 State v. Accommodation Bank of La., 26 La. An. 288. § 68, 72.
 State v. Adams, 44 Mo. 570. §§ 26, 803, 3980.
 State v. Adams, 65 N. C. 537. § 590.
 State v. Addington, 12 Mo. App. 214, 219; affirmed, 77 Mo. 110. §§ 5478, 5480, 5482, 5483.
 State v. Algood, 87 Tenn. 163. § 635.
 State v. Allis, 1 Ark. 2698. §§ 5070, 5080.
 State v. Almond, 2 Houst. (Del.) 612. § 5482.
 State v. American & Co. News Co., 43 N. J. L. 381. § 5606.
 State v. Anderson, 91 U. S. 667. §§ 6134, 7011.
 State v. Armstrong, 3 Sneed (Tenn.) 634. § 110.
 State v. Ashley, 1 Ark. 513. §§ 766, 772, 775.
 State v. Assessors, 47 N. J. L. 36. § 2893.
 State v. Atchison & Co. R. Co., 24 Neb. 143. §§ 5633, 5890.
 State v. Atchison, 3 Lea (Tenn.), 729. § 6422.
 State v. Atkins, 35 Ga. 315. § 19.
 State v. Atlantic & Co. R. Co., 3 Woods (U. S.), 434. §§ 7000, 7001.
 State v. Attorney-General, 30 La. An., pt. II. 954. §§ 6605, 6775, 6779.
 State v. Augusta & Co. R. Co., 54 Ga. 401. §§ 5381, 5370.
 State v. Bailey, 16 Ind. 46. §§ 71, 315, 343, 349, 6642, 7670.
 State v. Bailey, 19 Ind. 452. § 510.
 State v. Baltimore & Co. R. Co., 6 Gill (Md.), 363, 387. §§ 2229, 2233.
 State v. Baltimore & Co. R. Co., 3 How. (U. S.) 534; affirming 12 Gill & J. (Md.) 399. §§ 5383, 5676.
 State v. Baltimore & Co. R. Co., 15 W. Va. 362, 376. §§ 6419, 6426.
 State v. Bank, 6 Gill & J. (Md.) 205. § 7847.
 State v. Bank of Charleston, Dudley (S. C.), 187. § 1247.
 State v. Bank of Charleston, 2 McMull. (S. C.) 439. §§ 6636, 6744.
 State v. Bank of Louisiana, 6 La. 745. §§ 3974, 5222.
 State v. Bank of Maryland, 6 Gill & J. (Md.) 205. §§ 6466, 6467, 6494, 6563.
 State v. Bank of South Carolina, 1 Spears (S. C.), 433. § 6636.
 State v. Bank of the State, 45 Mo. 528. § 618.
 State v. Bank of the State, 1 S. C. 63. §§ 7, 5397.
 State v. Bank of Washington, 18 Ark. 554. § 6751.
 State v. Barada, 57 Mo. 562. § 8076.
 State v. Barbee, 3 Ind. 258. § 583.
 State v. Barksdale, 5 Humph. (Tenn.) 154. §§ 6429, 6430, 6443.
 State v. Barron, 57 N. H. 498; 58 N. H. 370. §§ 6620, 6770, 6782, 6799.
 State v. Batchelor, 15 Mo. 207. § 3615.
 State v. Batt, 38 La. An. 355. § 700.
 State v. Beale, 16 Mo. App. 131, 136. §§ 5480, 5516.
 State v. Beazley, 60 Mo. 220. § 7939.
 State v. Beck, 81 Ind. 500. §§ 228, 594.
 State v. Beecher, 15 Ohio, 723. § 771.
 State v. Bell Telephone Co., 36 Ohio St. 296. § 5498.
 State v. Bencke, 9 Iowa, 203. § 643.
 State v. Bentley, 23 N. J. L. 532. §§ 2828, 2829, 2832, 5577.
 State v. Bergenthal, 72 Wis. 314. §§ 4414, 4417, 4433.
 State v. Bethlehem & Co. Gravel Road Co., 32 Ind. 357. § 7672.
 State v. Bieler, 87 Ind. 320. § 6794.
 State v. Bienville Oil Works, 28 La. An. 204. §§ 4406, 4413, 4426, 4427.
 State v. Bissell, 4 G. Greene, 328. § 1118.
 State v. Blake, 36 N. J. L. 442. § 5611.
 State v. Blauvelt, 34 N. J. L. 261. § 5626.
 State v. Bluff City Ins. Co., 19 S. W. Rep. 758. § 2828.
 State v. Boal, 46 Mo. 528. §§ 6804, 6806.
 State v. Boies, 11 Me. 474. § 7590.
 State v. Boland, 12 Mo. App. 74. § 4241.
 State v. Bonell, 42 La. An. 1110. § 5483.
 State v. Bonnell, 35 Ohio St. 10. §§ 720, 3936.
 State v. Boogher, 3 Mo. App. 442. § 6444.
 State v. Boston & Co. R. Co., 25 Vt. 433. §§ 7913, 7915, 7944.
 State v. Bradford, 32 Vt. 50. §§ 6623, 6806, 6810.
 State v. Branin, 23 N. J. L. 484. §§ 2827, 2828, 2829, 2832, 2848, 5577.
 State v. Brawler, 15 Mo. App. 597. § 7941.
 State v. Bredow, 31 Mo. 523. § 531.
 State v. Brewer, 64 Ala. 287. § 2825.
 State v. Brockman, 39 Mo. App. 131. §§ 6492, 6503, 6504, 7786.
 State v. Brown, 20 Fla. 407. §§ 634, 635.
 State v. Brown, 64 Md. 199. § 6218.
 State v. Brown, 33 Miss. 500. §§ 6624, 6795.
 State v. Brown, 34 Miss. 688. § 776.
 State v. Brown & Co. Man. Co. (R. I.), 25 Atl. Rep. 246. §§ 5493, 5496.
 State v. Brownstown & Co. Gravel Road Co., 120 Ind. 337. §§ 5939, 6620, 6625.
 State v. Buchanan, 5 Har. & J. (Md.) 317. § 8092.
 State v. Buchanan, Wright (Ohio), 233. §§ 766, 7901.
 State v. Bull, 16 Conn. 179. § 6634.
 State v. Burke, 33 La. An. 498. § 7780.
 State v. Burlington, 36 Vt. 521, 524. § 6425.
 State v. Burnett, 2 Ala. 140. §§ 6785, 6786.
 State v. Butler, 15 Lea (Tenn.), 104. § 502.
 State v. Butler, 86 Tenn. 614. §§ 1109, 2807, 2831, 2915, 5352, 5371, 5569, 5850.
 State v. Caldwell, 3 La. An. 435. § 1013.
 State v. Callaway County Court, 54 Mo. 395. §§ 5394, 7774.

- State v. Campbell, 64 N. H. 402. § 5483.
 State v. Canal Co., 40 Kan. 96. § 246.
 State v. Cape Girardeau & C. R. Co., 48 Mo. 468. § 5455.
 State v. Carr, 5 N. H. 357, 371. §§ 501, 518, 2991, 6598, 7690.
 State v. Central Ohio & C. Asso., 29 Ohio St. 399. §§ 234, 327, 6811.
 State v. Central Pac. R. Co., 10 Nev. 47. § 7841.
 State v. Central St. Louis Masonic Hall Asso., 14 Mo. App. 597. § 7941.
 State v. Centreville Bridge Co., 18 Ala. 678. § 6783.
 State v. Chamber of Commerce, 20 Wis. 63. §§ 804, 806, 848, 849, 856, 893, 908, 3979, 4393, 4538, 5474.
 State v. Charter Oak Life Ins. Co., 9 Mo. App. 364. § 7939.
 State v. Chase, 5 Ohio St. 528. § 7829.
 State v. Cheek, 63 Mo. 364. § 7652.
 State v. Cheraw & C. R. Co., 16 S. C. 524. § 2265.
 State v. Chicago & C. R. Co., 80 Iowa, 586. § 7933.
 State v. Chicago & C. R. Co., 36 Minn. 402. § 5622.
 State v. Chicago & C. R. Co., 38 Minn. 281. §§ 643, 644.
 State v. Chicago & C. R. Co., 99 Mo. 34. § 825.
 State v. Chicago & C. R. Co., 19 Neb. 476. § 5501.
 State v. Chicago & C. R. Co., 25 Neb. 156, 165. §§ 7891, 7932.
 State v. Chicago & C. R. Co., 79 Wis. 259. § 7826, 7831.
 State v. Chute, 34 Minn. 135. §§ 728, 745, 749.
 State v. Cincinnati, 20 Ohio St. 18. §§ 592, 2342.
 State v. Cincinnati, 23 Ohio St. 445. §§ 1013, 6793.
 State v. Cincinnati Gaslight & C. Co., 18 Ohio St. 262. § 1803.
 State v. Citizens' Benefit Asso., 6 Mo. App. 163. § 7941.
 State v. Citizens' Savings Bank, 31 La. An. 836. §§ 4010, 6790.
 State v. City Council of Charleston, 1 Mills (S. C.), 36. § 6778.
 State v. Clark, 23 Minn. 422. § 599.
 State v. Clark, 52 Mo. 508. § 4708.
 State v. Clark, 54 Mo. 17. § 658.
 State v. Claypool, 13 Ohio St. 14. § 7194.
 State v. Cobb, 64 Ala. 127. §§ 6094, 6070, 6071, 6074, 6076, 6097.
 State v. Coffee, 59 Mo. 59. § 766.
 State v. Cohn, 9 Nev. 179. § 5338.
 State v. Collector & C., 38 N. J. L. 270. § 5574.
 State v. Columbus Gas Co., 34 Ohio St. 572. §§ 5530, 5534, 5535.
 State v. Commercial Bank, 6 Smedes & M. (Miss.) 218. §§ 4753, 4874, 6615, 6624.
 State v. Commercial Bank, 13 Smedes & M. (Miss.) 569. §§ 6618, 6798.
 State v. Commercial Bank, 33 Miss. 474. §§ 6618, 6628, 6629.
 State v. Commercial Bank, 10 Ohio, 535. §§ 6608, 6636, 6637, 6641, 6792, 6803.
 State v. Commercial & C. Bank, 24 Miss. 144. § 6828.
 State v. Commercial State Bank, 23 Neb. 677. §§ 2951, 6854, 7042.
 State v. Commissioners, 23 N. J. L. 510. § 5772.
 State v. Commissioners, 27 N. J. L. 228. §§ 89, 92.
 State v. Commissioners, 5 Ohio St. 497. § 658.
 State v. Common Council of Jersey City, 25 N. J. L. 536. § 829.
 State v. Concord R. Co., 59 N. H. 85. § 6428.
 State v. Conklin, 34 Wis. 1. § 948.
 State v. Consolidation Coal Co., 46 Md. 1. §§ 315, 5353, 5622, 6140, 6605, 6780.
 State v. Copeland, 3 R. I. 33. §§ 643, 658.
 State v. Council Bluffs & C. Ferry Co., 11 Neb. 351. § 6609.
 State v. County Court, 50 Mo. 317. § 588.
 State v. County Court, 51 Mo. 82. § 588.
 State v. County Court, 51 Mo. 522. § 3032.
 State v. County Court, 64 Mo. 30. § 1334.
 State v. County Judge of Marshall, 7 Iowa, 186. § 7830.
 State v. County Treasurer, 4 S. C. 520. § 5441.
 State v. Cox, 88 Ind. 254. § 4207.
 State v. Craton, 6 Ired. L. (N. C.) 164. § 85.
 State v. Crawfordville & C. Turnp. Co., 102 Ind. 283. § 6613.
 State v. Curran, 12 Ark. 321. §§ 5383, 6579.
 State v. Curtis, 35 Conn. 374. § 768.
 State v. Curtis, 9 Nev. 325. §§ 956, 1011.
 State v. Daniel, 28 La. An. 38. § 611.
 State v. Davis, 23 Ohio St. 434. § 39.
 State v. Dawson, 16 Ind. 40. §§ 57, 58.
 State v. Dawson, 22 Ind. 272. § 5338.
 State v. Dawson, 3 Hill (S. C.), 100. §§ 6342, 6371.
 State v. Delaware & C. R. Co., 30 N. J. L. 473. §§ 7891, 8127.
 State v. Delleseline, 1 McCord (S. C.), 52. §§ 766, 4959.
 State v. Dillon, 36 Ind. 388. § 5942.
 State v. Divine, 38 N. C. 778. § 5515.
 State v. Douglas County Road Co., 10 Or.: 198. §§ 6775, 6777, 6778.
 State v. Douman, 23 Wis. 541. § 594.
 State v. Dowling, 50 Mo. 314. § 2857.
 State v. Doyle, 40 Wis. 175. § 7467.
 State v. Doyle, 40 Wis. 220. § 7902.
 State v. Dubois, 39 La. An. 676. § 611.
 State v. Duval County, 23 Fla. 483. § 611.
 State v. Einstein, 46 N. J. L. 479. § 4428.
 State v. Elliott, 64 Fed. Rep. 27. § 7782.
 State v. Engle, 34 N. J. L. 425. § 8112.
 State v. Essex Bank, 8 Vt. 488. § 6617.
 State v. Evans 3 Ark. 585. § 766.
 State v. Fagan, 22 La. An. 545. §§ 650, 6598, 6599.
 State v. Felton, 52 N. J. L. 161. § 7515.
 State v. Ferguson, 31 N. J. L. 107. §§ 715, 794, 3936, 7509.
 State v. Ferguson, 33 N. H. 424. § 955.
 State v. Ferris, 42 Conn. 550. §§ 730, 731, 790, 3192, 3285.
 State v. Fidelity & C. Ins. Co., 77 Iowa, 648. §§ 7931, 7944.
 State v. Fidelity & C. Ins. Co., 39 Minn. 538. §§ 7931, 7944.
 State v. Fire Creek & C. Co., 33 W. Va. 188. § 5492.
 State v. First Nat. Bank, 2 S. Dak. 568. § 6431.
 State v. Fisher, 52 Mo. 174, 177. §§ 1017, 1028, 5478.
 State v. Fisher, 23 Vt. 714. § 6783.
 State v. Flannagan, 67 Ind. 140. § 5935.
 State v. Florida & C. R. Co., 15 Fla. 690. §§ 6063, 6096, 6134.
 State v. Foley, 31 Iowa, 527. § 1025.
 State v. Foulkes, 94 Ind. 493. §§ 228, 6794, 6810.
 State v. Fourth N. H. Turnp., 15 N. H. 162. § 6598.
 State v. Franklin Bank, 10 Ohio, 91. §§ 2094, 2168, 3231, 3317.
 State v. Freeman, 38 N. H. 426. §§ 1021, 1025.
 State v. Freeport, 43 Me. 198. § 6419.
 State v. Fuller, 96 Mo. 165. § 7652.
 State v. Fuller, 34 N. J. L. 227. § 6031.
 State v. Gaillard, 11 S. C. 309. § 5441.
 State v. Garrouette, 67 Mo. 445, 446. §§ 1122, 1123.
 State v. Gastinel, 20 La. An. 114; 13 La. An. 517. § 786.
 State v. Gee, 79 Mo. 313. § 3615.
 State v. Georgia R. Co., 54 Ga. 423. § 5570.
 State v. Gissh, 31 La. An. 544. § 1028.
 State v. Gleason, 12 Fla. 190, 265. § 6797.
 State v. Glenn, 18 Nev. 34. §§ 637, 4655.
 State v. Glidden, 55 Conn. 46. § 7782.
 State v. Godfrey, 24 Me. 232. § 7625.
 State v. Godwinsville & C. R. Co., 44 N. J. L. 496. § 5685.
 State v. Godwinsville & C. Road Co., 49 N. J. L. 266. §§ 6429, 6436, 6442.
 State v. Gooch, 97 N. C. 186. § 6972.
 State v. Goodwill, 33 W. Va. 179. §§ 5492, 5494.
 State v. Gordon, 37 Ind. 171. § 5340.
 State v. Grand Lodge, 8 Mo. App. 148. §§ 914, 923.
 State v. Granville & C. Society, 11 Ohio, 1. §§ 67, 5411.
 State v. Great Works Milling & C. Co., 20 Me. 41. §§ 6319, 6425.
 State v. Greene Co., 54 Mo. 540. §§ 365, 366, 403, 1122, 5394.
 State v. Greensdale, 106 Ind. 364. § 4014.
 State v. Greer, 9 Mo. App. 219. § 70.
 State v. Greer, 78 Mo. 188; reversing, 9 Mo. App. 219. § 756.
 State v. Groves, 15 R. I. 208. § 5483.
 State v. Guerrero, 12 Nev. 105. § 3445.
 State v. Gummersall, 24 N. J. L. 529. §§ 6785, 6788.
 State v. Gurney, 2 S. C. 559. § 5441.
 State v. Guttenberg, 38 N. J. L. 419. § 590.
 State v. Hamilton, 47 Ohio St. 52. §§ 5659, 5670.
 State v. Hampshire Turnp. Co., 2 Sneed (Tenn.), 254. § 6793.
 State v. Hancock, 33 N. J. L. 315; 35 N. J. L. 537. § 5574.
 State v. Hancock County, 12 Ohio St. 596. § 1118.

- State v. Hannibal & Co. R. Co., 37 Mo. 265. §§ 1062, 5577.
 State v. Hannibal & Co. R. Co., 51 Mo. 532. §§ 5672, 7503, 7517.
 State v. Hannibal & Co. R. Co., 97 Mo. 318. § 8129.
 State v. Hannibal & Co. Road Co., 37 Mo. App. 496. §§ 5821, 5941, 6796.
 State v. Hardy, 7 Neb. 377. § 1013.
 State v. Harris, 3 Ark. 570. §§ 766, 772, 2389, 6799, 6895.
 State v. Hartford & Co. R. Co., 29 Conn. 538. §§ 7826, 7830.
 State v. Hastings, 12 Wis. 47. § 638.
 State v. Hawthorn, 9 Mo. 385. §§ 5431, 5489.
 State v. Haynes, 12 La. An. 235. § 6859.
 State v. Hebrew Congregation, 30 La. An. 205. § 893.
 State v. Heppenheimer, 54 N. J. L. 439. § 2832.
 State v. Hernando Ins. Co., 19 S. W. Rep. 758. § 2828.
 State v. Heyward, 3 Rich L. (S. C.) 389. §§ 67, 5381.
 State v. Hilbert, 72 Wis. 184. § 5428.
 State v. Hitchcock, 1 Kan. 178. §§ 475, 588.
 State v. Hoboken, 30 N. J. L. 225. § 5516.
 State v. Hoboken, 33 N. J. L. 280. § 1028.
 State v. How, 1 Mich. 512. §§ 505, 506.
 State v. Hunter, 94 N. C. 829. § 223.
 State v. Hunton, 28 Vt. 594. §§ 776, 2495.
 State v. Ibberville Parish Judge, 30 La. An., pt. I, 303. § 2506.
 State v. Illinois Central R. Co., 33 Fed. Rep. 730. §§ 475, 575, 620, 635.
 State v. Independent School District, 29 Iowa, 264. § 6810.
 State v. Insurance Co., 115 Ind. 257. §§ 7930, 7931.
 State v. Insurance Co., 49 Ohio St. 440. § 7931, 7944.
 State v. Jacksonville & Co. R. Co., 15 Fla. 201. §§ 7334, 7575.
 State v. Jacksonville & Co. R. Co., 16 Fla. 708. §§ 6988, 7011, 7050.
 State v. Jacobs, 17 Ohio, 143. § 785.
 State v. Jefferson Iron Co., 60 Tex. 312. § 3790.
 State v. Jefferson Turnpike Co., 3 Humph. (Tenn.) 303. §§ 1222, 1385, 1410, 1424, 1484.
 State v. Jenkins, 25 Mo. App. 484. § 6776.
 State v. Jersey City, 25 N. J. L. 536. §§ 809, 815, 816.
 State v. Jersey City, 27 N. J. L. 493. § 3960.
 State v. Jersey City, 29 N. J. L. 170. § 5507.
 State v. Jersey City, 37 N. J. L. 348. § 1025.
 State v. Jersey City, 45 N. J. L. 480. § 2811.
 State v. John, 5 Ohio, 217. § 3050.
 State v. Jones, 38 N. J. L. 83. §§ 2828, 2829, 2832.
 State v. Jones, 67 N. C. 210. § 5604.
 State v. Kansas City & Co. R. Co., 32 Fed. Rep. 722. § 5501.
 State v. Keeran, 5 R. I. 497. § 5482.
 State v. Kelsey, 8 Mo. 623, 630. §§ 3003, 4300.
 State v. Kingan, 51 Ind. 142. § 6795.
 State v. Knowles, 16 Fla. 577. § 25.
 State v. Krebs, 64 N. C. 604. § 5671.
 State v. Kuehn, 34 Wis. 229. § 4714.
 State v. Kupferle, 44 Mo. 154. §§ 767, 768, 776, 789, 6792.
 State v. Laclede Gaslight Co., 102 Mo. 472. § 5415.
 State v. Ladies of the Sacred Heart, 99 Mo. 533. § 6651.
 State v. Lathrop, 10 La. 398. §§ 7876, 7887.
 State v. Laughlin, 73 Mo. 443. § 5672.
 State v. Lawrence, 38 Mo. 535. §§ 767, 774.
 State v. Lawrence Bridge Co., 2 Kan. 433. § 577.
 State v. Lee, 21 Ohio St. 652. § 90.
 State v. Lee, 16 Nev. 242. § 90.
 State v. Löffingwell, 64 Mo. 458, 472. § 597.
 State v. Lehre, 7 Rich L. (S. C.) 234. §§ 732, 737, 1247, 1948, 6783.
 State v. Leonard, 3 Tenn. Ch. 177. § 6775.
 State v. Lingo, 26 Mo. 496. § 767.
 State v. Litchfield, 58 Me. 267. § 7738.
 State v. Little Rock & Co. R. Co., 31 Ark. 701. § 6038.
 State v. Liverpool & Co. Ins. Co., 40 La. An. 463. § 7898.
 State v. Loomis, 115 Mo. 307. § 5494.
 State v. Louisiana State Bank, 20 La. An. 468. § 7899.
 State v. Louisville & Co. R. Co., 10 Am. & Eng. Rail. Cas. 286. §§ 6425, 6429.
 State v. Macon County Court, 41 Mo. 453. §§ 5394, 5679, 5680.
 State v. Maine Central R. Co., 66 Me. 488. §§ 92, 365, 370, 389, 395.
 State v. Maloy, 20 Kan. 619. § 582.
 State v. Marshall, 64 N. H. 549. § 5483.
 State v. Matthews, 44 Mo. 523. § 7939.
 State v. Mayor & Co., 24 Ala. 701. § 72.
 State v. Mayor & Co., 33 N. J. L. 57. § 955.
 State v. McBride, 4 Mo. 303. §§ 634, 3920.
 State v. McCullough, 3 Nev. 202, 225. § 3881.
 State v. McDaniel, 22 Ohio St. 354. §§ 742, 781, 3858, 3866.
 State v. McGrath, 75 Mo. 424, 426. § 300.
 State v. McGrath, 86 Mo. 239. § 2110.
 State v. McGrath, 92 Mo. 355. §§ 298, 299.
 State v. McIver, 2 S. C. 25. §§ 2365, 2445, 2490, 2494.
 State v. McKeon, 25 Mo. App. 667. § 2479.
 State v. McNaughton, 56 Vt. 736. § 6808.
 State v. Mead, 71 Mo. 266. § 635.
 State v. Medical Examiners, 34 Minn. 377. § 643.
 State v. Medical Society & Co., 38 N. J. L. 387. § 905.
 State v. Merchant, 37 Ohio St. 251. § 745.
 State v. Merchants' Exchange, 2 Mo. App. 96. §§ 1023, 1035.
 State v. Merchants' Exchange Mut. Benefit Society, 72 Mo. 146. § 7941.
 State v. Merchants' Ins. & Co. Co., 8 Humph. (Tenn.) 235, 352. § 4539.
 State v. Metz, 29 N. J. L. 122; 31 N. J. L. 378. § 8128.
 State v. Metz, 32 N. J. L. 199. § 8128.
 State v. Miller, 41 La. An. 53. § 5507.
 State v. Miller, 45 Mo. 495. §§ 608, 613.
 State v. Miller, 1 Mo. App. 48. § 5499.
 State v. Miller, 23 N. J. L. 383. § 5626.
 State v. Milwaukee Chamber of Commerce, 47 Wis. 670. §§ 818, 849, 852, 881, 882, 889, 893, 908, 913, 914, 4395, 5474.
 State v. Milwaukee & Co. R. Co., 45 Wis. 579. § 6770.
 State v. Milwaukee Gas Light Co., 29 Wis. 454. § 6417.
 State v. Minneapolis & Co. R. Co., 40 Minn. 156. § 643.
 State v. Minnesota Thresher Man. Co., 40 Minn. 213. §§ 205, 2939, 3004, 3009, 6033, 6034.
 State v. Mississippi & Co. R. Co., 20 Ark. 495. § 6800.
 State v. Missouri & Co. R. Co., 25 Neb. 164. §§ 7891, 7932.
 State v. Mobile, 5 Port. (Ala.) 279. § 5638.
 State v. Moore, 19 Ala. 514. § 6626.
 State v. Moore, 5 Ohio St. 444. § 5570.
 State v. Moore, 38 Ohio St. 7; 39 Ohio St. 486. § 7940.
 State v. Morgan, 28 La. An. 482. §§ 5364, 5367, 5368.
 State v. Morris, 77 N. C. 512. § 5489.
 State v. Morris, 73 Tex. 435. § 5337.
 State v. Morris & Co. R. Co., 23 N. J. L. 360. §§ 5176, 6279, 6318, 6413, 6419, 6420, 6425, 6429, 6443.
 State v. Morris' Turnp. Co., 4 N. J. L. 165. §§ 6358, 6442.
 State v. Morristown Fire Asso., 23 N. J. L. 195. §§ 1082, 1576, 1707, 2962.
 State v. Murreesboro, 11 Humph. (Tenn.) 217. §§ 6429, 6430, 6436.
 State v. Murphy, 17 R. I. 698. § 7713.
 State v. Mutual Protection Asso., 26 Ohio St. 19. § 7941.
 State v. Nashville & Co. R. Co., 7 Lea (Tenn.), 15. § 6257.
 State v. Nashville University, 4 Humph. (Tenn.) 157. § 5809.
 State v. Nebraska Distilling Co., 29 Neb. 700. §§ 5972, 6401, 6407.
 State v. Nebraska Telephone Co., 17 Neb. 126. § 5530.
 State v. Needham, 32 Ind. 325. § 5942.
 State v. Newark, 3 Dutch. (N. J.) 135. § 590.
 State v. Newark, 35 N. J. L. 157. §§ 5570, 5575.
 State v. Newark, 39 N. J. L. 380. § 2860.
 State v. Newark, 40 N. J. L. 71. §§ 582, 583.
 State v. Newark, 40 N. J. L. 558. § 2866.
 State v. Newark & Co. R. Co., 34 N. J. L. 301. § 7622.
 State v. New Haven & Co. R. Co., 43 Conn. 351. § 70.
 State v. New Orleans & Co. R. Co., 20 La. An. 489. §§ 731, 765.
 State v. New Orleans Gas Light & Co. Co., 2 Rob. (La.) 529. § 6628.
 State v. New Orleans Gas Light Co., 25 La. An. 413. § 2521.
 State v. Newton, 45 N. J. L. 469. § 5183.
 State v. Newton, 50 N. J. L. 534. § 5453.
 State v. New York & Co. Tel. Co., 49 N. J. L. 322. § 7681.

- State v. New York Life Ins. Co., 10 Mo. App. 580; affirmed, 81 Mo. 89. § 7939.
 State v. Northern Cent. R. Co., 18 Md. 193, 194. §§ 6630, 8097, 7430, 7891.
 State v. Northern Cent. R. Co., 41 Md. 131. §§ 5408, 5572.
 State v. Northern Pac. R. Co., 39 Minn. 25. § 5574.
 State v. North Louisiana & C. R. Co., 34 La. An. 947. § 2740.
 State v. Northwestern & C. Assn., 62 Wis. 174. § 8039.
 State v. Norwalk & C. Turnp. Co., 10 Conn. 157. § 5913.
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 State v. Oberlin Building & C. Assn., 35 Ohio St. 258. § 6517.
 State v. Ohio & C. R. Co., 23 Ind. 362. §§ 6319, 6439.
 State v. Ohio & C. R. Co., 6 Ohio C. C. 414. §§ 3871, 3876, 3925.
 State v. Oleson, 38 Minn. 150. § 635.
 State v. O'Neill, 4 Mo. App. 221. §§ 3363, 7507, 7511, 7545.
 State v. O'Neill, 24 Wis. 149. § 643.
 State v. Orleans Nav. Co., 7 La. An. 679. § 6626.
 State v. Orvis, 20 Wis. 235. § 769.
 State v. Overton, 24 N. J. L. 385. §§ 849, 937, 942, 1020, 1022.
 State v. Paint Rock Coal & C. Co., 92 Tenn. 81. § 5494.
 State v. Palmes, 23 Fla. 620. § 611.
 State v. Parker, 26 Vt. 357. § 643.
 State v. Parsons, 40 N. J. L. 1. § 6804.
 State v. Passaic, 42 N. J. L. 524. § 6031.
 State v. Passaic County Agric. Soc., 54 N. J. L. 260. §§ 6422, 6439, 6440.
 State v. Passaic Turnp. Co., 27 N. J. L. 217. §§ 5660, 5911.
 State v. Pasumpsic Turnp. Co., 3 Vt. 178. § 6626.
 State v. Paterson & C. Co., 21 N. J. L. 9. §§ 769, 6774, 6775, 6776.
 State v. Patterson, 98 N. C. 860. § 635.
 State v. Patton, 4 Ired. L. (N. C.) 16. § 6437.
 State v. Paul, 5 R. I. 185. § 5482.
 State v. Pawtuxet Turnp. Co., 8 R. I. 182. §§ 6608, 6611.
 State v. Peel Splint Coal Co., 36 W. Va. 802. § 5494.
 State v. Pennsylvania & C. Canal Co., 23 Ohio St. 121. §§ 6617, 6803, 6811.
 State v. Peoples & C. Assn., 43 N. J. L. 389. § 2445.
 State v. People's Mut. Benefit Assn., 42 Ohio St. 579. §§ 4382, 6616, 6617.
 State v. Person, 32 N. J. L. 134; affirmed, 32 N. J. L. 566. §§ 92, 5408.
 State v. Peterson, 38 Minn. 143. § 635.
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 State v. Philadelphia & C. R. Co., 45 Md. 361. §§ 368, 5570, 8119.
 State v. Phipps, 50 Kan. 608. § 7940.
 State v. Pimm, 50 Mo. 87. § 1943.
 State v. Ford, 93 Mo. 606. § 643.
 State v. Portland, 74 Me. 268. §§ 6419, 6425.
 State v. Portland & C. R. Co., 57 Me. 402. § 6419.
 State v. Powers, 24 N. J. L. 400. § 2832.
 State v. Prioleau, 2 Hill (S. O.), 367. § 5048.
 State v. Pritchard, 36 N. J. L. 101. § 6788.
 State v. Pugh, 43 Ohio St. 98. §§ 582, 658.
 State v. Railway, 33 N. J. L. 110. § 7890.
 State v. Railroad Co., 24 Neb. 143. § 246.
 State v. Ramon, 10 La. An. 420. § 6809.
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 State v. Real Estate Bank, 5 Ark. 695. § 5335.
 State v. Reinmund, 45 Ohio St. 214. § 8132.
 State v. Reitz, 62 Ind. 159. § 586.
 State v. Republican Valley R. Co., 17 Neb. 647; 18 Neb. 512. §§ 5501, 7828.
 State v. Richards, 52 N. J. L. 156. §§ 5556, 5557.
 State v. Richmond & C. R. Co., 72 N. C. 634. § 5361.
 State v. Richmond & C. R. Co., 73 N. C. 527. § 5383.
 State v. Riordan, 24 Wis. 484. § 594.
 State v. Rives, 5 Ired. L. (N. C.) 297, 307. §§ 5364, 6718, 6746, 6758, 7848, 7853, 7854, 7856.
 State v. Robertson (Kan.), 21 Pac. 382. § 636.
 State v. Robertson, 24 N. J. L. 504. § 5575.
 State v. Robinson, 20 Neb. 96. § 634.
 State v. Roe, 25 N. J. L. 211. § 6788.
 State v. Rohlfes (N. J. L.), 19 Atl. Rep. 1099. § 3873.
 State v. Rollins, 13 Mo. 179, 182. § 7507.
 State v. Rombauer, 46 Mo. 155. § 2445.
 State v. Root, 83 Wis. 667. §§ 7902, 7940, 7941.
 State v. Ross, 122 Mo. 437. §§ 6813, 6854, 6864, 6879, 7192.
 State v. Saline County Court, 51 Mo. 350. §§ 5394, 7774.
 State v. Sannerud, 38 Minn. 229. § 635.
 State v. Sappington, 68 Mo. 454. § 4801.
 State v. Savannah & C. Canal Co., 26 Ga. 665. § 7826.
 State v. Scott, 22 Neb. 628. § 7932.
 State v. Scripture, 42 N. H. 485. § 6444.
 State v. Security Bank, 2 S. Dak. 538. §§ 6431, 6438.
 State v. Seneca County Bank, 5 Ohio St. 171. §§ 6513, 6620, 6621, 6798.
 State v. Senft, 2 Hill (S. O.), 367. § 6031.
 State v. Sherman, 22 Ohio St. 411. §§ 395, 5361.
 State v. Shields, 89 Mo. 259. § 6444.
 State v. Shibley, 25 Minn. 387. §§ 443, 97, 905, 2040.
 State v. Silver, 9 Nev. 227. § 619.
 State v. Simmons Hardware Co., 109 Mo. 118. § 6402.
 State v. Simonds, 3 Mo. 414. § 36.
 State v. Simons, 32 Minn. 540. § 646.
 State v. Simonton, 78 N. C. 57. §§ 24, 6624.
 State v. Smith, 32 Ind. 213. §§ 6775, 6776.
 State v. Smith, 31 Mo. 566. § 2479.
 State v. Smith, 44 Ohio St. 848. § 636.
 State v. Smith, 15 Or. 98. §§ 732, 2627, 3857, 3860, 3872, 4611.
 State v. Smith, 48 Vt. 266. §§ 1948, 2047, 2069, 2094, 2100, 3932, 3937, 5968, 5981.
 State v. Smyth, 14 R. I. 100. § 5483.
 State v. Snow, 2 R. I. 63. § 658.
 State v. Society & C. 1 Paine (U. S.), 652. § 531.
 State v. Southern Kansas Ry. Co., 24 Fed. Rep. 179. § 7827.
 State v. Southern Minnesota R. Co., 18 Minn. 40. §§ 6823, 7826, 7827.
 State v. Southern Pac. Co., 23 Or. 424. § 7477.
 State v. Southern Pacific R. Co., 24 Tex. 80. §§ 5411, 5617, 6780, 6793.
 State v. Spartanburg & C. R. Co., 8 S. C. 129. § 6087.
 State v. Spooner, 47 Wis. 438. § 7939.
 State v. Sporman's & C. Assn., 29 Mo. App. 326. §§ 4412, 4426, 4431.
 State v. Springfield Township, 6 Ind. 83. § 25.
 State v. St. Paul, 36 Minn. 529. §§ 5575, 5618, 6622, 6625.
 State v. St. Paul & C. Turnp. Co., 92 Ind. 42. §§ 6601, 6602, 6608.
 State v. Standard Oil Co., 49 Ohio St. 137. §§ 6404, 6407, 6411, 6412, 7838.
 State v. Starke, 13 Fla. 255. § 594.
 State v. Stebbins, 1 Stew. (Ala.) 299. § 5633.
 State v. Steele, 37 Minn. 428. § 279.
 State v. Stewart, 32 Mo. 379. § 767.
 State v. Stewart, 47 Mo. 382. § 7939.
 State v. Stimson, 24 N. J. L. 9. §§ 5003, 5004.
 State v. St. Louis & C. Ins. Co., 8 Mo. 330. § 6783.
 State v. St. Louis & C. R. Co., 77 Mo. 202. §§ 2813, 2814, 2830, 2831, 2818.
 State v. St. Louis & C. R. Co., 29 Mo. App. 301, 307. §§ 4412, 4417, 4422, 4423, 4431, 4434.
 State v. Stockley, 45 Ohio St. 304. §§ 756, 3866.
 State v. Stoll, 2 S. O. 538. § 5441.
 State v. Stonewall Ins. Co., 89 Ala. 335. § 2811.
 State v. Stormont, 24 Kan. 686. §§ 10, 475.
 State v. Sullivan County Court, 51 Mo. 522. § 5394.
 State v. Swisher, 17 Tex. 441. § 843.
 State v. Tabor, 70 N. C. 161. § 4708.
 State v. Thomas, 88 Tenn. 491. § 4102.
 State v. Thompson, 23 Kan. 338. § 7713.
 State v. Thompson, 27 Mo. 365. §§ 731, 750.
 State v. Thompson, 20 N. J. L. 689. § 6788.
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 State v. Timken, 48 N. J. L. 87. §§ 1652, 2445.
 State v. Tolan, 33 N. J. L. 195. §§ 780, 6783.
 State v. Tombeckee Bank, 2 Stew. (Ala.) 30. §§ 27, 5389.
 State v. Tomlinson, 20 Kan. 692. § 6808.
 State v. Trenton & C. Turnp. Co., 34 N. J. L. 182. § 5940.
 State v. Trustees of Union Township, 8 Ohio St. 394. § 475.
 State v. Tucker, 46 Ind. 358. § 588.
 State v. Tudor, 5 Day (Conn.), 329. §§ 737, 1050, 1052.
 State v. Tunis, 23 N. J. L. 546. § 5577.
 State v. Turnpike Co., 37 Ohio St. 451. § 5942.

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- State v. Vail, 53 Mo. 97. §§ 6776, 6783.
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- State v. Van Horne, 7 Ohio St. 327. § 1118.
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- State v. Vincennes University, 5 Ind. 77. §§ 24, 802, 804, 816, 817, 4901, 6653, 6683.
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- State v. Vreeland, (MS.), A. D. 1846. § 6788.
- State v. Wabash & C. R. Co., 115 Ind. 466. § 7148.
- State v. Wabash & C. R. Co., 83 Mo. 144. § 5501.
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- State v. Weir, 33 Iowa, 134. § 643.
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- State v. Western & Life Ins. Co., 47 Ohio St. 167. §§ 7929, 7944.
- State v. Western Irrigating Canal Co., 40 Kan. 96. §§ 5335, 5353, 5374, 5375.
- State v. Western North Carolina R. Co., 95 N. C. 602. §§ 6025, 6785.
- State v. West Wisconsin R. Co., 34 Wis. 197. § 6828.
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- State v. Wilcox, 45 Mo. 458. § 643.
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- State v. Wilmington City Council, 3 Harr. (Del.) 294. § 725.
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- State v. Woodmansee, 1 N. Dak. 246. § 5522.
- State v. Woodruff, 36 N. J. L. 94. § 368.
- State v. Woodruff Sleeping-car Co., 114 Ind. 155. § 8125.
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- State Bank v. Bowers, 5 Blackf. (Ind.) 72. § 5124.
- State Bank v. Chetwood, 8 N. J. L. 1. §§ 4739, 5176.
- State Bank v. Clark, 1 Hawks. (N. C.) 36. §§ 24, 7733.
- State Bank v. Criswell, 15 Ark. 230. § 5713.
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- State Bank v. Fox, 3 Blatchf. (U. S.) 431. §§ 2069, 3277, 4638, 4650, 4789, 4802, 5126, 5133, 5158.
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- State Bank v. Receivers, 3 N. J. Eq. 266. § 6967.
- State Bank v. State, 1 Blackf. (Ind.) 267. § 3968.
- State Bank v. Wilson, 1 Dev. (N. C.), 484. § 4779.
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- State Board of Assessors v. Central R. Co., 48 N. J. L. 146, 356. §§ 5556, 5557.
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- Steamboat v. Hammond, 9 Mo. 59. § 1657.
- Steamboat v. Lumm, 9 Mo. 64. § 1220.
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- Steamship Co. v. Joliffe, 2 Wall. (U. S.) 450. § 5438.
- Steamship Co. v. Murphy, 6 Phila. (Pa.) 224. § 1163.
- Steamship Co. v. Tugman, 106 U. S. 118. §§ 1834, 7449, 7456.
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- Stearns v. Marsh, 4 Denio (N. Y.), 227. §§ 2656, 2698.
- Stebbins v. Edmonds, 12 Gray (Mass.), 203. §§ 4164, 4244.
- Stebbins v. Lardner, 2 S. Dak. 127. § 4827.
- Stebbins v. Leowolf, 3 Cush. (Mass.) 137. § 2710.
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- Steed v. Whitaker, Barn. 220. § 5194.
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- Steele v. Smith, 3 E. D. Smith (N. Y.), 321. § 6298.

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 Steele v. Western & Co. Lock Nav., 2 Johns. (N. Y.) 283. § 6343.
 Steen v. Norton, 45 Wis. 412. § 8076.
 Steever v. Illinois Central R. Co., 62 Iowa, 371. § 5543.
 Stein v. Bienville Water-Supply Co., 141 U. S. 67. § 5569.
 Stein v. Bienville Water Co., 34 Fed. Rep. 145. §§ 5399, 5401, 5484.
 Stein v. Howard, 65 Cal. 616. §§ 1579, 2092, 2108.
 Stein v. Indianapolis & Co. Assn., 18 Ind. 237. § 5114.
 Stein v. Mobile, 24 Ala. 591. § 1118.
 Steiner v. Central Railroad, 60 Ga. 552. § 7511.
 Steinmetz v. Versailles & Co. Turnpike Co., 57 Ind. 457. § 225.
 Stenhouse v. Charlotte & Co. R. Co., 70 N. C. 542. 4785.
 Stenton v. Jerome, 54 N. Y. 480. §§ 2692, 2699.
 Stephens v. Buffalo & Co. R. Co., 20 Barb. (N. Y.) 339. § 1253.
 Stephens v. Bullett, 43 Fed. Rep. 842. §§ 3302, 3303, 3304, 3692.
 Stephens v. Fox, 83 N. Y. 313; 17 Hun (N. Y.), 435. §§ 3397, 3399.
 Stephens v. Green Hill Cemetery Co., 1 Houst. (Del.) 26. § 7404.
 Stephens v. Overstolz, 43 Fed. Rep. 465. §§ 4303, 4304.
 Stephens v. Overstolz, 43 Fed. Rep. 771. §§ 4120, 4121, 4273, 4278.
 Stephens v. Schuchmann, 32 Mo. App. 333. §§ 3786, 7302.
 Stephens & Co. Transp. Co. v. Central R. Co., 33 N. J. 229. §§ 5691, 7621, 7625.
 Stephenson's Case, 45 L. J. (Ch.) 488. §§ 1260, 4154.
 Stephenson v. Doe, 8 Blackf. (Ind.) 508. § 4168.
 Stephenson v. New York & Co. R. Co., 2 Duer (N. Y.), 341. §§ 4853, 4984.
 Stephenson v. Piscataqua Ins. Co., 54 Me. 55, 70. § 7465.
 Stephenson v. Smith, 7 Mo. 610, 617. § 3395.
 Seophenson v. Texas & Co. R. Co., 42 Tex. 163. § 257.
 Stephenson Ins. Co. v. Dunn, 45 Ill. 211. § 7539.
 Sterner v. Denver & Co. R. Co., 17 Hun (N. Y.), 316. § 8037.
 Sterling v. Marietta & Co. Trading Co., 11 Serg. & R. (Pa.) 185. §§ 4650, 4897, 5170.
 Sterling v. Peet, 14 Conn. 245. §§ 5077, 5085.
 Sterne v. Herman, 11 Abr. Pr. (N. s.) (N. Y.) 376. §§ 3625, 4335, 4336.
 Sterne v. Herman, 42 How. Pr. (N. Y.) 376. § 3670.
 Stern Auction Co. v. Mason, 16 Mo. App. 473. § 1430.
 Stetson v. Bangor, 56 Me. 274. §§ 2854, 2865.
 Stetson v. City Bank, 2 Ohio St. 167; 12 Ohio St. 577. § 6736.
 Stetson v. Faxon, 19 Pick. (Mass.) 147. §§ 6373, 7406.
 Stetson v. Patten, 2 Me. 358. §§ 5028, 5137, 5295.
 Stettauer v. New York & Co. R. Co., 42 N. J. Eq. 46. §§ 4428, 4431, 4432.
 Steuben & Co. R. Co. v. Treasurer N. Township, 1 Ohio St. 105. § 1118.
 Steubenville v. Culp, 38 Ohio St. 18, 23. § 4708.
 Stevens v. Brown, 3 Vt. 420. § 7507.
 Stevens v. Bruce, 21 Pick. (Mass.) 193. § 5752.
 Stevens v. Carp River Iron Co., 57 Mich. 427. § 4727.
 Stevens v. Davidson, 38 Gratt. (Va.) 813. § 3970.
 Stevens v. Eden Meeting House, 12 Vt. 686. §§ 710, 715, 779.
 Steve v. Hauser, 39 N. Y. 302. § 7010.
 Stevens v. Hill, 29 Me. 133. §§ 3947, 3989, 3994, 4634, 6474, 6482.
 Stevens v. Hurlbut Bank, 31 Conn. 149. § 2656.
 Stevens v. Lynch, 12 East, 38. § 1717.
 Stevens v. Middlesex Canal, 12 Mass. 466. §§ 6342, 6343, 6370, 6371.
 Stevens v. Midland R. Co., 10 Ex. 352. § 6298.
 Stevens v. Midland County R. Co., 10 Ex. 352. § 6312.
 Stevens v. Phoenix Ins. Co., 41 N. Y. 149. §§ 12, 7451.
 Stevens v. Phoenix Ins. Co., 24 How. Pr. (N. Y.) 517. § 7463.
 Stevens v. Pratt, 101 Ill. 206. §§ 7894, 7914, 7923.
 Stevens v. Rutland & Co. R. Co., 28 Vt. 545, 546. §§ 72, 74, 78, 1279, 4518, 4620, 4532, 4565.
 Stevens v. South Devon R. Co., 13 Beav. 48; 9 Hare, 313. §§ 71, 2127, 4518, 4527, 4566.
 Stevens v. Springer, 23 Me. App. 375. § 2479.
 Stevens v. Union Trust Co., 57 Hun (N. Y.), 498; 11 N. Y. Supp. 268. § 6096.
 Stevens v. Warren, 101 Mass. 564. § 7589.
 Stevens v. Willard, 43 Vt. 692. §§ 4010, 4848.
 Stevens v. Wilson, 18 N. J. Eq. 447. § 2547.
 Stevens County v. St. Paul & Co. R. Co., 36 Minn. 467. § 5569.
 Stevens Hospital v. Dyas, 15 Ir. Ch. 405. § 5297.
 Stevenson v. Bay City, 26 Mich. 44, 46. § 4083.
 Stevenson v. Palmer, 14 Colo. 565. §§ 6898, 6931.
 Stevens Point & Co. v. Reilly, 44 Wis. 295. § 594.
 Stewart's Appeal, 56 Pa. St. 413. §§ 5353, 5356, 5368, 6140.
 Stewart's Appeal, 72 Pa. St. 291. §§ 263, 264.
 Stewart's Case, L. R. 1 Ch. 511. §§ 1523, 1550, 1764, 1802.
 Stewart's Case, L. R. 1 Ch. 574. §§ 1444, 1445, 1446, 1528.
 Stewart, Ex parte, 4 De Gex, J. & S. 543. § 5210.
 Stewart, Re, 8 Week. Rep. 297. § 693.
 Stewart v. Anderson, 70 Tex. 588, 593. § 6857.
 Stewart v. Austin, L. R. 3 Eq. 299. §§ 1482, 4475.
 Stewart v. Chesapeake & Co. Canal Co., 5 Fed. Rep. 149. § 6833.
 Stewart v. Duffy, 53 Md. 564. § 2534.
 Stewart v. Dunn, 12 Mees. & W. 656; 1 Dowl. & L. 642. § 817.
 Stewart v. Father Matthew Society, 41 Mich. 67. § 1010.
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 Stewart v. Flowers, 44 Miss. 513. § 6268.
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- Symonds v. Cincinnati, 14 Ohio, 147. § 5626.
- Symons' Case, L. R. 5 Ch. 298. §§ 1095, 3170, 3273.
- Syndic v. Members Board of Direction, Jour. des Palais, 1869, p. 712; 36 La. An. 369. § 6947.
- Syracuse & C. Canal Road Co. v. Tully, 66 Barb. (N. Y.) 25. § 6429.
- Syracuse & C. R. Co., Re 91 N. Y. 1. § 765.
- Syracuse & C. R. Co. v. Gere, 6 Thomp. & C. (N. Y.) 636; 4 Hun (N. Y.), 392. § 1227.
- Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 189, 192. § 550.
- Syracuse Water Co. v. Syracuse, 116 N. Y. 167. § 5659.
- Tabor v. Goss & C. Man. Co., 11 Colo. 419. §§ 3429, 3456, 3513, 3640, 7538, 7898, 7979, 7980.
- Tabor v. Wilson, 34 Mo. App. 89. § 3531.
- Tadlock v. Eccles, 20 Tex. 782, 792. § 626.
- Taendstickfabriks Aktiebolaget Vulcan v. Myers, 34 N. Y. St. Rep. 122; 11 N. Y. Supp. 663. § 7668.
- Taft v. Presidio R. Co., 84 Cal. 131. §§ 2373, 2489, 2505.
- Taft v. Brewster, 9 Johns. (N. Y.) 334. §§ 5074, 5076, 5085, 5088, 5129, 5137.
- Taft v. Hartford & C. R. Co., 8 R. I. 310. §§ 2127, 2238, 2264, 2265, 2290.
- Taft v. Schwamb, 80 Ill. 289. § 1084.
- Taft v. Ward, 105 Mass. 518. §§ 14, 691, 2806, 2926.
- Tagg v. Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479. § 5199.
- Taggart v. Perkins, 73 Mich. 303. § 3879.
- Taggart v. Western Maryland R. Co., 24 Md. 563. §§ 68, 72, 1158, 1216, 1217, 1229, 1317, 1335, 2003, 5396, 6598.
- Tailors of Ipswich, Case of, 11 Coke, 53. §§ 1026, 1029, 1038.
- Tait v. Central Lunatic Asylum, 84 Va. 271. § 5588.
- Taite's Case, L. R. 3 Eq. 795. §§ 1444, 1446.
- Talbot's Case, 5 De Gex & S. 386. § 4252.
- Talbot v. Dent, 9 B. Mon. (Ky.) 526. § 1118.
- Talbot v. Hudson, 15 Gray (Mass.), 417. §§ 5592, 5594, 5611.
- Talcott v. Grant Wire & C. Co., 33 Ill. App. 155. § 7059.
- Talcott v. Pine Grove, 1 Flipp. (U. S.) 49. § 1163.
- Talcott v. Township of Pine Grove, 1 Flipp. (U. S.) 120. § 7853.
- Talcott Mountain Turnp. Co. v. Marshall, 11 Conn. 185, 190. § 5345.
- Talladega Ins. Co. v. Landers, 43 Ala. 115. §§ 59, 5827.
- Talladega Ins. Co. v. McCullough, 42 Ala. 667. § 7506, 7507.
- Talladega Ins. Co. v. Peacock, 67 Ala. 253. §§ 788, 5730, 5731.
- Talladega Ins. Co. v. Woodward, 44 Ala. 287. §§ 7506, 7515, 7528, 7527.
- Tallmade v. Fishkill Iron Co., 4 Barb. (N. Y.) 382. §§ 1609, 1616, 3093, 3713, 3786, 4264, 4265, 4370.
- Tallman v. Butler County, 12 Iowa, 531. § 2812.
- Tallmadge v. North American Coal Co., 3 Head (Tenn.), 337. §§ 5060, 5639, 7885, 7913, 7920, 7977.
- Talmage v. Pell, 9 Paige (N. Y.), 410. § 6986.
- Talmage v. Pell, 7 N. Y. 348. §§ 1102, 4121, 6939.
- Talman v. Gibson, 1 Hall (N. Y.), 308. § 7593.
- Talory v. Jackson, Cro. Car. 513. §§ 1989, 4362.
- Tama Water Power Co. v. Hopkins, 79 Iowa, 653. §§ 1673, 1804, 1998, 2988, 3770, 3786.
- Tannatt v. Rocky Mountain Nat. Bank, 1 Colo. 278. §§ 5123, 5171.
- Tanner's Case, 5 De Gex & S. 182. § 428.
- Tanner v. Gregory, 71 Wis. 490. § 2425.
- Tanner v. Hall, 69 Ala. 628. § 7738.
- Tanner v. Trustees, 5 Hill (N. Y.), 121, 391. § 1021.
- Tanner & Co. Engine Co. v. Hall, 22 Fla. §§ 5051, 7798.
- Tapley v. Martin, 116 Mass. 275. § 7237.
- Tappan v. Bailey, 4 Met. (Mass.) 529. §§ 14, 2806, 2926, 4645.
- Tappan v. Blaisdell, 5 N. H. 190. § 1084.
- Tappan v. Evans, 11 N. H. 311. § 2775.
- Tappan v. Merchants' National Bank, 19 Wall. (U. S.) 490. §§ 2846, 2849, 2866, 8095.
- Tappenden v. Randall, 2 Bos. & P. 467. § 1772.
- Tarbell v. Griggs, 3 Paige (N. Y.), 207. § 3060.
- Tarbell v. Paige, 24 Ill. 46. §§ 507, 518, 521, 1569, 1853, 1858, 1998, 2029, 2030, 2951, 3541, 3543, 3553, 3428, 3629, 4354, 6730.
- Targart v. Northern & C. R. Co., 29 Md. 557. § 6093.
- Tarleton v. Vietes, 1 Gilm. (Ill.) 470. § 5018.
- Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520. §§ 496, 501, 518, 1138, 1550, 1794, 1850, 1853, 4354, 7665, 7710.
- Tarter's Case, 64 How. Pr. (N. Y.) 385. § 7477.
- Tate v. Adams, 10 Cush. (Mass.) 252. § 6226.
- Tasker v. Wallace, 6 Daly (N. Y.), 364. § 1623.
- Tassey v. Church, 4 Watts & S. (Pa.) 346. §§ 5126, 5156.
- Tate v. Bell, 4 Yerg. (Tenn.) 202. § 5381.
- Tate v. Missouri & C. R. Co., 64 Mo. 149. § 6374.
- Tate v. Stooltzfoos, 15 Serg. & R. 35. § 590.
- Tatem v. Wright, 23 N. L. 429. § 12.
- Tatman v. Lobach, 1 Duer (N. Y.), 354. § 2496.
- Tatton v. Wade, 18 C. B. 371. § 4446.
- Taunton & C. Turnp. Corp. v. Witing, 9 Mass. 321. § 7425.
- Taunton Turnp. Corp. v. Whiting, 10 Mass. 327. §§ 1167, 1169, 1784, 1823, 7590, 7597.
- Taurine Co., Re, 25 Ch. Div. 118. §§ 1706, 3256.
- Taussig v. Glenn, 51 Fed. Rep. 409. §§ 3658, 3659.
- Taverner's Case, Sir T. Raym. 446. § 1027.
- Tax Cases, The, 12 Gill & J. (Md.) 117. §§ 2813, 2828.
- Taylor v. Great Indian Peninsular R. Co., 4 De Gex & J. 559. § 2564.
- Taylor v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390. §§ 5022, 5024.
- Taylor v. Agricultural & C. Assn., 68 Ala. 229. §§ 6133, 6179.
- Taylor v. Albemarle Steam Nav. Co., 105 N. C. 494. 10 S. E. Rep. 897. § 5286.
- Taylor v. Allen, 2 Atk. 213. § 6977.
- Taylor v. Ashton, 11 Mees. & W. 401. §§ 1462, 4147.
- Taylor v. Baldwin, 14 Abb. Pr. (N. Y.) 156. § 7128.
- Taylor v. Bank of Alexandria, 5 Leigh (Va.), 471. §§ 7659, 7685, 7977.
- Taylor v. Bank of Illinois, 7 T. B. Mon. (Ky.) 576, 584. §§ 7655, 7977.
- Taylor v. Boardman, 25 Vt. 581, 589. §§ 7208, 7341.
- Taylor v. Bowers, 34 L. T. (N. S.) 938. §§ 1772.
- Taylor v. Bruen, 2 Barb. Ch. (N. Y.) 301. § 7942.
- Taylor v. Burlington & C. R. Co., 4 Dill. (U. S.) 570. § 6147.
- Taylor v. Burlington & C. R. Co., 5 Iowa, 114. § 7804.
- Taylor v. Onever, 6 Gray (Mass.), 166. § 2656.
- Taylor v. Columbian Ins. Co., 14 Allen (Mass.), 353. §§ 7337, 7338, 7342.
- Taylor v. Coon, 79 Wis. 76. § 3505.

- Taylor v. Croker**, 4 Esp. 187. § 5760.
Taylor v. Dowlen, L. R. 4 Ch. 637. § 7037.
Taylor v. Dulwich Hospital, 1 P. Wms. 655, 656. § 5059.
Taylor v. Earle, 8 Hun (N. Y.), 1. § 324.
Taylor v. Earle, 8 Hun (N. Y.), 17. § 4010.
Taylor v. Fields, 4 Ves. 396. § 1084.
Taylor v. Fletcher, 15 Ind. 80. §§ 1333, 1339.
Taylor v. Gillean, 23 Tex. 503. §§ 6898, 7812.
Taylor v. Gloucester, 1 Rolle, 409; 3 Bulst. 109. § 815.
Taylor v. Gorman, 1 Drury & W. 235. § 7056.
Taylor v. Grand Trunk R. Co., 48 N. H. 304. §§ 6377, 6383.
Taylor v. Griswold, 14 N. J. L. 222. §§ 737, 955, 1052.
Taylor v. Heggie, 83 N. C. 244. § 5071.
Taylor v. Heriot, 4 Desaus. Eq. (S. C.) 227. § 6841.
Taylor v. Holmes, 127 U. S. 459. §§ 4500, 4501, 4505.
Taylor v. Hughes, 2 Jones & Lat. (Irish Ch.) 24. §§ 1800, 7783.
Taylor v. Hutton, 43 Barb. (N. Y.) 195; 18 Abb. Pr. (N. Y.) 16. § 802.
Taylor v. Manwaring, 48 Mich. 171. § 3152.
Taylor v. Mayor of Bath, temp. Ld. Ch. J. Lee, B. R. § 752.
Taylor v. Merchants' Fire Ins. Co., 3 How. (U. S.) 370. § 4978.
Taylor v. Miami Exporting Co., 5 Ohio, 162. §§ 2094, 3277, 4479, 4480, 4578, 4583.
Taylor v. Miami Exporting Co., 6 Ohio, 176. §§ 2038, 2495, 3979, 3981, 4001.
Taylor v. Midland R'y Co., 28 Beav. 287. § 4701.
Taylor v. Morgan, 3 Watts (Pa.), 333. § 2471.
Taylor v. Newberns, 2 Jones Eq. (N. C.) 141. §§ 61, 1118.
Taylor v. New England & Co. Co., 4 Allen (Mass.) 577. § 2993, 3637.
Taylor v. North Star Gold Min. Co., 79 Cal. 285. §§ 1711, 3387, 6012.
Taylor v. North Star Mut. Ins. Co., 46 Minn. 198, 200. § 7226.
Taylor v. Ohio River R. Co., 35 W. Va. 328. § 7538.
Taylor v. Oldham, 1 Jacob, 527. § 6868.
Taylor v. Perquite, 35 Mo. App. 389. § 5018.
Taylor v. Philadelphia & C. R. Co., 7 Fed. Rep. 377. § 7168.
Taylor v. Philadelphia & C. R. Co., 7 Fed. Rep. 386. § 6052.
Taylor v. Philadelphia & C. R. Co., 9 Fed. Rep. 1. § 7212.
Taylor v. Philadelphia & C. R. Co., 14 Phila. (Pa.) 451. § 6840.
Taylor v. Plumer, 3 Maule & S. 562. §§ 7084, 7086, 7092, 7103, 7106.
Taylor v. Plymouth, 8 Met. (Mass.) 462. § 5621.
Taylor v. Porter, 4 Hill (N. Y.), 140. §§ 5448, 5596, 6700.
Taylor v. Robinson, 14 Cal. 395, 401. § 5305.
Taylor v. Rundell, 1 Younge & C. 128; 1 Ph. 222. § 4439.
Taylor v. Salmon, 4 Mylne & C. 134. §§ 4565, 4566.
Taylor v. Taylor, L. R. 10 Eq. 477. §§ 3318, 3331.
Taylor v. Thompson, 66 How. Fr. (N. Y.) 102. § 4255.
Taylor v. Williams, 17 B. Mon. (Ky.) 489. § 4135.
Taylor v. Wilson, 17 Neb. 88. § 637.
Taylor v. Ypsilanti, 105 U. S. 60, 71. §§ 5425, 5426.
Taylor v. Zepp, 14 Mo. 432. § 5246.
Taylor County Court v. Bimora & C. R. Co., 35 Fed. Rep. 161. §§ 1109, 4063, 5719, 7463.
Taylor Orphan Asylum, Re, 36 Wis. 534, 552. § 4060.
Taymouth v. Koehler, 35 Mich. 22. § 5287.
Teachout v. Des Moines Broad Gauge Street R. Co., 75 Iowa, 722. § 4520.
Teachout v. Van Hoesen, 76 Iowa, 113. § 4053.
Teager v. Landsley, 69 Iowa, 725. § 8074.
Teasdale's Case, L. R. 9 Ch. 54. § 2248.
Tehan v. First Nat. Bank, 39 Fed. Rep. 577. § 7477.
Teitig v. Boesman, 12 Mont. 404. § 6474.
Telegraph Co. v. Davenport, 97 U. S. 363. §§ 2427, 2489, 2556, 2567, 4701.
Tel. Co. v. Texas, 105 U. S. 460. §§ 671, 683, 5460, 5562, 7879, 8094, 8122.
Telegraph Construction Co., Re, L. R. 10 Eq. 384. § 3122.
Telephone Case, The, 126 U. S. 1. § 8123.
Telephone Co. v. Turner, 88 Tenn. 265. § 8019.
Telfair v. Howe, 3 Rich. Eq. (S. C.) 235. §§ 295, 5793.
Telford & Co. Turnp. Co. v. Gerhab, 21 Am. & Eng. Corp. Cas. 471. §§ 2412, 2462, 2463.
Temperance Mut. Ben. Assn. v. Schweinhard, 3 Pa. County Ct. 353. § 6310.
Tempest v. Kilner, 2 C. B. 300. § 1088.
Temple v. Lemon, 112 Ill. 51. § 1235.
Templin v. Chicago & C. R. Co., 73 Iowa, 548. § 4063.
Tenant v. Travellers' Ins. Co., 31 Fed. Rep. 322. § 5647.
Ten Eyck v. Craig, 62 N. Y. 406. § 4060.
Ten Eyck v. Delaware & C. Canal, 18 N. J. L. 200. §§ 27, 6342, 6371.
Ten Eyck v. Pontiac & C. R. Co., 74 Mich. 226. §§ 4387, 7650.
Tennant v. Trenchard, L. R. 4 Ch. 537. §§ 4022, 4024.
Tennent v. Glasgow Bank, 4 App. Cas. H. L. (S. C.) 615. §§ 1439, 3707.
Tennessee v. Davis, 50 How. Fr. (N. Y.) 447. § 4762.
Tennessee v. Davis, 100 U. S. 257, 264. § 7477.
Tennessee v. Pullman Southern Car Co., 117 U. S. 51. § 8125.
Tennessee v. Whitworth, 117 U. S. § 2211.
Tennessee & C. R. Co. v. East Alabama R. Co., 73 Ala. 426. §§ 3915, 5320.
Tennessee River Transp. Co. v. Kavanaugh, 93 Ala. 324. § 5840.
Tenney v. East Warren Lumber Co., 43 N. H. 343. §§ 3905, 3926, 5070, 5078, 5089, 5090, 6186.
Terre Haute & C. R. Co. v. Earp, 21 Ill. 231. § 1284.
Terre Haute & C. R. Co. v. Fitzgerald, 47 Ind. 79. § 6308.
Terre Haute & C. R. Co. v. McKinley, 33 Ind. 274. §§ 5343, 6345.
Terre Haute & C. R. Co. v. Stockwell, 118 Ind. 98. § 4986.
Terrell v. Branch Bank, 12 Ala. 502. §§ 4897, 5205, 5208, 5225.
Terrett v. Taylor, 9 Cranch (U. S.), 43. §§ 2939, 6609.
Territory v. Armstrong, 6 Dak. Ter. 226. § 6810.
Territory v. Clayton, 5 Utah, 598. § 634.
Territory v. Lockwood, 3 Wall. (U. S.) 236. § 6792.
Terry v. Anderson, 95 U. S. 628. §§ 1994, 3037.
Terry v. Bank of America, 77 Ga. 177. § 530.
Terry v. Birmingham Nat. Bank, 93 Ala. 599. §§ 2677, 7733, 7737, 7740.
Terry v. Chandler, 23 Wis. 456. § 3476.
Terry v. Commercial Bank, 92 U. S. 454. § 3499.
Terry v. Eagle Lock Co., 47 Conn. 141. §§ 1111, 2104.
Terry v. Imperial Fire Ins. Co., 3 Dill. (U. S.) 408. § 7478.
Terry v. Little, 101 U. S. 216. §§ 1981, 2925, 3020, 3418, 3431, 3432, 3437, 3453, 3469.
Terry v. Martin, 10 S. C. 263. § 3493.
Terry v. Merchants & C. Bank, 66 Ga. 177. § 7691.
Terry v. Stauffer, 17 La. An. 303. § 766.
Terry v. Tubman, 92 U. S. 156. §§ 2015, 2019, 3037, 3347, 3459.
Terwilliger v. Great Western Tel. Co., 59 Ill. 249. § 3850.
Teutonia Ins. Co. v. O'Connor, 27 La. An. 371. § 1024.
Texas v. Hardenberg, 10 Wall. (U. S.) 68. § 6080.
Texas v. White, 7 Wall. (U. S.) 700. § 6080.
Texas & C. R. Co. v. Adams, 78 Tex. 372. § 7164.
Texas & C. R. Co. v. Bledsoe (Tex. Civ. App.), 20 S. W. Rep. 1355. §§ 6949, 7148, 7159.
Texas & C. R. Co. v. Collins, 84 Tex. 121. §§ 7148, 7159.
Texas & C. R. Co. v. Comstock, 83 Tex. 537. § 7161.
Texas & C. R. Co. v. Marlor, 123 U. S. 687. §§ 6109, 6148.
Texas & C. R. Co. v. Rust, 17 Fed. Rep. 275, 282. § 6942.
Texas & C. R. Co. v. Thedens (Tex. Civ. App.), 21 S. W. Rep. 132. § 7159.
Texas Banking Co. v. Hutchins, 53 Tex. 61. §§ 5197, 5198.
Texas Express Co. v. Texas & C. R. Co., 4 Woods (U. S.), 370. § 5543.
Texas Land & C. Co. v. Worsham, 76 Tex. 536. § 7465.
Texas Pac. R. Co. v. Brick, 83 Tex. 526. § 7149.
Texas Pac. R. Co. v. Comstock, 83 Tex. 537. § 7149.
Texas Pac. R. Co. v. Geiger, 79 Tex. 13. § 7149.
Texas Pac. R. Co. v. Griffin, 76 Tex. 441. §§ 7131, 7149, 7197.
Texas Pac. R. Co. v. Johnson, 76 Tex. 421. §§ 7131, 7149, 7152, 7164, 7193, 7197.

Texas—Thompson TABLE OF CASES CITED.

- Texas Pac. R. Co. v. Miller, 79 Tex. 78. § 7149.
 Texas Pac. R. Co. v. Overheiser, 76 Tex. 437. § 7149.
 Texas Trunk R. Co. v. Lewis, 81 Tex. 1. § 6898, 6931, 7013, 7794.
 Texas Western R. Co. v. Gentry, 63 Tex. 625. § 5303.
 Thacher v. Bank, 5 Sandf. (N. Y.) 121. § 4835.
 Thacher v. Dinsmore, 5 Mass. 399. § 5132.
 Thacher v. King, 156 Mass. 490. §§ 4186, 4200, 4262, 4311, 4327, 4370.
 Thames, The, 7 Blatchf. (U. S.) 226. § 4802.
 Thames v. Central City Ins. Co., 49 Ala. 577. § 720.
 Thames Haven Dock & Co. v. Hall, 3 Eng. Railw. Cas. 441. § 3899.
 Thames Haven Dock Co. v. Hall, 5 Man. & G. 274. § 5059.
 Thames-Haven Dock & Co. v. Rose, 4 Man. & G. 552. § 3914.
 Thames Tunnel Co. v. Sheldon, 6 Barn. & C. 341. § 1146.
 Tharsis Co. v. Societé des Metaux (Q. B. Div.), 60 L. S. Rep. (N. s.) 924. § 7992.
 Thatcher v. West River Nat. Bank, 19 Mich. 196. §§ 7267, 7609.
 Thau v. Bankers' & C. Tel. Co., 56 N. Y. Super. 588. 2 N. Y. Supp. 11. § 6854.
 Thayer v. Boston, 19 Pick. (Mass.) 511. §§ 6275, 6276, 6277, 6287.
 Thayer v. Butler, 141 U. S. 234. §§ 1939, 2103, 2348, 2377, 4466.
 Thayer v. Mann, 2 Cush. (Mass.) 371. § 3144.
 Thayer v. New England & Co. Co., 108 Mass. 523. §§ 3392, 3393, 4234, 4311, 4330, 4336.
 Thayer v. Tyler, 5 Allen (Mass.), 94. § 7256.
 Thayer v. Tyler, 10 Gray (Mass.), 164. § 8021.
 Thayer v. Union Tool Co., 4 Gray (Mass.), 75. §§ 3382, 3432, 3446, 3731, 3787, 4327.
 Thayer v. Wendell, 1 Gall. (U. S.) 37. §§ 5077, 5085.
 Thebus v. Smiley, 110 Ill. 316. §§ 3170, 3308, 3312.
 Thelsson v. Smith, 2 Wheat. (U. S.) 396. § 7070.
 Theological Seminary v. Childs, 4 Paige (N. Y.), 419. § 5783.
 Theford, Case of, 12 Vin. Abr. 90, pl. 16. § 1931.
 Theis, The, L. R. 2 Adm. & Ec. 365. § 6307.
 Thew v. Forelain Man. Co., 5 S. C. 415. §§ 4622, 4630, 7591.
 Theys, Ex parte, 25 Ch. Div. 567. § 3797.
 Thien v. Voegtlin, 3 Wis. 481. § 5697.
 Thigpen v. Mississippi & R. Co., 32 Miss. 347. §§ 1149, 1203, 1311, 1513, 1930.
 Thigpen v. Pitt, 1 Jones & E. (N. C.) 49. § 2775.
 Third Avenue R. Co. v. Ebling, 12 Daly (N. Y.), 99. § 4613.
 Third Avenue Sav. Bank v. Dimock, 24 N. J. Eq. 26. §§ 3115, 5274.
 Third Nat. Bank, Re, 4 Fed. Rep. 775. § 7326.
 Third Nat. Bank v. Elliot, 42 Hun (N. Y.), 121. § 6504.
 Third Nat. Bank v. Lange, 51 Md. 138. § 4930.
 Third School District in Blandford v. Gibbs, 2 Cush. (Mass.) 39. § 100.
 Thistle v. Buford, 50 Mo. 273. § 519.
 Thomas' Case, L. R. 13 Eq. 437. § 1532.
 Thomas v. Armstrong, 7 Cal. 286. § 7853.
 Thomas v. Bishop, Strange, 955. §§ 5126, 5154, 5156.
 Thomas v. Board of Comm'r's, 5 Ind. 4. 7. § 589.
 Thomas v. Brady, 10 Pa. St. 164. § 7959.
 Thomas v. Brownville & Co. R. Co., 109 U. S. 522; 2 Fed. Rep. 877; 1 McCrary, 392. §§ 4026, 4059, 4061, 4065, 4081, 4085, 6164.
 Thomas v. Cincinnati & C. R. Co., 62 Fed. Rep. 803. § 7782.
 Thomas v. Dakin, 22 Wend. (N. Y.) 9, 71. § 2, 632, 2925.
 Thomas v. Edwards, 2 Mees. & W. 215. § 416.
 Thomas v. Georgia E. & Co. R. Co., 38 Ga. 222. § 7429.
 Thomas v. Guiraud, 6 Colo. 530. § 618.
 Thomas v. Hubbell, 35 N. Y. 120. § 4190.
 Thomas v. Industrial University, 71 Ill. 310. § 7758.
 Thomas v. Lusk, 13 La. An. 277. § 1084.
 Thomas v. Merchants' Bank, 9 Paige (N. Y.), 216. § 7794.
 Thomas v. Musical & C. Protective Union, 121 N. Y. 45. § 4526.
 Thomas v. Patent Lionite Co., 17 Ch. Div. 250. § 3122.
 Thomas v. Peoria & C. R. Co., 36 Fed. Rep. 808. §§ 7118, 7119.
 Thomas v. Placerville & C. Min. Co., 65 Cal. 600. § 7428.
 Thomas v. Railroad Co., 101 U. S. 71. §§ 75, 5355, 5356, 5358, 5359, 5360, 5361, 5880, 5882, 5883, 5968, 5998, 5999, 6000, 6004, 6006, 6137, 6410.
 Thomas v. Richmond, 12 Wall. (U. S.) 349. § 1116.
 Thomas v. Sweet, 37 Kan. 183. §§ 4024, 4010, 4062, 4672.
 Thomas v. Visitors of Frederick County School, 7 Gill & J. (Md.) 389. § 373.
 Thomas v. Wabash & C. R. Co., 40 Fed. Rep. 126. §§ 592, 598, 619.
 Thomas v. Whallon, 31 Barb. (N. Y.) 172. §§ 7233, 7246, 7247.
 Thompson v. Bishop, 24 Tex. 302. § 7820.
 Thompson's Appeal, 22 Pa. St. 16. § 7096.
 Thompson's Case, 4 De Gex, J. & S. 749; 34 L. J. (Ch.) 525. § 1650.
 Thompson's Estate, Re, 33 Barb. (N. Y.) 334. § 5837.
 Thompson v. Abbott, 61 Mo. 176. §§ 365, 372, 403, 405.
 Thompson v. Bemis Paper Co., 127 Mass. 595. § 3450.
 Thompson v. Blanchard, 4 N. Y. 303. § 2617.
 Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619. §§ 3330, 6897.
 Thompson v. Candor, 60 Ill. 244. § 507.
 Thompson v. Diffendorfer, 1 Md. Ch. 489. § 6840.
 Thompson v. Erie R. Co., 11 Abb. Fr. (N. s.) (N. Y.) 183; 42 How. Fr. (N. Y.) 68. §§ 2285, 4465.
 Thompson v. Erie R. Co., 9 Abb. Fr. (N. s.) (N. Y.) 212. § 4435.
 Thompson v. Foerstel, 10 Mo. App. 290. § 6145.
 Thompson v. Greeley, 107 Mo. 577. §§ 4120, 4316, 4323.
 Thompson v. Guion, 5 Jones Eq. (N. C.) 113. §§ 72, 74, 1873.
 Thompson v. Hale, 6 Pick. (Mass.) 259. § 5752.
 Thompson v. Huron Lumber Co., 4 Wash. 600. §§ 6492, 6513.
 Thompson v. Jewell, 43 Mich. 240. § 7577.
 Thompson v. Kelly, 2 Ohio St. 647. § 1118.
 Thompson v. Lambert, 41 Iowa, 239. §§ 4534, 5045, 5298, 5962, 6032, 6041, 6082, 6131, 6132.
 Thompson v. Lee Co., 22 Iowa, 206. § 3571.
 Thompson v. Lyon, 14 Cal. 39, 42. § 7661.
 Thompson v. Marion & C. Gravel Road Co., 98 Ind. 449. § 7387.
 Thompson v. McKee, 5 Dak. 172. §§ 4622, 4637, 4660.
 Thompson v. Meisser, 108 Ill. 359. §§ 3075, 3095, 3170, 3173, 3460, 3797.
 Thompson v. Mercer Co., 40 Ill. 379. § 1206.
 Thompson v. Morgan, 6 Minn. 292. § 506.
 Thompson v. Moxey, 47 N. J. Eq. 538. §§ 2068, 4599.
 Thompson v. Natchez Water & C. Co., 68 Miss. 423. § 6174.
 Thompson v. New Orleans & C. R. Co., 10 La. An. 403. § 6293.
 Thompson v. New York & C. R. Co., 3 Sandf. Ch. (N. Y.) 625. §§ 62, 5349, 5401, 6598.
 Thompson v. Page, 1 Met. (Mass.) 565. § 1170.
 Thompson v. Patrick, 4 Watts (Pa.), 414. § 2181.
 Thompson v. People, 23 Wend. (N. Y.) 537. §§ 224, 6612, 6807.
 Thompson v. Perkins, 3 Mass. (U. S.) 232. §§ 7034, 7092.
 Thompson v. Perrine, 103 U. S. 806; 105 U. S. 589. § 590.
 Thompson v. Reno Savings Bank, 19 Nev. 103. §§ 1513, 1582, 1740, 2114, 3484, 3485, 3486, 3494, 3518, 3786, 3802.
 Thompson v. Reno Savings Bank, 19 Nev. 171. §§ 2003, 3335, 3522, 3779.
 Thompson v. Reno Sav. Bank, 19 Nev. 242. §§ 3328, 3537, 3543.
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 Thompson v. Scott, 4 Dill. (U. S.) 508. § 7128.
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 Thompson v. Sixpenny Savings Bank, 5 Bosw. (N. Y.) 292. § 4688.
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 Thompson v. Swain, 107 Mo. 594. § 4323.
 Thompson v. Swoope, 24 Pa. St. 474. § 7919.
 Thompson v. Thompson, 4 Cush. (Mass.) 127. § 7271.
 Thompson v. Tioga R. Co., 36 Barb. (N. Y.) 79. §§ 5126, 5140, 5747, 7900.
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- Toulmin v. Steere, 3 Meriv. 209. § 5212.
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- Tregear v. Taitawanda Water Co., 76 Cal. 537. §§ 1066, 2440, 2617.
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- Trenholm v. Commercial Nat. Bank, 38 Fed. Rep. 323. § 6795.
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- Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117. § 5229.
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- Trester v. Missouri Pac. R. Co., 33 Neb. 171. § 7891.
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- Triebert v. Burgess, 11 Md. 452. § 6880.
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- Trimble v. Woodhead, 102 U. S. 647. § 6469.
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 Tripp v. Appleman, 33 Fed. Rep. 19. §§ 3302, 3659.
 Tripp v. Bishop, 56 Pa. St. 424. § 5063.
 Tripp v. Curtenius, 36 Mich. 494. § 7328.
 Tripp v. Merchants' Mut. F. Ins. Co., 12 R. I. 435. § 2811.
 Tripp v. Northwestern Nat. Bank, 41 Minn. 400. §§ 3025, 6468, 6473.
 Tripp v. Northwestern Nat. Bank, 45 Minn. 383. §§ 6474, 6492.
 Tripp v. Overacker, 7 Colo. 72. § 5658.
 Tripp v. Pontiac & Co. Plank-road Co., 66 Mich. 1. § 5440.
 Tripp v. Swanzy Paper Co., 13 Pick. (Mass.) 291. §§ 3989, 3988, 5126, 5139, 5746.
 Tripp v. Hunccheon, 82 Ind. 907. § 3403.
 Trisconi v. Winship, 43 La. An. 45. §§ 2300, 2301, 4110, 6694.
 Trots v. Warren, 11 Me. 227. §§ 3914, 5029, 5176, 5266, 5328.
 Trotter v. Strong, 63 Ill. 272. § 3796.
 Troup's Case, 29 Beav. 353. § 5702.
 Trowbridge v. Commissioners, 5 Hun (N. Y.), 595. § 2848.
 Trowbridge v. Souder, 11 Cush. (65 Mass.) 83. §§ 418, 2939, 2992, 4216, 5955.
 Troy v. Troy & Co. R. Co., 3 Lans. (N. Y.) 270. § 6358.
 Troy Academy v. Nelson, 24 Vt. 189. §§ 1205, 1307.
 Troy & Co. R. Co. v. Boston & Co. R. Co., 86 N. Y. 117. § 75.
 Troy & Co. R. Co. v. Kerr, 17 Barb. (N. Y.) 581, 607. §§ 72, 77, 1160, 1185, 1281, 1369, 1550, 1784, 1794, 1942, 1950, 5358, 5359, 5370, 5580.
 Troy & Co. R. Co. v. Newton, 1 Gray (Mass.), 544. §§ 1550, 1794, 1828.
 Troy & Co. R. Co. v. Newton, 8 Gray (Mass.), 596. §§ 1332, 1732.
 Troy & Co. R. v. Northern Turnp. Co., 16 Barb. (N. Y.) 100. § 5399.
 Troy & Co. R. Co. v. Tibbits, 18 Barb. (N. Y.) 298. §§ 1157, 1158, 1185, 1784.
 Troy & Co. R. Co. v. Warren, 18 Barb. (N. Y.) 310. §§ 1157, 1252.
 Troy Turnpike Co. v. McChesney, 21 Wend. (N. Y.) 298. §§ 1185, 1550, 1694, 1784, 1796, 1794, 4868, 4887.
 Truchelut v. City Council, 1 Nott & McC. (S. C.) 227. § 590.
 Truckee & Co. Turnpike Co. v. Campbell, 41 Cal. 89. §§ 37, 5914.
 Trueman v. Loder, 11 Ad. & EL 589. § 5032.
 Truesdale v. Peoria Grain Sugar Co., 101 Ill. 561. § 5600.
 Truman v. London R. Co., 25 Ch. Div. 423. § 5911.
 Trumbull Co. Fire & Co. Ins. Co. v. Horner, 17 Ohio, 407. § 5275.
 Trundy v. Farrar, 32 Me. 225. § 5176.
 Trunick v. Smith, 63 Pa. St. 18. § 4983.
 Trust Co. v. Floyd, 47 Ohio St. 525. § 4133.
 Trust Co. v. International Loan & Co., 153 Mass. 271. § 7942.
 Trust Co. v. Railroad Co., 67 How. Pr. (N. Y.) 390. § 6857.
 Trust Co. v. Weed, 14 Phila. (Pa.) 422. § 4063.
 Trustees v. Allen, 14 Mass. 172. § 1542.
 Trustees v. Auburn & Co. R. Co., 3 Hill (N. Y.), 567. § 5527.
 Trustees v. Bosseux, 3 Fed. Rep. 817; 4 Hughes (U. S.), 387. §§ 4106, 4108.
 Trustees v. Campbell, 16 Ohio St. 11. § 290.
 Trustees v. Flint, 13 Met. (Mass.) 539. §§ 950, 1019, 2927, 3662.
 Trustees v. Foy, 1 Murph. (N. C.) 58. § 5381.
 Trustees v. Garvey, 53 Ill. 401. §§ 1206, 1207.
 Trustees v. Greenough, 105 U. S. 527. §§ 7037, 7056, 7199.
 Trustees v. Hills, 6 Cow. (N. Y.) 23. §§ 501, 503, 530, 1973.
 Trustees v. Moody, 62 Ala. 399. §§ 255, 256.
 Trustees v. Parks, 10 Me. 441. §§ 4963, 7590, 7594.
 Trustees v. Peaslee, 15 N. H. 317. §§ 294, 5835.
 Trustees v. People, 87 Ill. 303. § 1024.
 Trustees v. Reneau, 2 Swan (Tenn.), 94. § 290.
 Trustees v. Stetson, 5 Pick. (Mass.) 506. § 1205.
 Trustees v. Stewart, 1 N. Y. 681. § 1206.
 Trustees v. Tatman, 13 Ill. 28. § 25.
 Trustees v. Winston, 5 Stew. & Fort. (Ala.) 17. §§ 25, 1790.
 Trustees of Brighton & Co. Turnp. Roads v. Surveyors of Highways, L. R. 5 Q. B. 146. § 5942.
 Trustees of Dartmouth v. Woodward, 4 Wheat. (U. S.) 518. § 756.
 Trustees of Free Schools in Andover v. Flint, 13 Met. (Mass.) 539, 543. § 950.
 Trustees of M. E. Church v. Tryron, 1 Denio (N. Y.), 451. § 7613.
 Trustees of N. C. Endowment Fund v. Satchwell, 71 N. O. 111. § 653.
 Tscheider v. Biddle, 4 Dill. (U. S.) 55. §§ 7408, 7754.
 Tuberville v. Long, 3 Hen. & M. (Va.) 309. § 7552.
 Tuchband v. Chicago & Co. R. Co., 115 N. Y. 437. §§ 799, 8038.
 Tuckahoe & Co. R. Co. v. Baker, 49 N. J. Eq. 581. § 581.
 Tuckahoe Canal Co. v. Tuckahoe & Co. R. Co., 11 Leigh (Va.), 42. §§ 5399, 5400, 5401, 5615.
 Tucker v. Aiken, 7 N. H. 113. §§ 2917, 3893.
 Tucker v. Atkinson, 1 Humph. (Penn.) 300. §§ 6931, 6934.
 Tucker v. Buffington, 15 Mass. 480. § 2619.
 Tucker v. Ferguson, 22 Wall. (U. S.) 527. §§ 2823, 5574.
 Tucker v. Gilman, 121 N. Y. 189; 45 Hun (N. Y.), 193. §§ 3221, 3566, 3721, 6963.
 Tucker v. Rochester, 7 Wend. (N. Y.) 254. §§ 5045, 5181.
 Tucker v. St. Louis & Co. R. Co., 54 Mo. 177. § 4984.
 Tucker v. Tilton, 55 N. H. 223. § 5233.
 Tucker v. Wilson, 1 P. Wms. 256. § 2656.
 Tucker Man. Co. v. Fairbanks, 98 Mass. 101. §§ 5126, 5129, 5137, 5146, 5152.
 Tuckerman v. Brown, 33 N. Y. 297. §§ 1546, 1568, 1705, 6950.
 Tuckerman v. Newhall, 17 Mass. 581, 583. § 3796.
 Tufon v. Nevins, 2 Ld. Raym. 1354. § 3882.
 Tugman v. Chicago, 78 Ill. 405. §§ 1021, 1028.
 Tull v. Trustees of M. E. Church, 75 N. C. 424. §§ 4133, 5167.
 Tuller v. Voght, 13 Ill. 277. § 6298.
 Tullis v. Brawley, 3 Minn. 277. § 3363.
 Tully v. Davis, 30 Ill. 103. § 5032.
 Tully v. Herrin, 44 Miss. 626. § 7334.
 Tunesma v. Schuttler, 114 Ill. 156. § 3518.
 Tunis v. Hestonville & Co. R. Co., 149 Pa. St. 70; 1 Pa. Dist. Rep. 125. §§ 3871, 3878.
 Tunison v. Detroit & Co. Copper Co., 73 Mich. 452. § 4894.
 Tunno, Ex parte, 1 Bailey Eq. (S. C.) 395. § 693.
 Tunstall v. Worthington, Hempst. (U. S.) 632. § 8699.
 Turnbull v. Freret, 5 Mart. (N. s.) (Lda.) 703. § 7595.
 Turnbull v. Payson, 95 U. S. 418. §§ 1924, 1926, 3652, 3656, 3657, 3659, 7732.
 Turnbull v. Prentiss Lumber Co., 55 Mich. 387. § 6570.
 Turner v. Calvert, 12 Serg. & R. (Pa.) 46. § 6053.
 Turner v. Cross, 83 Tex. 218. § 7159.
 Turner v. Davies, note (1), 2 Wms. Saund. 148, 148 a (6th ed.). § 433.
 Turner v. Davis, 48 Conn. 397. § 3621.
 Turner v. First Nat. Bank, 26 Iowa, 562, 567. §§ 6951, 6996, 6999, 7022, 7101, 7102, 7268, 7310, 7317.
 Turner v. Grangers' & Co. Co., 65 Ga. 649. § 1450.
 Turner v. Hannibal & Co. R. Co., 74 Mo. 602. § 6366.
 Turner v. Indianapolis & Co. R. Co., 8 Biss. (U. S.) 380. § 6243.
 Turner v. North Beach & Co. R. Co., 34 Cal. 594. §§ 6387, 6391.
 Turner v. Peoria & Co. R. Co., 95 Ill. 134. §§ 7183, 7185.
 Turner v. Richardson, 7 East, 335. §§ 3722, 6998.
 Turner v. Thomas, 10 Mo. App. 338. § 5030.
 Turner v. Tolumne Water Co., 25 Cal. 397. § 6345.
 Turnpike Co. v. Arndt, 31 Pa. St. 317. § 72.
 Turnpike Co. v. Ferree, 17 N. J. Eq. 117. § 2782.
 Turnpike Co. v. Merriweather, 5 B. Mon. (Ky.) 13. § 1756.
 Turnpike Co. v. Wallace, 8 Watts (Pa.), 316. § 6571.
 Turnpike Co. v. State, 3 Wall. (U. S.) 210. § 5399.
 Turnpike Road v. Van Ness, 2 Cranch C. C. 451. § 1924.
 Turquand v. Kirby, L. R. 4 Eq. 123. §§ 1996, 3327, 3335.

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- Tuttle v. Frelinghuysen, 38 N. J. Eq. 12. § 7272.
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- Tutwiler v. Tuscaloosa Coal &c. Co., 89 Ala. 391. §§ 2344, 4553, 7409, 7374.
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- Twin Lick Oil Co. v. Marbury, 91 U. S. 587. §§ 275, 4022, 4047, 4059, 4061, 4074, 4805, 5206, 5300, 5317, 5650, 6226, 6499, 6509, 6531.
- Two good, Ex parte, 19 Ves. 229. § 7045.
- Twycross v. Grant, 2 C. P. Div. 469, 503. §§ 415, 451, 452, 476.
- Twyne's Case, 1 Sm. Lead. Cas. 1. § 2617.
- Tysak v. Brumley, 1 Barn. Ch. (N. Y.) 519; modifying 4 Edw. Ch. (N. Y.) 258. § 5393.
- Tyler v. Beacher, 44 Vt. 648. §§ 5691, 5592, 5607.
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- Tyrrill v. Bank, 10 H. L. Cas. 26. §§ 457, 458, 4022.
- Tyrrill v. Washburn, 6 Allen (Mass.), 466. §§ 14, 2806, 2926, 3705, 3984.
- Tyrone &c. R. Co. v. Jones, 78 Pa. St. 60. § 4986.
- Tyson v. Baltimore County, 28 Md. 510. § 6363.
- Tyson v. South &c. R. Co., 61 Ala. 554. § 6350.
- Tyson v. Virginia &c. R. Co., 1 Hughes (U. S.), 80. § 4585.
- Udell v. Atherton, 7 Hurlst. & N. 172. §§ 4783, 4929.
- Uhl v. Dillon, 10 Md. 500. § 6839.
- Ullman v. Hannibal &c. R. Co., 67 Md. 118. § 6288.
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- Ulster R. Co. v. Banbridge R. Co., 1 Re. 2 Eq. 190. § 4069.
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- Unangst's Appeal, 55 Pa. St. 128. § 7771.
- Uncas Nat. Bank v. Rith, 23 Wis. 339. § 5755.
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- Underhill v. Devereux, 2 Wms. Saund. 71. § 3592.
- Underhill v. Gibson, 2 N. H. 352. §§ 5126, 5132, 5137.
- Underhill v. Santa Barbara &c. Co., 93 Cal. 300. §§ 4110, 4267, 4279, 5037, 5705, 6059.
- Underwood v. Lilly, 10 Serg. & R. (Pa.) 101. § 590.
- Underwood v. Newport Lyceum, 5 B. Mont., (Ky.) 129. §§ 5743, 6305, 7394.
- Underwood v. New York &c. R. Co., 17 How. Pr. (N. Y.) 537. § 1497.
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- Union v. Durkes, 38 N. J. L. 21. § 28.
- Union Agricultural &c. Association v. Neill, 31 Iowa 95. § 1268.
- Union Agricultural Soc. v. Gamble, 52 Iowa, 524. §§ 6683, 6685.
- Union Bank v. Bell, 14 Ohio St. 200. § 5369.
- Union Bank v. Call, 5 Fla. 409. § 5106.
- Union Bank v. Campbell, 4 Humph. (Tenn.) 394, 396. §§ 5199, 5208, 5213, 5220, 5223, 5225.
- Union Bank v. Dewey, 1 Sandf. (N. Y.) 509. § 7674.
- Union Bank v. Douglass, 1 McCrary (U. S.), 86. § 4155.
- Union Bank v. Ellicott, 6 Gill & J. (Md.) 363. §§ 6466, 6494.
- Union Bank v. Geary, 5 Pet. (U. S.) 99. § 4943.
- Union Bank v. Guice, 2 La. An. 249. §§ 939, 6189.
- Union Bank v. Jacobs, 6 Humph. (Tenn.) 515. §§ 5698, 5730, 5734.
- Union Bank v. Jolly, 18 How. (U. S.) 506. § 7467.
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- Union Bank v. Knapp, 3 Pick. (Mass.) 96. § 7733.
- Union Bank v. Laird, 2 Wheat. (U. S.) 390. §§ 2320, 2332, 2337, 2389, 2392, 2589, 2591, 2594.
- Union Bank v. Mackall, 2 Cranch C. C. (U. S.) 695. § 4841.
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- Union Bank v. State, 9 Yerg. (Tenn.) 501. §§ 1060, 2811, 2812, 2851, 3231, 3317, 5380, 5570, 5574.
- Union Bank v. United States Bank, 4 Humph. (Tenn.) 369. §§ 5106, 7790.
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- Union Branch R. Co. v. East Tennessee &c. R. Co., 14 Ga. 327. § 6598.
- Union Bridge Co. v. Troy &c. R. Co., 7 Laus. (N. Y.) 240. §§ 3960, 5089, 5107.
- Union Canal Co. v. Loyd, 4 Watts & S. (Pa.) 393. §§ 4894, 5234.
- Union Canal v. Young, 1 Whart. (Pa.) 410. §§ 256, 5112.
- Union Canal Co. v. Young, 1 Wheat. (U. S.) 423. § 84.
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- Union Central Life Ins. Co. v. Jones, 35 Ohio St. 351. § 3721.
- Union Central Life Ins. Co. v. Thomas, 46 Ind. 44. §§ 7950, 7951.
- Union County v. James, 21 Pa. St. 525. § 6808.
- Union Fire Ins. Co. v. O'Garra, 4 Ont. (Can.) 369. § 1147.
- Union Fire Ins. Co. v. Shoolbred, 4 Ont. (Can.) 359. § 1228.
- Union Gold Min. Co. v. Bank, 2 Colo. 226. §§ 5105, 5106.
- Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531. §§ 4853, 4858, 7642.
- Union Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248. §§ 4882, 4883, 5228, 5311, 5642, 5643, 5087.
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- Union Imp. Co. v. Com., 69 Pa. St. 140. § 5411.
- Union Ins. Co., Matter of, 22 Wend. (N. Y.) 591. §§ 784, 3914.
- Union Ins. Co. v. Cram, 43 N. H. 641. § 225.
- Union Ins. Co. v. Greenleaf, 64 Me. 123. § 4622.
- Union Ins. Co. v. Hoge, 21 How. (U. S.) 35. § 5857.
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- Union Loan &c. Co. v. Southern California Motor Road Co., 51 Fed. Rep. 840. § 6186.
- Union Locks &c. Co. v. Towne, 1 N. H. 44. §§ 71, 72, 1278.
- Union Man. Co. v. Pitkin, 14 Conn. 174. §§ 4865, 5288, 7374.
- Union Man. Co. v. Young, 1 Whart. (Pa.) 410. § 256.
- Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313. §§ 945, 3972, 5019, 5264.
- Union Mut. Ins. Co. v. Osgood, 1 Duer (N. Y.), 707. §§ 7658, 7666, 7667.
- Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63. § 4943.
- Union Mutual Life Ins. Co. v. Frear Stone Man. Co., 97 Ill. 537. §§ 1513, 1579, 1598, 1668, 2951, 4059, 5381.
- Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67. §§ 7957, 7958, 7960.
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 Union Nat. Bank v. Douglass, 1 McCrary (U. S.), 86, § 2951.
 Union Nat. Bank v. First Nat. Bank, 90 Ill. 56, 58, § 7552.
 Union Nat. Bank v. Goetz, 138 Ill. 127. § 7096.
 Union Nat. Bank v. Hunt, 76 Mo. 439; 7 Mo. App. 42. §§ 1373, 1392, 2065, 2066, 2068, 6035.
 Union Nat. Bank v. Miller, 15 Fed. Rep. 703. § 2883.
 Union Pacific R. Co. v. Burlington & Co. (1880), 1 McCrary (U. S.), 452. § 675.
 Union Pacific R. Co. v. Chicago & C. R. Co., 51 Fed. Rep. 309; 47 Fed. Rep. 15. §§ 3952, 3961, 3976, 6016.
 Union Pacific R. Co. v. Credit Mobilier, 135 Mass. 367. § 4047, 5317.
 Union Pacific R. Co. v. Durant, 3 Dill. (U. S.) 343. § 4669.
 Union Pacific R. Co. v. Hall (1875), 91 U. S. 343; 4 Dill. (U. S.) 479. §§ 676, 7408, 7754, 7826, 7830.
 Union Pac. R. Co. v. Horney, 5 Kan. 340. § 7559.
 Union Pac. R. Co. v. McComb, 1 Fed. Rep. 799. § 7476.
 Union Pac. R. Co. v. Miller, 87 Ill. 45. § 7503.
 Union Pacific R. Co. v. United States, 99 U. S. 420. § 2157.
 Union Pacific R. Co. v. United States, 16 Ct. of Cl. (U. S.) 353. § 337.
 Union Pacific R. Co. v. United States, 20 Ct. of Cl. (U. S.) 70. § 5543.
 Union Passenger R. Co.'s Appeal, 81 Pa. St. 91. §§ 611, 624.
 Union Plate Glass Co., Re, 42 Ch. Div. 513. § 2117.
 Union R. Co. v. Cambridge, 11 Allen (Mass.), 287. § 5516.
 Union Sav. Assn. v. Edwards, 47 Mo. 445. § 4914.
 Union Sav. Assn. v. Seligman, 92 Mo. 635; 11 Mo. App. 142. §§ 733, 734, 1597, 1902, 2933, 2935, 2936, 3214, 3215, 3680, 3702.
 Union Sav. Assn. v. Seligman, 11 Mo. App. 142. §§ 1902, 2936, 3215, 3609.
 Union Turnpike v. Jenkins, 2 Mass. 37. § 7804.
 Union Turp. Co. v. Jenkins, 1 Caines Rep. 381; 1 Caines Cas. 95. §§ 1039, 1138, 1209, 1224, 1540, 1577, 1824, 1829, 1958, 3970, 3975.
 Union Trust Co. v. Chicago & C. R. Co., 7 Fed. Rep. 513. §§ 7183, 7185.
 Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434. §§ 7000, 7114, 7113, 7119, 7170, 7183.
 Union Trust Co. v. Monticello & C. R. Co., 63 N. Y. 311. § 6116.
 Union Trust Co. v. Nevada & C. R. Co., 20 Fed. Rep. 80. § 6262.
 Union Trust Co. v. Rigdon, 93 Ill. 458. §§ 2664, 3072.
 Union Trust Co. v. Rockford & C. R. Co., 6 Biss. (U. S.) 197. § 6211.
 Union Trust Co. v. Souther, 107 U. S. 591. § 6823.
 Union Trust Co. v. St. Louis & C. R. Co., 4 Dill. (U. S.) 114. §§ 6833, 7220.
 Union Trust Co. v. Walker, 107 U. S. 596. § 7117.
 Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 820. §§ 5845, 5955.
 United Companies v. Weldon, 47 N. J. L. 59 § 5407.
 United Daughters of Cornish, 35 Pa. St. 80. §§ 113, 6052.
 United Hebrew & C. Assn. v. Benshimol, 130 Mass. 325. § 5438.
 United Nickel Co. v. Worthington, 13 Fed. Rep. 392. § 4140.
 United Service Co., Re, L. R. 7 Eq. 76. § 6688.
 United Society v. Eagle Bank, 7 Conn. 456. §§ 1511, 1517, 3270.
 United Soc. v. Underwood, 9 Bush (Ky.), 609. §§ 4014, 4138, 4139.
 United States v. Addison, 6 Wall. (U. S.) 291. § 4708.
 United States v. Alexander, 4 Cranch. C. C. (U. S.) 311. § 6749.
 United States v. Amedy, 11 Wheat. (U. S.) 392. §§ 5029, 7790, 7882.
 United States v. American Bell Telephone Co. (1886), 29 Fed. Rep. 17. §§ 683, 7485, 7486, 7488, 7995, 8022, 8023, 8033, 8034, 8038, 8048.
 United States v. Ames, 99 U. S. 35. § 45.
 United States v. Babcock, 3 Dill. (U. S.) 567. § 7738.
 United States v. Baltimore & C. R. Co., 7 Am. Law Reg. (N. S.), 757. § 6432.
 United States v. Barry, 36 Fed. Rep. 246. § 3875.
 United States v. Boice, 2 McLean (U. S.), 352. § 7590.
 United States v. Bradley, 10 Pet. (U. S.) 343, 359. § 5785.
 United States v. Britton, 107 U. S. 655, 666; 108 U. S. 193. § 4677.
 United States v. Bryan, 9 Cranch (U. S.), 374. § 7070.
 United States v. Cassidy, 67 Fed. Rep. 698. § 7782.
 United States v. Church of Jesus Christ & Co., 5 Utah, 351. §§ 6535, 6832.
 United States v. City Bank, 21 How. (U. S.) 356. §§ 4741, 4754, 6229.
 United States v. Council of Keokuk, 6 Wall. (U. S.) 514. § 1119.
 United States v. Cutts, 1 Sumn. (U. S.) 139. § 2593.
 United States v. Cutts, 1 Sumn. (U. S.) 149. § 2339.
 United States v. Debs, 63 Fed. Rep. 436. § 7782.
 United States v. Debs, 64 Fed. Rep. 724. § 7782.
 United States v. Eckford, 6 Wall. (U. S.) 484. §§ 3787, 7321.
 United States v. E. C. Knight Co., 156 U. S. 1; 60 Fed. Rep. 306, 334. § 6415.
 United States v. Elliott, 62 Fed. Rep. 801; 64 Fed. Rep. 27. § 7782.
 United States v. Fay, 9 Port. (Ala.) 465. § 5743.
 United States v. Fisher, 2 Cranch (U. S.), 358. § 7070.
 United States v. Fox, 94 U. S. 315. § 5785.
 United States v. Gamble, 10 Mo. 457. § 3615.
 United States v. Globe Works, 6 Fed. Rep. 530. § 7570.
 United States v. Grundy, 3 Cranch (U. S.), 337. § 6587.
 United States v. Hack, 8 Pet. (U. S.) 271. § 7070.
 United States v. Hartwell, 6 Wall. (U. S.) 385. § 7270.
 United States v. Herron, 20 Wall. (U. S.) 251. § 7070.
 United States v. Hodson, 10 Wall. (U. S.) 395, 407, 408. § 5785.
 United States v. Hooe, 3 Cranch (U. S.), 73. § 7070.
 United States v. Howland, 4 Wheat. (U. S.) 108. § 7070.
 United States v. Insurance Companies, 22 Wall. (U. S.) 99. § 7369.
 United States v. Johns, 4 Dall. (U. S.) 412; 1 Wash. (U. S.) 363. §§ 7652, 7690, 7705.
 United States v. Johnson County, 5 Dill. (U. S.) 207. § 1126.
 United States v. Jones, 109 U. S. 513. § 672.
 United States v. Kagama, 118 U. S. 375. § 669.
 United States v. Keokuk, 6 Wall. (U. S.) 514, 518. § 1118.
 United States v. Kirkpatrick, 9 Wheat. (U. S.) 720. § 2825.
 United States v. Knox, 102 U. S. 422. §§ 3094, 3104.
 United States v. Knox, 111 U. S. 784. § 7310.
 United States v. La Coste, 2 Mason (U. S.), 141. § 5003.
 United States v. Lancaster, 2 McLean (U. S.), 431. § 5003.
 United States v. Lathrop, 17 Johns. (N. Y.) 4 § 4166.
 United States v. Lawrence, 3 Dall. (U. S.) 42. § 7829.
 United States v. Lincoln County, 5 Dill. (U. S.) 184. § 1126.
 United States v. Linn, 15 Pet. (U. S.) 290, 311. § 5785.
 United States v. Lockwood, 1 Pinn. (Wis.) 359. §§ 6785, 6786.
 United States v. Louisville & C. Canal Co., 1 Flipp. (U. S.) 260. § 5645.
 United States v. Louisville & C. R. Co., 18 Fed. Rep. 480. § 6435.
 United States v. Maurice, 2 Brock. (U. S.) 96. §§ 1166, 5785.
 United States v. McBratney, 11 Fed. Rep. 96, note. § 669.
 United States v. McKelden, McArthur & Mackey (D. C.), 162. § 716.
 United States v. Mills, 7 Pet. (U. S.) 138, 142. § 5003.
 United States v. Miles, 2 Utah, 19; 103 U. S. 304. § 7756.
 United States v. Mormon Church, 150 U. S. 145. § 5774.
 United States v. New Orleans, 98 U. S. 381. § 5427.
 United States v. New Orleans Railroad, 12 Wall. (U. S.) 362. § 7210.

- United States v. Northway, 120 U. S. 327. § 5003.
 United States v. Patterson, 55 Fed. Rep. 605. § 7782.
 United States v. Planters' Bank, 9 Wheat. (U. S.) 907. §§ 7, 24.
 United States v. Preston, 3 Pet. (U. S.) 57. § 4168.
 United States v. Southern Pac. R. Co., 49 Fed. Rep. 297. §§ 7449, 7484, 7486, 7488.
 United States v. State Bank, 6 Pet. (U. S.) 29. §§ 7070, 7790.
 United States v. Tingey, 5 Pet. (U. S.) 115, 128. § 8785.
 United States v. Union Pacific R. Co. (1875), 91 U. S. 72. §§ 678, 8134.
 United States v. Union Pac. R. Co. (1878), 98 U. S. 569; 11 Blatch. (U. S.) 385. §§ 673, 678.
 United States v. Union Pac. R. Co., 3 Dill (U. S.) 524. §§ 7408, 7754.
 United States v. Vaughan, 3 Binn. (Pa.) 394. § 2390.
 United States v. Waterborough, 2 Ware (U. S.), 158. § 7096.
 United States v. Williams, 4 McLean (U. S.), 236. § 1084.
 United States v. Williams, 5 Cranch (U. S.), 62. § 1859.
 United States v. Wolters, 46 Fed. Rep. 509. § 2805.
 United States v. Workmen's Amalgamated Council, 54 Fed. Rep. 994. § 7782.
 United States Bank v. Dandridge, 12 Wheat (U. S.) 64. § 97, 512, 5029.
 United States Bank v. Haskins, 1 Johns. Cas. (N. Y.) 132. § 7659.
 United States Bank v. Stearns, 15 Wend. (N. Y.) 314. §§ 503, 508, 518, 1846, 7665, 7689, 7690.
 United States Bung. Man. Co. v. Armstrong, 34 Fed. Rep. 94. § 7303.
 United States Ex. Co. v. Allen, 39 Fed. Rep. 712. § 8124.
 United States Express Co. v. Bedbury, 34 Ill. 459. §§ 524, 532, 1870, 5254, 7645, 7658.
 United States Express Co. v. Ellyson, 28 Iowa, 378. § 2812.
 United States Express Co. v. Hemmingsway, 39 Fed. Rep. 60. §§ 8107, 8124.
 United States Ins. Co. v. Ludwig, 103 Ill. 514. § 4600.
 United States Ins. Co. v. Shriver, 3 Md. Ch. 381, 389. §§ 5220, 5221.
 United States Life Ins. Co. v. Adams, 7 Biss. (U. S.) 30. § 7961.
 United States Life Ins. Co. v. Hessberg, 27 Ohio St. 393. § 4873.
 United States Mercantile Reporting & c. Asso. Re. 22 N. Y. St. Rep. 494; 4 N. Y. Supp. 516. § 297.
 United States Mercantile Reporting & c. Agency, Re. 115 N. Y. 176; affirming 22 N. Y. St. Rep. 494. §§ 287, 7761.
 United States Mortgage Co. v. Gross, 93 Ill. 483, 494. §§ 590, 5441, 7963.
 United States Rolling Stock Co., Re, 57 How. Pr. (N. Y.) 16. § 6942.
 United States Rolling Stock Co. v. Atlantic & c. R. Co., 34 Ohio St. 450. §§ 4047, 4079, 4080, 4085.
 United States Tel. Co. v. Western Union Tel. Co., 56 Barb. (N. Y.) 46. § 7790.
 United States Tel. Co. v. Western Union Tel. Co., 56 Barb. 53. § 11.
 United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119. §§ 38, 599, 5019, 5714.
 United States Trust Co. v. Harris, 2 Bosw. (N. Y.) 75. §§ 6965, 7302.
 United States Trust Co. v. Lee, 73 Ill. 142. §§ 7913, 7914.
 United States Trust Co. v. New York, West Shore & c. R. Co., 35 Hun (N. Y.), 341. § 6858.
 United States Trust Co. v. Wabash & c. R. Co., 32 Fed. Rep. 480. § 6959.
 United States Vinegar Co. v. Schlegel, 143 N. Y. 537. § 6518.
 Unity v. Burrage, 103 U. S. 447. §§ 590, 614.
 Unity Ins. Co. v. Cram, 43 N. H. 638. §§ 1868, 1869.
 Universal Banking Corp., Re, L. R. 5 Ch. 492. § 3803.
 Universal Beer Keg Co. v. Brown, 44 Hun (N. Y.), 629; 9 N. Y. St. Rep. 91. § 5289.
 Universal Fire Ins. Co. v. Tabor, 16 Colo. 531. §§ 3456, 3878, 3879.
 University v. Buell, 2 Vt. 48. § 1207.
 University v. Detroit Young Men's Soc., 12 Mich. 138. § 5074.
 University v. Maultsby, 8 Ired. Eq. (N. C.) 257. §§ 25, 2939.
 University v. Moody, 62 Ala. 389. § 5049.
 University v. North Carolina R. Co., 76 N. C. 103. § 2139.
 University v. Tucker, 31 W. Va. 621. §§ 7913, 7919.
 University v. Williams, 9 Gill & J. (Md.) 365. §§ 726, 3967, 4875, 5384, 6598, 6659, 6681.
 Updegraff v. Crans, 47 Pa. St. 103. §§ 764, 7784.
 Uphoff v. Chicago & c. R. Co., 5 Fed. Rep. 546. §§ 7890, 7892.
 Upshaw, Ex parte, 45 Ala. 234. § 610.
 Upson County R. Co. v. Sharman, 37 Ga. 644. § 5362.
 Upton v. Burnham, 3 Biss. (U. S.) 431. §§ 3289, 3301.
 Upton v. Englehart, 3 Dill. (U. S.) 496. §§ 1361, 1365, 1372, 1383, 1431, 1449.
 Upton v. Hansborough, 3 Biss. (U. S.) 417. §§ 502, 1325, 1518, 1550, 1579, 1695, 1849, 1863, 1861, 3222, 3537, 3552, 3752, 4126, 4354.
 Upton v. Hubbard, 28 Conn. 274. § 7342.
 Upton v. Jackson, 1 Flipp. C. C. (U. S.) 413. §§ 80, 1454, 1598, 1668, 2086, 3680.
 Upton v. New York & Erie Bank, 13 Hun (N. Y.), 269. § 7067.
 Upton v. Tribblecock, 91 U. S. 47. §§ 332, 1138, 1140, 1185, 1393, 1438, 1442, 1450, 1554, 1517, 1518, 1550, 1551, 1562, 1568, 1577, 1580, 1585, 1961, 2953, 3537, 3552, 4921.
 Upton Man. Co. v. Stewart, 61 Iowa, 209. § 7519.
 Usener v. State, 8 Tex. App. 177. § 634.
 Utah & c. R. v. Fisher, 116 U. S. 28. § 669.
 Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652. §§ 4386, 5303, 5952, 5983.
 Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296. §§ 508, 5720, 5952, 5983, 7689.
 Utica Ins. Co. v. Kip, 8 Cow. (N. Y.) 20, 25. §§ 5303, 5714, 5952, 6040.
 Utica Ins. Co. v. Lynch, 11 Paige (N. Y.), 520. § 7006.
 Utica Ins. Co. v. Scott, 19 Johns. (N. Y.) 1. §§ 5952, 5983, 6040.
 Utica & c. R. Co. v. Brinckerhoff, 21 Wend. (N. Y.) 139. § 1307.
 Utica Ins. Co. v. Tillman, 1 Wend. (N. Y.) 555. §§ 508, 1846, 7689, 7696.
 Utica Water Works Co. v. Utica, 31 Hun (N. Y.), 426. § 5686.
 Utley v. Clark-Gardner Lode Mining Co., 4 Colo. 369. §§ 7876, 7888, 7950, 7966, 7979.
 Utley v. Union Tool Co., 11 Gray (Mass.), 139. §§ 1868, 1869, 3651, 3652, 3653, 3731, 4354.
 Vagliano v. Bank of England, 22 Q. B. Div. 103, 117; affirmed, 23 Q. B. Div. 243, 255; reversed, H. L. (1891), 1 App. Cas. 107. §§ 2662, 2683.
 Vail v. Hamilton, 20 Hun (N. Y.), 355. § 6939.
 Vail v. Hamilton, 85 N. Y. 453; affirming 20 Hun (N. Y.), 355. §§ 6173, 6952.
 Vail v. Jameson, 41 N. J. Eq. 648. § 6494.
 Vail v. Newark Sav. Inst., 32 N. J. Eq. 627. § 7066.
 Vail v. Phillips, 14 N. J. Law Journal, 45. § 1584.
 Vale Mills v. Spalding, 62 N. H. 605. § 3301.
 Valencia County v. Atchison & c. R. Co., 3 N. Mex. 380. § 5569.
 Valk v. Crandall, 1 Sandf. Ch. (N. Y.) 179. §§ 219, 221, 1654, 1889, 4621, 4633, 4659.
 Valle v. Ziegler, 84 Mo. 214. §§ 2803, 2813, 2814.
 Valley Bank & Sav. Ins. v. Ladies' Congregational Sewing Soc., 28 Kan. 423. § 6672.
 Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44. §§ 1102, 2070, 7414.
 Valpy, Ex parte, L. R. 7 Ch. 289. § 6152.
 Van Allen v. American Nat. Bank, 52 N. Y. 1. §§ 7092, 7104.
 Van Allen v. Illinois & c. R. Co., 4 Abb. App. Dec. (N. Y.) 448. § 1138.
 Van Allen v. 37 Barb. (N. Y.) 225. § 7251.
 Van Allen v. Assessors, 3 Wall. (U. S.) 573. §§ 671, 2211, 2810, 2813, 2816, 2827, 2840, 2854, 2857, 2968.
 Van Alstyne v. Cook, 25 N. Y. 489, 493. §§ 6517, 6898, 6931, 7060.
 Van Alstyne v. Houston & c. R. Co., 56 Tex. 373. §§ 275, 6247.
 Van Amburgh v. Baker, 81 N. Y. 46. § 4228.
 Vanamee, Re, 29 N. Y. St. Rep. 198. § 7497.
 Vanatta v. State Bank, 9 Ohio St. 27. §§ 5127, 5748.
 Van Blarcom v. Broadway Bank, 9 Bosw. (N. Y.) 532. § 2622.

- Van Blarcom v. Dager, 4 Stew. (N. J.) 783. § 2199.
 Van Buren v. Chenargo & Co. Ins. Co., 12 Barb. (N. Y.) 671. § 7231.
 Vance v. Erie R. Co., 32 N. J. L. 334. §§ 6276, 6298, 6312.
 Vance v. Farmers' Bank, 1 Blackf. (Ind.) 80. §§ 681, 7692.
 Vance v. Little Rock, 30 Ark. 435. § 1013.
 Vance v. McNabb Coal & Co., 92 Tenn. 47. §§ 6526, 6543, 6547.
 Vance v. Phoenix Ins. Co., 4 Lea (Tenn.), 385. §§ 4107, 4108.
 Van Cise v. Merchants' Nat. Bank, 33 N. W. Rep. 897. § 2404.
 Van Cott v. Van Brunt, 82 N. Y. 535. §§ 1595, 1616, 1619, 1665.
 Van Cott v. Van Brunt, 2 Abb. N. Cas. (N. Y.) 283. §§ 4323, 4365, 4582.
 Vandall v. South San Francisco Dock Co., 40 Cal. 83. §§ 5638, 5686.
 Vandenburg v. Broadway Underground & R. Co., 29 Hun (N. Y.), 348. §§ 731, 3863.
 Vanderbilt v. Adams, 7 Cow. (N. Y.) 349. §§ 5521, 5530.
 Vanderbilt v. Bennett, 6 Pa. County Ct. 193. § 734.
 Vanderbilt v. Garrison, 5 Duer (N. Y.), 689. §§ 4500, 4508.
 Vanderbilt v. New Jersey Cent. R. Co. (N. J. Eq.), 2 Cent. Rep. 228. § 7028.
 Vanderbilt v. Richmond Turnp. Co., 2 N. Y. 479. §§ 6295, 6304.
 Vanderpoel v. Gorman, 149 N. Y. 562. § 3053.
 Vanderwerken v. Glenn, 85 Va. 9. §§ 1813, 1939, 2005, 3404, 3419, 3499, 3551, 3567, 3567, 7552.
 Van Diemen's Land Co. v. Cockrell, 1 O. B. (N. S.) 732. § 1777.
 Vandine, Re, 6 Pick. (Mass.) 187. § 1025.
 Van Doren v. Olden, 4 Green (N. J.), 117. § 2199.
 Van Dresser v. Oregon Rail & Nav. Co., 48 Fed. Rep. 202. § 7486.
 Van Dyck v. McQuade, 57 How. Pr. (N. Y.) 62; reversed, 86 N. Y. 38. §§ 4288, 4291, 4292.
 Vandyke v. Christ, 7 Watts & S. (Pa.) 373. § 6569.
 Van Dyke v. Stout, 8 N. J. Eq. 333. § 731.
 Vane v. Cobbold, 1 Exch. 798. §§ 447, 1386.
 Vane v. Newcombe, 132 U. S. 220. §§ 7062, 7758.
 Van Etten v. Eaton, 19 Mich. 187, 193. §§ 4098, 4177, 4224, 4333, 4356.
 Van Heusen v. Radcliff, 17 N. Y. 580. § 6917.
 Van Hoffman v. Quincy, 4 Wall. (U. S.) 535. § 3035.
 Van Hook v. Somerville Man. Co., 5 N. J. Eq. 137. §§ 3914, 3929, 4012, 5107.
 Van Hook v. Somerville Man. Co., 5 N. J. Eq. 633. §§ 4933, 4934.
 Van Hook v. Throckmorton, 8 Paige (N. Y.), 33. § 6969.
 Van Hook v. Whitlock, 2 Edw. Ch. (N. Y.) 304, 310. § 3015.
 Van Hook v. Whitlock, 3 Paige (N. Y.), 409; 7 Paige (N. Y.), 373. §§ 1986, 3110, 3115, 3116, 3345.
 Van Hook v. Whitlock, 26 Wend. 43. §§ 1989, 1991, 5277.
 Van Hoozer v. Cory, 34 Barb. (N. Y.) 9. § 6141.
 Vanhorne v. Dorrance, 2 Dall. (U. S.) 304. § 5614.
 Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388. § 4011.
 Van Hostrop v. Madison City, 1 Wall. (U. S.) 291. § 1113.
 Van Kleeck v. Reformed Dutch Church, 6 Paige (N. Y.), 600. § 678.
 Van Leer v. Erie, 26 Pa. St. 277. § 6328.
 Van Leuvan v. First Nat. Bank, 6 Lads. (N. Y.) 373. §§ 4835, 5210, 5226, 5229.
 Vann v. Downing, 48 Phila. Leg. Int. 264. § 4981.
 Vanneman v. Young, 52 N. J. L. 403. §§ 7647, 7708.
 Van Ness v. Forrest, 8 Cranch (U. S.), 30. § 7593.
 Van Norman v. Jackson Circuit Judge, 45 Mich. 204. §§ 2772, 2776.
 Van Orsdall v. Hazard, 3 Hill (N. Y.), 243. § 7509.
 Van Pelt v. Association, 79 Ga. 439. § 240.
 Van Pelt v. United States & Co. 13 Abb. Pr. (N. S.) (N. Y.) 325, 331; 3 Jones & S. (N. Y.) 117. §§ 6558, 7370.
 Van Riper, Ex parte, 20 Wend. (N. Y.) 614. §§ 1259, 3046, 3051, 4308.
 Van Riper v. American Central Ins. Co., 60 Ind. 123. §§ 1748, 1832.
 Van Riper v. Parsons, 40 N. J. L. 1. §§ 574, 595.
 Van Rielwick v. Lamon, 2 McArthur (D. C.), 172. § 7812.
 Van Sandau v. Moore, 1 Russ. 441, 458. § 2925.
 Vansands v. Middlesex County Bank, 26 Conn. 144. §§ 2322, 2594, 2626, 3238, 3243.
 Vansant v. Roberts, 3 Md. 119. §§ 294, 5829.
 Van Schoick v. Delaware & C. Canal Co., 20 N. J. L. 249. §§ 6342, 6343, 6346, 6371.
 Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 439. § 5265.
 Vansickle v. Erdelmeyer, 36 Ind. 262. § 5942.
 Van Steenwyck v. Sackett, 17 Wis. 645. §§ 638, 6959.
 Vanstone v. Goodwin, 42 Mo. App. 39. §§ 2615, 2616, 2628.
 Van Valkenburgh v. Thomasville & R. Co., 4 N. Y. Supp. 782. §§ 4388, 4650, 4873.
 Van Wagenen v. Clark, 22 Hun (N. Y.), 497. §§ 3551, 3552.
 Van Wagenen v. Paterson Sav. Bank, 10 N. J. Eq. 13. § 6494.
 Van Wagoner v. Paterson Gaslight Co., 23 N. J. L. 283. § 7251.
 Van Weel v. Winston, 115 U. S. 228. §§ 3375, 3363, 6559.
 Vanzant v. Waddell, 2 Yerg. (Tenn.) 260. § 5437.
 Varick v. Smith, 5 Paige (N. Y.), 137, 160. §§ 5592, 5614.
 Varnell v. Speer, 55 Ga. 132. § 7804.
 Varner v. Nobleborough, 2 Greenl. (Me.) 121. § 1220.
 Varnum v. Hart, 25 N. Y. St. Rep. 755; 6 N. Y. Supp. 346. § 6955.
 Varnum v. Hart, 119 N. Y. 101; reversing 6 N. Y. Supp. 346. §§ 6517, 7860.
 Vassar v. Camp, 11 N. Y. 441. § 4978.
 Vassault v. Edwards, 43 Cal. 458. § 5018.
 Vatable v. New York & C. R. Co., 9 Abb. N. Cas. (N. Y.) 271. § 6247.
 Vatable v. New York & C. R. Co., 96 N. Y. 49; reversing 11 Abb. N. C. (N. Y.) 133. §§ 258, 261, 269.
 Vater v. Lewis, 36 Ind. 288. §§ 5126, 5133, 5151, 7648.
 Vaughan v. Company of Gunmakers, 6 Mod. 82; 2 Ld. Raym. 989. § 829.
 Vaughan v. Harkinson, 35 N. J. L. 79. § 5104.
 Vaughan v. Lewis, Carth. 227. § 815.
 Vaughn v. Hancock, 3 O. B. 766. § 1048.
 Vaughn v. Tracy, 32 Mo. 415. § 5238.
 Vawter v. Franklin College, 53 Ind. 88. § 7702.
 Vawter v. Ohio & C. R. Co., 14 Ind. 174. §§ 1140, 1394, 1395, 1862.
 Veasey v. Graham, 17 Ga. 99. §§ 4047, 5072, 5106.
 Veazie v. Mayo, 45 Me. 560; 49 Me. 156. §§ 5470, 5505.
 Veazie Bank v. Fenno, 8 Wall. (U. S.) 533. §§ 2859, 5761.
 Vedder v. Fellows, 20 N. Y. 126, 131. § 1022.
 Veeder v. Baker, 83 N. Y. 156. § 3398.
 Veeder v. Mudgett, 27 Hun (N. Y.), 519. § 3137.
 Veeder v. Mudgett, 95 N. Y. 295. §§ 1600, 2090, 2253, 3713.
 Veiller v. Brown, 18 Hun (N. Y.), 571. §§ 3255, 3270.
 Veitch v. Russell, 3 Ad. & El. (N. S.) 928. § 4855.
 Venango Nat. Bank v. Taylor, 56 Pa. St. 14. §§ 7300, 7301.
 Venard v. Cross, 8 Kan. 248. § 5607.
 Vennard v. McConnell, 11 Allen (Mass.), 555. § 7271.
 Venner v. Atchison & C. R. Co., 28 Fed. Rep. 581, 589. §§ 78, 4571.
 Venning v. Leckie, 13 East, 7. § 1255.
 Venezuela, Central R. Co. of, v. Kisch, L. R. 2 H. L. 99. § 1443.
 Verio v. Sandwich, 1 Sid. 305. § 794.
 Vermont v. Society & Co., 1 Paine (U. S.), 652. §§ 531, 5590.
 Vermont & C. R. Co. v. Burlington, 28 Vt. 193. § 6194.
 Vermont & C. R. Co. v. Orcutt, 16 Gray (Mass.), 116, 117. § 7432.
 Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2. §§ 80, 98, 6593, 6598, 6602.
 Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792. § 6929.
 Vermont & C. R. Co. v. Vermont Cent. R. Co., 50 Vt. 500. §§ 6869, 7168.
 Vermont Cent. R. Co. v. Baxter, 22 Vt. 365. § 6341.
 Vermont Cent. R. Co. v. Claves, 21 Vt. 30. §§ 1220, 1224, 1606, 7590, 7705.
 Vermont Mining & C. Co. v. Windham County Bank, 44 Vt. 459. § 4900.
 Vermont Mt. Fire Ins. Co. v. Cummings, 11 Vt. 503. § 7401.

Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524; affirmed, 22 Wend. (N. Y.) 183. § 5239.
 Vernon v. Palmer, 62 How. Pr. (N. Y.) 425. § 4192.
 Vernon v. Peckham, 66 Barb. (N. Y.) 113. § 6016.
 Vernon Society v. Hills, 6 Cow. (N. Y.) 23. §§ 531, 3851, 3863, 3893, 3897, 6577, 6588, 6600, 6655, 7665, 7722.
 Verona & Co. v. Murtaugh, 50 N. Y. 314. § 4164.
 Verplanck v. Mercantile Ins. Co., 1 Edw. (N. Y.) 84; 2 Paige (N. Y.), 438. §§ 1076, 2054, 2486, 4009, 4060, 4477, 4482, 4538, 4539, 4540, 5672, 5686, 6873, 6980, 6920, 7219.
 Verplank v. Calmes, 1 Johns. Ch. (N. Y.) 57. § 6823.
 Versailles & Co. Turnp. Co. v. Versailles (Ky.), 10 S. W. Rep. 280; 11 S. W. Rep. 712. § 5337.
 Verzan v. McGregor, 23 Cal. 339, 347. § 6190.
 Vestry of Christ Church v. Simons, 2 Rich. (S. C.) 366. §§ 1906, 1907.
 Vianua v. Barclay, 3 Cow. (N. Y.) 281. § 5300.
 Vice v. Anson, 7 Barn. & C. 409. §§ 1067, 1800.
 Vice v. Anson, 1 Man. & R. 113. § 1913.
 Vick v. Lane, 56 Miss. 681. § 3502a.
 Vick v. La Rochelle, 57 Miss. 602. § 1518.
 Vicksburg & C. R. Co. v. Calderwood, 15 La. An. 481. § 5626.
 Vicksburg & C. Co. v. Dennis, 116 U. S. 655. §§ 2823, 2825.
 Vicksburg & C. R. Co. v. McKean, 12 La. An. 638. §§ 1224, 1315, 1395, 1969.
 Vicksburg & C. R. Co. v. McKean, 14 La. An. 735. § 3224.
 Vicksburg & C. R. Co. v. Onachita, 11 La. An. 649. § 7747.
 Vicksburg & C. R. Co. v. Putnam, 118 U. S. 545. § 7728.
 Victoria Gold Min. Co. v. Fraser (Colo.), 29 Pac. Rep. 667. § 4858.
 Victory Web Printing & Co. v. Beecher, 26 Hun (N. Y.), 48. §§ 4193, 4225.
 Viele v. Germania Ins. Co., 26 Iowa, 9. § 5265.
 Viele v. Wells, 9 Abb. N. O. (N. Y.) 277. § 3148.
 Vigers v. Pike, 8 Cl. & Fin. 562, 652. §§ 3592, 5310.
 Vilas v. Milwaukee & C. R. Co., 17 Wis. 498. § 263.
 Vilas v. Page, 106 N. Y. 439, 459. §§ 6186, 6216, 6261, 6903, 7114, 7172.
 Viles v. Bangs, 35 W. Va. 131. § 6951.
 Villa v. Jorde, 17 La. An. 9. § 3072.
 Villers v. Beaumont, 2 Dyer, 146. § 5174.
 Vinas v. Merchants' & C. Ins. Co., 27 La. An. 367. §§ 6276, 6310.
 Vincennes University v. Indiana, 14 How. (U. S.) 268. §§ 681, 6655.
 Vincent v. Bamford, 42 How. Pr. (N. Y.) 109; 1 J. & Sp. (N. Y.) 506. § 3147.
 Vincent v. Chapman, 10 Gill & J. (Md.) 279. § 5165.
 Vincent v. Chicago & C. R. Co., 49 Ill. 33. § 5549.
 Vincent v. Sands, 11 Abb. Pr. (N. S.) (N. Y.) 231. § 4335.
 Vincent v. Sands, 11 Abb. Pr. (N. S.) (N. Y.) 366, 374; 42 How. Pr. (N. Y.) 231. §§ 3669, 4164, 4209, 4222, 4371.
 Vintner's Co. v. Passey, 1 Burr. 235. §§ 948, 1024.
 Vinton's Appeal, 99 Pa. St. 434. §§ 2194, 2199, 4220.
 Vinton v. Middlesex R. Co., 11 Allen (Mass.), 304. § 6308.
 Virginia v. Chesapeake & C. Canal Co., 32 Md. 501. § 8064.
 Virginia & C. Man. Co. v. Hale, 93 Ala. 542. § 7409.
 Virginia & C. R. Co. v. Washington, 86 Va. 629. §§ 5884, 6293.
 Virginia & C. Steamboat Nav. Co. v. United States, Taney (U. S.), 418. §§ 7553, 7557.
 Virginia City v. Mining Co., 2 Nev. 88. § 594.
 Virginia Coupon Cases, 114 U. S. 269. § 7760.
 Virginia Tidewater Coal Co. v. Mercantile Trust Co., 35 N. Y. St. Rep. 141; 12 N. Y. Supp. 529. § 6082.
 Visitors & C. of St. John's College v. State, 15 Md. 330. §§ 5384, 5388.
 Vogel v. Preston, 42 Mich. 511. § 7815.
 Vogel v. St. Louis Museum, 8 Mo. App. 587. §§ 4627, 4858, 5304.
 Voisin v. Leche, 23 La. An. 25. § 6775.
 Volcano Canyon Road Co. v. Placer County, 88 Cal. 634. §§ 5914, 5942.
 Vollans v. Fletcher, 1 Exch. 20. § 440.
 Von Glahn v. De Rossett, 81 N. C. 467. §§ 265, 3487, 6718, 6720, 6729, 6730, 6733.

Von Glahn v. De Rossett, 76 N. C. 292. §§ 3483, 3493, 3533.
 Von Glahn v. Harris, 73 N. C. 323. §§ 3483, 3493.
 Von Glahn v. Lattimer, 73 N. C. 333. §§ 3483, 3493.
 Von Hoffman v. Quincy, 4 Wall. (U. S.) 535. § 1118.
 Von Phul v. Hammer, 29 Iowa, 222. §§ 588, 594.
 Von Schmiedt v. Bourn, 50 Cal. 616. § 2455.
 Von Schmidt v. Huntington, 1 Cal. 55. §§ 6568, 6685, 6697, 6713.
 Voorhees v. Receivers, 19 Ohio, 463. § 3684.
 Voris v. Benshaw, 49 Ill. 425. §§ 4617, 4618.
 Vose v. Cowdrey, 49 N. Y. 336, 343. §§ 265, 266.
 Vose v. Grant, 15 Mass. 505, 519. §§ 418, 1569, 1576, 2951, 2956, 2963, 3430, 3466, 3488, 4218.
 Voshell v. Hynson, 26 Md. 83. § 6880.
 Vowell v. Thompson, 3 Oranch C. C. (U. S.) 428. §§ 772, 733, 735.
 Vredenburg v. Behau, 33 La. An. 627. § 5651.
 Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188. §§ 1146, 1361, 1364, 1475.
 Vreeland v. Van Horn, 17 N. J. Eq. 137, 140. § 6064.
 Wabash & C. Canal Co. v. Johnson, 2 Ind. 219. § 7826.
 Wabash & C. R. Co. v. Central Trust Co., 22 Fed. Rep. 272. § 6843.
 Wabash & C. R. Co. v. Ham, 114 U. S. 587, 594. § 6526.
 Wabash & C. R. Co. v. Illinois, 118 U. S. 567. §§ 5460, 5539, 5548, 7878.
 Wabash & C. R. Co. v. Peyton, 106 Ill. 534. § 6293.
 Wabash R. Co. v. Dykeman, 133 Ind. 56. §§ 6880, 6881, 6887, 6888.
 Wachtel v. Noah Widows' & C. Society, 84 N. Y. 28. §§ 881, 891, 892.
 Wachtel v. Wilde, 58 Ga. 50. § 6840.
 Waddell's Appeal, 84 Pa. St. 90. § 5596.
 Waddell, Re, 8 Jur. (N. S.) 181, pt. 2. § 7738.
 Waddill v. Alabama & C. E. Co., 35 Ala. 323. §§ 5748, 7386.
 Wade v. American Colonization Society, 7 Smedes & M. (Miss.) 663. §§ 5823, 5835.
 Wade v. Pettibone, 11 Ohio, 57. § 6226.
 Wadhams v. Bay, 73 Ill. 415. § 4943.
 Wadhams v. Litchfield & C. Turnp. Co., 10 Conn. 416. § 3914, 5924.
 Wadleigh v. Gilman, 12 Me. 403. § 5485.
 Wadleigh v. Veasie, 3 Sumn. (U. S.) 167. § 6211.
 Wagenen v. Clark, 22 Hun (N. Y.) 497. § 3566.
 Wager v. Hall, 16 Wall. (U. S.) 584. § 7271.
 Wager v. Reid, 3 Thomp. & C. (N. Y.) 335. § 4060.
 Wagner v. Baird, 7 How. (U. S.) 234. § 3774.
 Wagner v. Gage County, 3 Neb. 237. § 5626.
 Wagner v. Meety, 69 Mo. 150. §§ 1122, 1123, 1130.
 Wagner v. Vestry & C. of Christ Church, 9 Rich. Eq. (S. O.) 155. § 6775.
 Wagner Free Institute v. Philadelphia, 132 Pa. St. 612. §§ 5409, 5421.
 Wahlig v. Standard Pump Co., 30 N. Y. St. Rep. 390. § 4724.
 Wahlig v. Standard Pump Man. Co., 5 N. Y. Supp. 420. §§ 6746, 7619.
 Wait, Re, 1 Jac. & W. 585. § 1084.
 Wait v. Ferguson, 14 Abb. Pr. (N. Y.) 379. §§ 3446, 4166, 4167, 4186.
 Wait v. Nashua Armory Asso. (N. H.), 34 Cent. L. J. 119. §§ 4617, 4619, 4622, 4628.
 Waite, Re, 99 N. Y. 433, 448. §§ 7339, 7345.
 Waite v. Dowley, 94 U. S. 527, 533. §§ 2857, 2876, 4414.
 Waite v. Windham County Mining Co., 36 Vt. 18. §§ 788, 3906, 4704, 4708, 4731.
 Waite v. Windham Mining Co., 37 Vt. 608. §§ 3932, 3938, 3991, 4707.
 Waithman, Ex parte, 2 Mont. & A. 264; 4 Deac. & Ch. 412. § 5210.
 Wakefield v. Fargo, 90 N. Y. 213. § 3147.
 Wakefield v. Martin, 3 Mass. 558. § 7816.
 Wakefield v. Newborn, 6 Q. B. 276. § 3099.
 Wakefield v. South Boston R. Co., 117 Mass. 544. § 4916.
 Wakeman v. Dalley, 51 N. Y. 27. §§ 1460, 1462, 6326.
 Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208. § 2661.
 Wakeman v. Grover, 4 Paige (N. Y.), 23; affirmed, 11 Wend. (N. Y.) 187. §§ 3519, 6918.
 Walburn v. Chenault, 43 Kan. 352. §§ 1630, 5249.
 Walburn v. Ingilby, 1 Mylne & K. 61, 76. §§ 2926, 4427.
 Walden v. Boulton, 55 Mo. 405. § 4943.

- Waldo v. Chicago &c. R. Co., 14 Wis. 575. §§ 1364, 1367, 1409, 1424, 1484, 5792.
- Wales v. Alden, 22 Pick. (Mass.) 245, 247. §§ 7342, 7349.
- Wales v. Muscatine, 4 Iowa, 302, 308. § 6285.
- Wales v. Stetson, 2 Mass. 143, 146. §§ 3031, 5381, 5910.
- Walker's Case, 2 Jur. (N. S.) 1216. § 1521.
- Walker's Case, L. R. 2 Eq. 554. §§ 3242, 3291.
- Walker's Case, L. R. 6 Eq. 30, 34. §§ 3233, 3285, 3288.
- Walker, Ex parte, 1 Tenn. Ch. 97. § 296.
- Walker v. Bank of New York, 9 N. Y. 582, 587. §§ 5028, 5126, 5127, 5156.
- Walker v. Bartlett, 2 Jur. (N. S.) 643. § 2729.
- Walker v. Bartlett, 18 C. B. 845. §§ 1067, 3283, 3308.
- Walker v. Birchard, 82 Iowa, 388. §§ 4198, 4277.
- Walker v. Borland, 21 Mo. 289. § 2479.
- Walker v. Caldwell, 4 La. An. 298. § 611.
- Walker v. Chapman, Loft. 342. § 1772.
- Walker v. Cincinnati, 21 Ohio St. 11, 41. § 5458.
- Walker v. Crain, 17 Barb. 119. §§ 3095, 3561, 3566, 3752, 5392.
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- Wain v. Bank of North America, 8 Serg. & R. (Pa.) 89. § 2626.
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- Waltham Bank v. Waltham, 10 Met. (Mass.) 334. §§ 2917, 3231, 3317.
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- Wamburzee v. Kennedy, 4 Desau. 481. § 1506.
- Wandling v. Straw, 25 W. Va. 692, 705. § 3571.
- Wangelin v. Goe, 50 Ill. 459, 463. § 4401.
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- Warburg v. Tucker, 3 Macq. H. L. Cas. 772. § 3209.
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- Ward's Case, L. R. 3 Ex. 180. § 1446.
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- Ward v. Johnson, 95 Ill. 215. §§ 5697, 5949.
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- Wardens of Christ's Church v. Pope, 8 Gray (Mass.), 140. § 3918.
- Wardens of St. Saviour v. Bostock, 2 Bos. & Pul. (N. R.) 175. § 4901.
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- Wardrobe v. California Stage Co., 7 Cal. 118. § 6337.
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- Ware v. McCandlish, 10 Leigh (Va.), 595. § 2199.
- Ware v. Merchants' National Bank, 151 Mass. 415. § 2627.
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- Ware v. Swann, 79 Ala. 330. § 5016.
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- Waring v. Mayor & Co. of Mobile, 24 Ala. 701. § 72.
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- Warner v. McMullin, 131 Pa. St. 370. § 4672.
- Warner v. Mower, 11 Vt. 385. §§ 18, 707, 710, 717, 720, 3936, 5074, 5080, 6467.
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- Warren v. Union National Bank, 7 Phila. (Pa.) 156. § 7334.
- Warren Academy v. Starrett, 15 Me. 443. § 7591.
- Warren County v. Marcy, 97 U. S. 86. § 6905.
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- Warren L. Co. v. Belvidere, 35 N. J. L. 584, 587. § 5438.
- Warrick v. Warrick, 3 Atk. 291, 294. §§ 5194, 5200.
- Warriner v. Giles, 2 Strange, 954. § 7734.
- Watrace v. Watrace & Co., 2 Coldw. (Tenn.) 515. § 7545.
- Warwick R. Co. v. Cady, 11 R. I. 131. §§ 1734, 1735.
- Wasatch Mining Co. v. Jennings, 5 Utah, 243. § 4068.
- Washburn v. Blake, 47 Me. 316. § 4733.
- Washburn v. Cass Co., 3 Dill. (U. S.) 251. §§ 355, 365, 366.
- Washburn v. Green, 33 L. ed. 516. § 1582.
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- Washburn Mill Co. v. Bartlett, 3 N. Dak. 138. § 7957.
- Washer v. Allensville & Co. Turnp. Co., 81 Ind. 78. § 7661.
- Washington v. Page, 4 Cal. 388. § 608.
- Washington v. Tait, 3 Humph. (Tenn.) 543. § 6841.
- Washington & Co. v. Cazenove, 83 Va. 744. § 6069.
- Washington & R. Co. v. Lewis, 83 Va. 746. § 6235.
- Washington & Co. Road v. State, 19 Md. 239. §§ 6609, 6678, 6681.
- Washington & Co. Turnp. Road v. Baltimore & R. Co., 10 Gill & J. (Md.) 392. § 5401.
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- Washington College v. Duke, 14 Iowa, 14. § 529.
- Washington County v. Franklin R. Co., 34 Md. 159. § 611.
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- Washington County Mut. Ins. Co. v. Hastings, 2 Allen (Mass.), 338. §§ 7950, 7953.
- Washington County Mut. Ins. Co. v. Miller, 26 Vt. 77. § 1659.
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- Washington University v. Rouse, 8 Wall. (U. S.) 439. §§ 5569, 5570.
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- Waterbury v. Clark, 4 Day (Conn.), 198. § 5175.
- Waterbury v. National Union Ex. Co. 50 Barb. (N. Y.) 158. § 2806.
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- Water Lot Co. v. Bank of Brunswick, 53 Ga. 30. § 289.
- Waterlow v. Sharp, L. R. 8 Eq. 501. §§ 3969, 5730.
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- Waterman v. Chicago & R. Co., 139 Ill. 658; 34 Ill. App. 268. § 4703.
- Waterman v. Connecticut & R. Co., 30 Vt. 610. §§ 6343, 6345.
- Waterman v. Sprague Man. Co., 55 Conn. 554, 576. § 7841.
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- Waters v. Barton, 1 Coldw. (Tenn.) 450. § 7341.
- Waters v. Leech, 3 Ark. 110. §§ 1021, 1024.
- Waters v. Quimby, 27 N. J. L. 158. § 4245.
- Waters v. Quimby, 27 N. J. L. 296. §§ 4247, 4248.
- Waters v. Taylor, 15 Ves. 10, 29. § 6434.
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- Watertown v. Robinson, 59 Wis. 513; 69 Wis. 230, §§ 7503, 7509.
- Watertown Fire Ins. Co. v. Rust, 141 Ill. 85; affirming 40 Ill. App. 119. § 7960.
- Watertown Fire Ins. Co. v. Simons, 96 Pa. St. 520, 526. § 7960.
- Water Valley Man. Co. v. Seaman, 53 Miss. 655. §§ 1391, 1410, 1424, 6335.
- Watervliet Bank v. White, 1 Denio (N. Y.), 608. §§ 4802, 5133, 5158, 5159, 7592.
- Waterworks Co. v. Burkhardt, 41 Ind. 364. §§ 5702, 5601.
- Watkins, Ex parte, 4 Deac. & Ch. 87. § 5211.
- Watkins, Ex parte, 2 Mont. & A. 348. § 5211.
- Watkins v. Eames, 9 Cush. (Mass.), 537. § 1205.
- Watkins v. Hill, 8 Pick. (Mass.) 522. § 6231.
- Watkins v. Minnesota Thresher Man. Co., 41 Minn. 150. §§ 7013, 7015.
- Watkins v. Peck, 13 N. H. 360. § 5246.
- Watkins v. Scottish Imp. Ins. Co., 23 Q. B. Div. 285. § 7990.
- Watkins v. Wallace, 19 Mich. 57, 75. § 6534.
- Watkins v. Wilcox, 6 Thomp. & C. (N. Y.) 539; 4 Hun (N. Y.), 220. § 5271.
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 Watson v. Bennett, 12 Barb. (N. Y.) 196. §§ 4634, 4752, 4756, 5047.
 Watson v. Citizens' Sav. Bank, 5 S. C. 159. § 6450.
 Watson v. Clerk, Comb. 138; Carth. 75. §§ 949, 7405.
 Watson v. Crandall, 7 Mo. App. 233; 78 Mo. 583. §§ 1472, 1473, 1636, 4094.
 Watson v. Eales, 23 Beav. 294. §§ 1751, 1777.
 Watson v. Goodwin, 17 N. Y. Supp. 51. § 4255.
 Watson v. Harmon, 85 Mo. 443, 446. § 2479.
 Watson v. Jones, 13 Wall. (U. S.) 679. § 893.
 Watson v. Lisbon Bridge, 14 Me. 201. § 6358.
 Watson v. McLaren, 19 Wend. (N. Y.) 557. § 5273.
 Watson v. Memphis & C. R. Co., 9 Heisk. (Tenn.) 255. § 4983.
 Watson v. Mercer, 3 Pet. (U. S.) 88. §§ 590, 1278.
 Watson v. Phenix Bank, 8 Met. (Mass.) 217. §§ 6904, 7031, 7733.
 Watson v. Spratley, 10 Exch. 222, 236. §§ 1067, 1068, 1083, 1084, 2848.
 Watson v. Steele, 78 Ala. 361. § 3248.
 Watson v. Tripp, 11 R. I. 98. § 7756.
 Watson v. Walker, 23 N. H. 471. § 3383.
 Watson v. Watson, 6 Conn. 334. § 3363.
 Watson v. Watson Man. Co., 30 N. J. Eq. 588. § 7062.
 Watson Coal & C. Co. v. James, 72 Iowa, 184. § 4934.
 Watts' Appeal, 78 Pa. St. 370; §§ 1109, 4074, 4109, 4110, 4479, 4494, 4495, 4534, 5249, 5298, 5730, 5733, 5955, 6131, 6133.
 Watts v. Carroll Parish, 11 La. An. 141. § 7830.
 Watts v. Eufaula Nat. Bank, 76 Ala. 474. § 7409.
 Watts v. Porter, 3 El. & Bl. 743. § 2797.
 Watts v. Potter, 3 Mason (U. S.), 77. § 2479.
 Watts-Campbell Co. v. Yuengling, 3 N. Y. Supp. 869; 21 N. Y. St. Rep. 136. § 5258.
 Waugh v. Carver, 2 H. Black. 235. §§ 1377, 1909.
 Waukon & C. R. Co. v. Dwyer, 49 Iowa, 121. §§ 1184, 1185.
 Wausau Boom Co. v. Plumer, 35 Wis. 274. §§ 5958, 7375.
 Way v. Billings, 2 Mich. 397. § 7689.
 Way v. Foster, 1 Allen (Mass.), 408. § 7959.
 Wayen Pike Co. v. Hammons, 129 Ind. 368. § 4052.
 Wayland v. County Commrs., 4 Gray (Mass.), 500. § 5610.
 Wayland University v. Boorman, 56 Wis. 657. § 5748.
 Wayne v. Commercial Nat. Bank, 32 Pa. St. 343. § 4841.
 Wayne County Turnp. Co. v. Berry, 5 Ind. 286. §§ 6282, 6358.
 Wayne Pike Co. v. Hammons, 129 Ind. 368. §§ 4504, 4546.
 Weale v. West Middlesex Water Works Co., 1 Jac. & W. 358. § 4591.
 Wear v. Jacksonville & C. R. Co., 24 Ill. 593. §§ 1332, 1333, 1577.
 Weare v. Gove, 44 N. H. 196. §§ 5028, 5126, 5153.
 Weary v. State University, 42 Iowa, 335. § 25.
 Weatherly v. Medical & C. Society, 76 Ala. 567. §§ 938, 1047.
 Weaver v. Ashcroft, 50 Tex. 428. § 1084.
 Weaver v. Barden, 49 N. Y. 286. §§ 2587, 2592, 2603, 4701.
 Weaver v. Barden, 3 Lans. (N. Y.) 338. § 2353.
 Weaver v. Davis, 47 Ill. 235, 237. §§ 6934, 7812.
 Weaver v. Field, 16 Fed. Rep. 22. § 6211.
 Weaver v. Lapley, 43 Ala. 224. § 608.
 Weaver's Company v. Forrest, 2 Stra. 1241. §§ 6302, 7373.
 Weaverville & C. R. Co. v. Supervisors of Trinity County, 64 Cal. 69, 71. §§ 5340, 5914.
 Webb v. Baltimore & C. R. Co., 77 Md. 92. § 5026.
 Webb v. Bank of Cape Fear, 5 Jones L. (N. C.) 288. § 7508.
 Webb v. Commissioners, L. R. 5 Q. B. 642. § 3969.
 Webb v. Direct London & C. R. Co., 9 Hare, 129; 1 De Gex, M. & G. 531. § 440.
 Webb v. Edwards, 46 Ala. 17. § 8076.
 Webb v. Graniteville Mfg. Co., 11 S. C. 396. §§ 2530, 2533, 2536.
 Webb v. Moler, 8 Ohio, 548. §§ 5791, 6598, 6600.
 Webb v. Motz, 6 How. Fr. (N. Y.) 439, 441. § 7552.
 Webb v. Ridgely, 38 Md. 365. § 741.
 Webb v. Vermont Cent. R. Co., 20 Blatchf. (U. S.) 218. § 6210.
 Webb v. Whiffen, L. R. 5 H. L. 711. § 1550.
 Webber v. Davis, 44 Me. 147. § 2669.
 Webber v. Humphreys, 5 Dill. (U. S.) 227. § 3615.
 Webber v. Leighton, 8 Mo. App. 502. § 3811.
 Webber v. Townley, 43 Mich. 534. § 4421.
 Webber v. Virginia, 103 U. S. 344. § 5481.
 Webber v. Williams College, 23 Pick. (Mass.) 302. §§ 4719, 4725.
 Weber v. Fickey, 47 Md. 196. §§ 3630, 3635.
 Weber v. Fickey, 52 Md. 500. §§ 1695, 3657, 3659, 3688.
 Weber v. Lee Co., 6 Wall. (U. S.) 210. §§ 1118, 1119.
 Weber v. Spokane Nat. Bank, 50 Fed. Rep. 735. §§ 4267, 5262, 5705, 5976, 7318.
 Weber v. Spokane Nat. Bank, 64 Fed. Rep. 208; reversing 50 Fed. Rep. 735. § 7318.
 Weber v. Stagra, 75 Mich. 33. § 5625.
 Weber v. Zimmerman, 22 Md. 156. § 829.
 Weber v. Zimmerman, 23 Md. 45. § 832.
 Webster's Case, 32 L. J. (Ch.) 135. §§ 1792, 1803.
 Webster's Case, L. R. 2 Eq. 741, 844. §§ 1390, 1444, 1446, 1529.
 Webster v. Bank, 4 Ark. 423. § 7865.
 Webster v. Cooper, 14 How. (U. S.) 504. § 580.
 Webster v. Howe Machine Co., 54 Conn. 394. §§ 2324, 4720.
 Webster v. Turner, 12 Hun (N. Y.), 264. §§ 4443, 6712.
 Webster v. Upton, 91 U. S. 65. §§ 1138, 1140, 1185, 1450, 1669, 3222, 3417, 3419, 3537, 3552, 4921, 6469, 7282.
 Webster Wagon Co. v. Home Ins. Co., 27 W. Va. 314. § 8048.
 Weckler v. First Nat. Bank, 42 Md. 581. §§ 5638, 6329.
 Weed v. Snow, 3 McLean (U. S.), 265. § 5744.
 Weekley v. Weekley, 2 Young & C. Exch. 281, note. § 1067.
 Weeks v. Garibaldi & C. Min. Co., 73 Cal. 599. §§ 7368, 7379.
 Weeks v. Property, L. R. 8 C. P. 427. § 4125.
 Weeks v. Silver Islet & C. Min. Co., 23 Jones & Sp. (N. Y.) 1; 8 N. Y. St. Rep. 110. §§ 1806, 4622, 4637.
 Weetjen v. St. Paul & C. R. Co., 4 Hun (N. Y.), 529. § 6210.
 Wehrhane v. Nashville & C. R. Co., 42 Hun (N. Y.), 660. § 6134.
 Wehrman v. Reakirt, 1 Cin. Sup. (Ohio) 230, 239. §§ 3133, 3255, 3283, 3351, 3541.
 Weick v. Lander, 75 Ill. 93. § 6373.
 Weidenfeld v. Allegheny & C. R. Co., 47 Fed. Rep. 11. §§ 4500, 4502.
 Weidenfeld v. Sugar Run R. Co., 48 Fed. Rep. 615. §§ 3952, 4490.
 Weidenger v. Spruance, 101 Ill. 278. § 3034.
 Weigley v. The Coal Oil Co., 5 Phila. (Pa.) 67. § 3143.
 Weil v. Greene County, 69 Mo. 281. §§ 7503, 7524.
 Weinman v. Wilkinsburg & C. R. Co., 118 Pa. St. 192. §§ 598, 1855.
 Weinreich v. Weinreich, 18 Mo. App. 364. § 5815.
 Weir v. Barnett, 3 Ex. Div. 32; affirmed, 3 Ex. Div. 238. §§ 4074, 4097.
 Weir v. Bell, 3 Exch. Div. 238. §§ 1389, 4147.
 Weiser v. Smith, 22 La. An. 156. § 2794.
 Weismser v. Douglas, 64 N. Y. 91. §§ 1115, 1116.
 Weiss' Case, 5 De Gex & S. 402. § 473.
 Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295. § 3142.
 Weith v. Wilmington, 68 N. C. 24. § 6064.
 Weitner v. Delaware & C. Canal Co., 4 Robt. (N. Y.) 234. § 6358.
 Welch v. Hotchkiss, 39 Conn. 140. § 1028.
 Welch v. Importers' & C. Bank, 122 N. Y. 177. §§ 4059, 4064, 5317, 6172, 6173, 7711.
 Welch v. Old Dominion Min. & C. R. Co., 31 N. Y. St. Rep. 916; 10 N. Y. Supp. 174. §§ 7649, 7701.
 Welch v. Post, 99 Ill. 471, 474. § 614.
 Welch v. Sage, 47 N. Y. 143. §§ 4724, 6079.
 Welch v. Sainte Genevieve, 1 Dill. (U. S.) 130. § 7630.
 Welch v. Wadsworth, 30 Conn. 149. § 580.
 Welch v. Woodruff, 20 N. Y. St. Rep. 840; 3 N. Y. Supp. 622. § 4072.
 Weld v. Bangor, 59 Me. 416. §§ 2877, 2884.
 Weld v. Gas Light Co., 1 Stark. 189. § 6358.
 Weld v. Oliver, 21 Pick. (Mass.) 569. § 2471.
 Welder v. Shenandoah Iron Co., 83 Va. 768. §§ 239, 7663.
 Welker v. Potter, 18 Ohio St. 85. § 594.
 Welland Canal Co. v. Hathaway, 8 Wend. (N. Y.) 480. §§ 518, 524, 5137, 6246, 5275, 7665.

Welland—Western TABLE OF CASES CITED.

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Welter v. Pace Tobacco Co., 42 Hun (N. Y.), 659. § 2430.
Wellsburg & Co. Plank Road Co. v. Young, 12 Md. 476. §§ 1846, 1936, 7977.
Welles v. Cowles, 2 Conn. 567. §§ 1066, 3317.
Welles v. Cowles (2d case), 4 Conn. 182. § 1066.
Welles v. Graves, 41 Fed. Rep. 459. §§ 4113, 4367, 7838.
Welles v. Larrabee, 36 Fed. Rep. 866. §§ 3195, 3213, 7284.
Welles v. Stout, 38 Fed. Rep. 67. §§ 3642, 7236, 7293.
Welles v. Stout, 38 Fed. Rep. 807. §§ 3789, 7284, 7295, 7300.
Wellesley v. Wellesley, 4 Myrles & C. 561. § 6145.
Wellington v. Continental Const. & Imp. Co., 5 N. Y. Supp. 587; 52 Hun (N. Y.), 408. §§ 3429, 3469, 3493, 3676, 3713, 3716.
Wellington v. Gale, 13 Mass. 483. § 3248.
Wellman v. Chicago & C. R. Co., 83 Mich. 592. § 5408.
Wellman v. Howland Coal & Iron Works, 19 Fed. Rep. 51. § 3513.
Welles v. Evans, 20 Wend. (N. Y.) 251. § 5295.
Wells v. Hull, L. R. 10 C. P. 402. § 5059.
Wells v. Gates, 18 Barb. (N. Y.) 554, 557. §§ 14, 35, 2426, 3223, 5316.
Wells v. Jewett, 11 How. Pr. (N. Y.) 247. § 4578.
Wells v. Jones, 41 Mo. App. 1. § 1856.
Wells v. Northern Pacific R. Co., 23 Fed. Rep. 469. §§ 203, 7901.
Wells v. Pierce, 27 N. H. 503. § 1486.
Wells v. Prince, 15 Gray (Mass.), 562. § 4146.
Wells v. Rahway & Co., 19 N. J. Eq. 402. §§ 3911, 3914, 6494.
Wells v. Robb, 43 Kan. 201. §§ 1081, 3598, 3838.
Wells v. Rodgers, 60 Mo. 525. §§ 309, 355, 1867, 3934.
Wells v. Smith, 7 Abb. Pr. (N. Y.) 261. § 2516.
Wells v. Southern Minnesota R. Co., 1 McCrary (U. S.), 18. § 4692.
Wells v. Tucker, 3 Binn. (Pa.) 366. § 2390.
Wells v. Wells, 35 Miss. 638. § 7337.
Wellsborough v. Railroad Co., 76 N. Y. 182. § 1138.
Wellsborough & Co. Plank Road Co. v. Griffin, 57 Pa. St. 417. §§ 258, 277, 7148.
Wells, Fargo & Co. v. Northern Pac. R. Co., 23 Fed. Rep. 469; 10 Sawy. (U. S.) 441. § 7942.
Wells, Fargo & Co. v. Oregon Co., 8 Sawy. (U. S.) 614; 15 Fed. Rep. 561. § 5535.
Welsh v. Bekey, 1 Penn. & W. (Pa.) 57, 61. § 6939.
Welsh v. First Division & C. R. Co., 25 Minn. 314. §§ 5995, 6111.
Welsh v. Kirkpatrick, 30 Cal. 202. § 7612.
Welsh v. Plumas County, 80 Cal. 338. § 5940.
Welsh v. State, 126 Ind. 71. § 5482.
Welsh Flannel & Co., Re, L. R. 20 Eq. 360. § 3136.
Welton v. Missouri, 91 U. S. 275. §§ 1025, 5481, 7878, 8105, 8115.
Welton v. Pacific R. Co., 34 Mo. 358. § 7659.
Welton v. State, 91 U. S. 275. § 5481.
Wendell v. Baxter, 12 Gray (Mass.), 494. § 6358.
Wendell v. Chrysler, 73 Mich. 424. § 6041.
Wendell v. Mugridge, 19 N. H. 109, 112. § 3363.
Wendover v. Lexington, 15 B. Mon. (Ky.) 258. § 5570.
Wenlock v. River Dee Co., 10 App. Cas. 354; 36 Ch. Div. 875, note; 19 Q. B. Div. 155; 38 Ch. Div. 534. §§ 5697, 5700, 5702, 5703, 5704.
Wentworth's Appeal, 82 Pa. St. 469, 471. §§ 3145, 3153.
Wentworth v. Lloyd, 32 Beav. 467. § 5300.
Werner v. Pen Argyl Land Imp. Co., 133 Pa. St. 457. § 4144.
Wert v. Crawfordville & Co., 19 Ind. 242. §§ 228, 1364, 1370, 1409, 5942, 7669.
Wertheim v. Continental & Co. Co., 21 Blatchf. (U. S.) 246. § 7738.
Wertz v. Wertz, 11 Mo. App. 30. § 1166.
Wesson v. Seaboard & C. R. Co., 4 Jones L. (N. O.) 379. § 6298.
West Ex parte, 56 Law Times (N. S.), 622. § 1377.
West v. Belding, 21 Pac. Rep. 1123. § 1187.
West v. Bullskin Prairie Ditching Co., 32 Ind. 138. § 231.
West v. Camden, 135 U. S. 507. §§ 4017, 4018, 4682.
West v. Carolina Ins. Co., 31 Ark. 476. §§ 2656, 6598, 6599.
West v. Crawford, 80 Cal. 19. §§ 1187, 1205, 1703, 1739.
West v. Eureka Imp. Co., 40 Minn. 394. § 7662.
West v. Hitchcock, 21 Pac. Rep. 1136. § 1187.
West v. Laraway, 28 Mich. 464. § 2928.
West v. Madison Co. Ag. Board, 82 Ill. 205. §§ 5090, 6016, 6131, 6159, 6203.
West v. Randall, 2 Mason (U. S.), 181. § 4565.
West v. Skrip, 1 Ves. Sr. 239. § 1084.
West v. West & Co. Man. Co., 44 Hun (N. Y.), 623. §§ 6504, 6505, 6506.
West Baton Rouge v. Duralde, 22 La. An. 107. § 2020.
Westbourne Grove Drapery Co., Re, 5 Ch. Div. 248. § 3122.
West Boylston v. Mason, 102 Mass. 341. § 4376.
West Branch Bank v. Armstrong, 40 Pa. St. 278. §§ 2332, 2781.
West Branch Boom Co. v. Dodge, 31 Pa. St. 285. § 5434.
West Branch Boom Co. v. Pennsylvania & C. Land Co., 121 Pa. St. 143. §§ 5347, 5667.
Westburg v. Kansas City, 64 Mo. 493. § 4708.
Westchester & C. R. Co. v. Jackson, 77 Pa. St. 321. §§ 2246, 2265.
West Chester & C. R. Co. v. Miles, 55 Pa. St. 209. § 3308.
Westchester Fire Ins. Co. v. Earle, 33 Mich. 143. § 945.
Westcott v. Atlantic Silk Co., 3 Met. (Mass.) 282, 290. §§ 4617, 4643, 4661.
Westcott v. Fargo, 6 Lans. (N. Y.) 319; affirmed, 61 N. Y. 542. §§ 2806, 7602.
Westcott v. Minnesota Mining Co., 23 Mich. 145. §§ 853, 1763.
West Devon & C. Mine, Re, L. R. 27 Ch. Div. 106. §§ 4426, 4427.
West End Narrow Gauge R. Co. v. Dameron, 4 Mo. App. 414. §§ 1104, 3554.
Westerfield v. Radde, 7 Daly (N. Y.), 326. §§ 4617, 4622, 4643.
Westerfield v. Radde, 12 Daly (N. Y.), 450; 67 How. Pr. (N. Y.) 204. § 4230.
Western v. Genesee Mut. Ins. Co., 12 N. Y. 253. § 7970.
Western & C. R. Co. v. Manro, 32 Md. 280. § 1940.
Western & C. R. Co. v. Rollins, 82 N. C. 523. § 99.
Western & C. R. Co. v. Smith, 75 Ill. 496. §§ 365, 405.
Western & C. R. Co. v. Taylor, 6 Heisk. (Tenn.) 408. § 7371.
Western Ark. Bank v. Sebastian County, 5 Dill. (U. S.) 414. § 1126.
Western Bank v. Bairs, L. R. 4 Ch. 381. § 4106.
Western Bank v. Gilstrap, 45 Mo. 419. §§ 4886, 5286.
Western Bank v. Tallman, 15 Wis. 82. § 7434.
Western Bank v. Tallman, 17 Wis. 530. § 1654.
Western Bank of Scotland v. Addie, L. R. 1 H. L. (Sc.) 145. §§ 1384, 1447, 1462, 4096, 4486, 6312, 6323, 6326.
Western Boatman's Benevolent Assn. v. Kribben, 43 Mo. 37, 41. §§ 4914, 5711.
Western Canada Oil Co., Re, 1 Ch. Div. 115. § 1587.
Western College v. Cleveland, 12 Ohio, 375, 378. § 6275.
Western Cottage Organ Co. v. Reddish, 61 Iowa, 55. § 5962.
Western Female Seminary v. Blair, 1 Disney (Ohio), 370. § 5070.
Western Marine & Ins. Co., Re, 8 Ill. 289. § 7075.
Western Maryland R. Co. v. Franklin Bank, 60 Md. 36. § 4933.
Western Mining & C. Co. v. Peytona Canal Coal Co., 8 W. Va. 408. § 1078.
Western Nat. Bank v. Perez (C. A.) (1891), 1 Q. B. 304. § 7990.
Western News Co. v. Wilmarth, 33 Kan. 510. §§ 6276, 6298, 6314.
Western North Carolina R. Co. v. Rollins, 82 N. C. 523. §§ 5457, 6605, 6869, 6828.
Western Plank Road Co. v. Central Union Telephone Co., 116 Ind. 229. §§ 5938, 5940.
Western R. Co. v. Bayne, 11 Hun (N. Y.), 166. §§ 4043, 4617, 4622, 4646.
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Western R. Co. v. Sistrunk, 85 Ala. 352. § 7679.
Western Screw & Co. v. Cousley, 72 Ill. 531. §§ 480, 481.

TABLE OF CASES CITED. Western—Whetstone

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- Western Union Tel. Co. v. Com., 110 Pa. St. 405. §§ 5562, 8117.
- Western Union Tel. Co. v. Conant, 11 Colo. 111. §§ 7423, 7539, 7539.
- Western Union Tel. Co. v. Dickinson, 40 Ind. 444. §§ 7448, 7453.
- Western Union Tel. Co. v. Eyser, 2 Colo. 141; reversed, 91 U. S. 495. §§ 6383, 7676.
- Western Union Tel. Co. v. Fenton, 52 Ind. 1. § 5461.
- Western Union Tel. Co. v. Hamilton, 50 Ind. 181. § 5461.
- Western Union Tel. Co. v. Kansas Pac. R. Co., 4 Fed. Rep. 284. § 5357.
- Western Union Tel. Co. v. Massachusetts, 125 U. S. 530. § 683.
- Western Union Tel. Co. v. Mayer, 28 Ohio St. 521. §§ 7884, 7887, 8117.
- Western Union Tel. Co. v. Mayor & C., 38 Fed. Rep. 552. §§ 599, 5462, 5499.
- Western Union Tel. Co. v. Pendleton, 95 Ind. 12. § 5461.
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- Western Union Tel. Co. v. Pennsylvania, 128 U. S. 39. § 5562.
- Western Union Tel. Co. v. Pleasants, 46 Ala. 641. §§ 7989, 7998.
- Western Union Tel. Co. v. Reed, 96 Ind. 195. § 5461.
- Western Union Tel. Co. v. Rich, 16 Kan. 517. § 6303.
- Western Union Tel. Co. v. Richmond, 26 Gratt. (Va.) 1, 20. § 7790.
- Western Union Tel. Co. v. St. Joseph & C. R. Co., 3 Fed. Rep. 430. § 5357.
- Western Union Tel. Co. v. State, 64 N. H. 265. §§ 8094, 8122.
- Western Union Tel. Co. v. State, 62 Tex. 630. § 659.
- Western Union Tel. Co. v. Tierney, 57 Hun (N. Y.), 357; 10 N. Y. Supp. 940, 948. § 5562.
- Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. Rep. 1. § 5357.
- Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. Rep. 423. § 5357.
- Western Union Tel. Co. v. Yopst, 113 Ind. 248. §§ 4897, 6291.
- Westervelt v. Demarest, 46 N. J. L. 37. §§ 4144, 4145.
- Westervelt v. Gregg, 12 N. Y. 202. § 670.
- Westfall v. Jones, 23 Barb. (N. Y.) 9. § 4067.
- West Feliciana R. Co. v. Johnson, 5 How. (Miss.) 273. § 4870.
- Westfield v. Mayo, 122 Mass. 100. § 4376.
- Westfield Bank v. Cornen, 37 N. Y. 320. §§ 5208, 5221, 5310.
- Westinghouse Machine Co. v. Wilkinson, 79 Ala. 312. § 5963.
- Westman v. Snickerafabrik, 1 Ex. Div. 237, 240. § 7990.
- Westmoreland v. Martin, 24 S. C. 238. § 7056.
- Westmoreland & Co. v. Fielden [1891], 3 Ch. 15, 26. §§ 3404, 3419, 3557.
- West Nashville Planing Mill Co. v. Nashville Savings Bank, 85 Tenn. 252. §§ 1185, 1681, 3223.
- Weston's Case, 10 Ch. Div. 579. §§ 4027, 4066.
- Weston's Case, L. R. 4 Ch. 20. §§ 3231, 3233, 3256, 3257.
- Weston's Case, L. R. 5 Ch. 614. §§ 3271, 3273.
- Weston's Case, L. R. 6 Eq. 17. § 1550.
- Weston v. Bear River & Co., 5 Cal. 186; 6 Cal. 425. §§ 2389, 2397, 2401, 2409, 2634, 2737, 3238.
- Weston v. Charleston, 2 Pet. (U. S.) 449. § 2855.
- Weston v. Dane, 51 Me. 461. § 7780.
- Weston v. Foster, 7 Met. (Mass.) 297. § 7572.
- Weston v. Hunt, 2 Mass. 500, 501. §§ 8, 5777.
- Weston v. Lane, 40 Kan. 479. § 6811.
- Weston v. Loyhed, 30 Minn. 221. § 6950.
- West Philadelphia & C. R. Co. v. Union & C. R. Co., 9 Phila. (Pa.) 495. § 617.
- West Philadelphia Canal Co. v. Innes, 3 Whart. (Pa.) 198. §§ 3222, 3225.
- West River Bridge Co. v. Dix, 6 How. (U. S.) 507; affirming 16 Vt. 446. §§ 5, 500, 5615.
- Westropp v. Solomon, 8 C. B. 345. § 2741.
- West Salem Land Co. v. Montgomery Land Co., 89 Va. 192. §§ 4623, 4647, 4658, 5286, 5313.
- West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557; 3 Dill. (U. S.) 403. §§ 4789, 4794, 4798.
- West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434. §§ 5537, 5550.
- West Virginia Transp. Co. v. Volcanic Oil and Coal Co., 5 West Va. 382. §§ 200, 5513.
- West Winsted & C. Assn. v. Ford, 27 Conn. 282. §§ 518, 1870, 5249, 7665.
- West Wisconsin R. Co. v. Supervisors, 35 Wis. 257. § 52, 5408.
- West Wisconsin R. Co. v. Supervisors, 93 U. S. 535. § 2823.
- Wetherbee v. Baker, 35 N. J. Eq. 501. §§ 1579, 1606, 2964, 3510.
- Wetherbee v. Fitch, 117 Ill. 67. §§ 4621, 4622, 4629, 4943, 5258.
- Wethey v. Andrews, 3 Hill (N. Y.), 582. § 5752.
- Wetmore v. St. Paul & C. R. Co., 5 Dill. (U. S.) 531. § 276.
- Wetumpka v. Winter, 29 Ala. 651. §§ 1115, 1118, 5396.
- Wetumpka & C. R. Co. v. Bingham, 5 Ala. 657, 658. § 97, 5176.
- Wetumpka & C. R. Co. v. Cole, 6 Ala. 655. §§ 7506, 7807.
- Weyant v. New York & C. R. Co., 3 Duer (N. Y.), 360. § 6347.
- Weyer v. Second Nat. Bank, 57 Ind. 198. §§ 2381, 2530, 2795.
- Weymouth v. Boyer, 1 Ves. 416. § 1506.
- Weymouth v. Sanborn, 43 N. H. 171. § 3187.
- Weymouth v. Washington & C. Co., 1 MacArthur (U. S.), 19. § 7889.
- Weymouth & C. Steam Packet Co., Re (1891), 1 Ch. 66. § 1600.
- Whaalan v. Mad River & C. R. Co., 8 Ohio St. 249, 251. § 6350.
- Whalen v. Centenary Church, 62 Mo. 326. § 6350.
- Whaley v. Dawson, 2 Sch. & Lef. 367. § 3527.
- Whaley v. Gaillard, 21 S. C. 560. § 1128.
- Whaley & C. Co. v. Green, 5 Q. B. Div. 109. §§ 457, 461, 462, 467.
- Whalley v. Whalley, 1 Vern. 484. § 4011.
- Wharton v. Mobile School Commis., 43 Ala. 598. § 594.
- Whastman v. Pearson, L. R. 3 C. P. 422. §§ 4930, 6283.
- Whedon v. Peoria & C. R. Co., 42 Ill. 494. § 7660.
- Wheat v. Rice, 97 N. Y. 296. § 2234.
- Whedon v. Gorham, 38 Conn. 408, 412. § 3021.
- Wheeden v. Railroad Co., 2 Phila. (Pa.) 23. § 12.
- Wheeler, Matter of, 2 Abb. Pr. (N. S.) 361. §§ 745, 3976.
- Wheeler v. Bramah, 3 Camp. 310. § 3722.
- Wheeler v. Faurot, 37 Ohio St. 26. § 1432.
- Wheeler v. Frontier Bank, 23 Me. 308. § 3033.
- Wheeler v. Millar, 90 N. Y. 353. §§ 1906, 3136, 3809, 3810.
- Wheeler v. Millar, 24 Hun (N. Y.), 541. § 3396.
- Wheeler v. Newbould, 16 N. Y. 392. §§ 2664, 2668, 2671, 2699.
- Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347. §§ 2174, 2186, 2288 5306.
- Wheeler v. Pullman Iron & C. Co., 143 Ill. 197. §§ 6528, 6703.
- Wheeler v. San Francisco & C. R. Co., 31 Cal. 46. §§ 5871, 5874.
- Wheeler v. Thayer, 121 Ind. 64. §§ 2930, 3418, 3461.
- Wheeler v. Walker, 45 N. H. 355. §§ 4455, 7731, 7740.
- Wheeler v. Worcester, 10 Allen (Mass.), 591. § 1476.
- Wheeler & C. Co. v. Boyce, 35 Kan. 350. §§ 6276, 6312.
- Wheeler & Wilson Man. Co. v. Lawson, 57 Wis. 400. § 7434.
- Wheeling & C. Transp. Co. v. Baltimore & C. R. Co., 1 Cinc. Ohio, 311. § 8019.
- Wheeling & C. Trans. Co. v. Wheeling, 9 W. Va. 170. § 8096.
- Wheelock v. Kost, 77 Ill. 296. §§ 1858, 3170, 3192, 3213, 3263, 7271.
- Wheelock v. Moulton, 15 Vt. 519. §§ 18, 1073, 3231, 3317, 3967, 4875, 5096, 7074.
- Wheelock v. Post, 77 Ill. 296. § 1909.
- Wheelock v. Wheelwright, 5 Mass. 104. § 2454.
- Whetless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469. §§ 676, 6312.
- Wherry v. Hale, 77 Mo. 20. §§ 6033, 6037.
- Whetstone v. Ottawa University, 13 Kan. 320. § 216.

Whicker—Whitney TABLE OF CASES CITED.

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 Whipple v. Whitman, 13 R. I. 512, § 4943.
 Whitaker v. Brooks, 90 Ky. 68, §§ 2803, 2919.
 Whitaker v. Delaware &c. Canal Co., 87 Pa. St. 34, § 5347.
 Whitaker v. Grummond, 68 Mich. 249, §§ 1553, 1562.
 Whitaker v. Kilroy, 70 Mich. 635, §§ 4686, 4850, 4851.
 Whitaker v. Masterton, 106 N. Y. 277, §§ 4229, 4242, 4247, 4250.
 Whitaker v. Smith, 81 N. C. 340, § 3145.
 Whitaker v. Summer, 7 Pick. (Mass.) 551, § 7507.
 Whitmore v. Waterhouse, 4 Car. & P. 383, § 6288.
 Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, §§ 2857, 2872, 2884.
 Whitby v. Harrison, 10 Up. Can. C. P. 337, § 294.
 Whichote v. Lawrence, 3 Ves. 740, § 4060.
 White's Case, 10 Ch. Div. 720; 12 Ch. Div. 511, §§ 3712, 3792.
 White's Case, 3 De Gex & S. 157, §§ 1098, 3275.
 White's Case, L. R. 1 Q. B. 66, § 3285.
 White, Ex parte, 2 S. C. 469, §§ 275, 6258.
 White v. Bellefontaine Lodge, 30 Mo. App. 652, § 7668.
 White v. Brownell, 4 Abb. Pr. (N. s.) (N. Y.) 162, 192; 2 Daly (N. Y.) 329, 357, §§ 799, 847, 881, 893, 895, 896, 912, 913, 914, 1034, 4395.
 White v. Campbell, 5 Humph. (Tenn.) 38, §§ 6718, 6719, 6745.
 White v. Carpenter, 2 Paige (N. Y.), 217, § 6141.
 White v. Connecticut &c. Ins. Co., 4 Dill. (U. S.) 177, § 5491.
 White v. Connecticut Fire Ins. Co., 120 Mass. 330, § 5265.
 White v. Cotzhausen, 129 U. S. 329, § 6534.
 White v. Coventry, 29 Barb. (N. Y.) 305, § 6275.
 White v. Crow, 17 Fed. Rep. 98, § 7561.
 White v. Cuyler, 6 T. R. 176, § 5074.
 White v. Darby Fishing Co., 2 Conn. 260, § 5139.
 White v. Dougherty, Mart. & V. (Tenn.) 309, § 1084.
 White v. Flannigan, 1 Md. 525, § 7771.
 White v. Florence Bridge Co., 4 Ala. 464, § 4457.
 White v. Fox, 29 Conn. 570, § 4942.
 White v. Franklin Bank, 22 Pick. (Mass.) 181, §§ 1772, 5983, 6004.
 White v. Haight, 16 N. Y. 310, §§ 1546, 4121, 7232, 7244.
 White v. Havens, 20 How. Pr. (N. Y.) 177, §§ 5857, 7235.
 White v. Hindley Local Board, L. R. 10 Q. B. 219, § 6363.
 White v. Horsford, 37 Iowa, 566, § 4336.
 White v. How, 3 McLean (U. S.), 111, §§ 632, 4171, 4269, 4270, 4272, 4368.
 White v. Howard, 33 Conn. 342, 361, § 7919.
 White v. Howard, 46 N. Y. 144, §§ 5783, 5784.
 White v. Jones, 33 Ill. 159, § 1034.
 White v. Joy, 13 N. Y. 83, § 7247.
 White v. Keokuk &c. R. Co., 52 Iowa, 97, §§ 7142, 7148.
 White v. Knox, 111 U. S. 784, § 3119.
 White v. Kuntz, 107 N. Y. 518, §§ 1402, 1515.
 White v. Lester, 4 Abb. App. Dec. (N. Y.) 585, § 5814.
 White v. Madison, 26 N. Y. 117, § 5028.
 White v. National Bank, 102 U. S. 658, § 7091.
 White v. New York Agricultural Soc., 45 Hun, 560, § 740.
 White v. Ross, 4 Abb. App. Dec. (N. Y.) 589, §§ 513, 522, 5853, 7651.
 White v. Ross, 15 Abb. Pr. (N. Y.) 66, § 5275.
 White v. Salisbury, 33 Mo. 150, §§ 2387, 2394.
 White v. Sawyer, 16 Gray (Mass.), 586, § 1475.
 White v. Schuyler, 1 Abb. Pr. (N. Y.) 300, § 2425.
 White v. Schuyler, 31 How. Pr. (N. Y.) 38, § 2728.
 White v. Skinner, 31 Johns. (N. Y.) 307, §§ 5028, 5076, 5085, 5131, 5137.
 White v. State, 69 Ind. 273, §§ 497, 7652, 7748.
 White v. Syracuse &c. R. Co., 14 Barb. (N. Y.) 559, §§ 90, 1102, 5719.
 White v. Vermont &c. R. Co., 21 How. (U. S.) 575, §§ 6064, 6066.
 White v. Watkins, 23 Ill. 482, § 1432.
 White v. Westport Cotton Man. Co., 1 Pick. (Mass.) 215, §§ 4622, 4629, 4849, 5747.
 White v. White, 105 Mass. 325, § 590.
 White v. Whitman, 1 Curtis (U. S.), 594, § 6211.
 White v. Wood, 35 N. Y. St. Rep. 338; 13 N. Y. Supp. 631, § 6246.
 White &c. Man. Co. v. Pettes Importing Co., 30 Fed. Rep. 864, §§ 4152, 6492, 6508, 7793.
 White's Bank v. Toledo Ins. Co., 12 Ohio St. 601, §§ 2343, 5638, 5748, 5749.
 Whitechurch v. Hide, 2 Atk. 391, § 7776.
 Whitecomb v. Jacob, 1 Salk. 160, § 7094.
 White's Creek Turp. Co. v. State, 16 Lea (Tenn.), 24, § 6429.
 White v. Lewis, 25 La. An. 568, § 634.
 White Hall &c. R. Co. v. Myers, 16 Abb. Pr. (N. s.) (N. Y.) 34, §§ 1287, 1312.
 Whitehead v. Arkansas &c. R. Co., 23 Ark. 460, § 5695.
 Whitehead v. Barron, 2 Mood. & R. 248, § 431.
 Whitehead v. Vineyard, 50 Mo. 30, §§ 6195, 6199.
 Whitehead v. Wooten, 43 Miss. 523, § 6880.
 Whitehill v. Jacobs, 75 Wis. 474, §§ 1618, 1630.
 Whitehouse's Case, L. R. 3 Eq. 790, §§ 1444, 1446.
 Whitehouse, Re, 9 Ch. Div. 595, § 3786.
 Whitehouse v. Andrewsoggin R. Co., 62 Me. 208, § 6343.
 Whitehouse v. Birmingham Canal Co., 25 L. J. (Ex.) 27, §§ 6342, 6370.
 Whitehouse v. Fellows, 10 O. B. (N. s.) 765; 30 L. J. (C. P.) 306, § 6363.
 Whitehurst v. Whitehurst, 83 Va. 153, § 5973.
 Whitey v. Mississippi Water &c. Co., 38 Minn. 523, § 5626.
 Whiteman v. Wilmington &c. R. Co., 2 Harr. (Del.) 514, §§ 5588, 5589, 5600, 5626, 6303, 6305, 7394.
 White Mountains R. Co. v. Eastman, 34 N. H. 124, 134, §§ 446, 1313, 1400, 1513, 1516, 1579, 1580, 1733, 1784, 1921, 1922, 1925, 7732.
 White Mountains R. v. White Mountains Railroad, 50 N. H. 50, §§ 6162, 6601.
 White River Bank, Matter of, 23 Vt. 773, § 45.
 White River Lumber Co. v. Southwestern Imp. Asso., 55 Ark. 625, § 7965.
 White River Turp. Co. v. Vermont Central R. Co., 21 Vt. 590, §§ 5348, 5399, 5401, 5615, 5617.
 Whitesall v. Northampton, 49 Pa. St. 526, § 2848.
 Whitesides v. Cannon, 23 Mo. 457, § 1097.
 Whitesides v. Neely, 30 S. C. 31, § 614.
 White Sewing Machine Co. v. Betting, 46 Mo. App. 417, § 2437.
 Whitewater Valley Canal Co. v. Boden, 8 Blackf. (Ind.) 130, § 7691.
 White Water Valley Canal Co. v. Hawkins, 4 Ind. 474, § 5045.
 White Water &c. Co. v. Vallette, 21 How. (U. S.) 414, § 5045.
 Whitfield v. Le Despencer, Cowp. 751, § 6363.
 Whitfield v. Southeastern R. Co., 1 El. Bl. & El. 115, §§ 6298, 6310.
 Whitford v. Laidler, 94 N. Y. 145, §§ 5088, 5094.
 Whiting v. Crandall, 78 Mo. 593, § 1636.
 Whiting v. Fond du Lac, 25 Wis. 188, §§ 1115, 1117.
 Whiting v. Sheboygan &c. R. Co., 25 Wis. 167, §§ 27, 1120, 5458.
 Whiting v. Story County, 54 Iowa, 81, § 7758.
 Whiting v. Wellington, 10 Fed. Rep. 810, § 5256.
 Whittingham v. Bowen, 22 Vt. 317, §§ 5595, 5596.
 Whitley v. Fooy, 6 Jones Eq. (N. C.) 34, §§ 7084, 7092.
 Whitlock v. Heard, 13 Ala. 776, § 2662.
 Whitman v. Boston &c. Railroad, 3 Allen (Mass.), 133, § 5626.
 Whitman v. Cox, 26 Me. 335, §§ 1080, 6718, 6720, 6748, 7681, 7683, 7720.
 Whitman v. Granite Church, 24 Me. 236, §§ 1931, 7737.
 Whitman v. Mason, 40 Ind. 189, § 7247.
 Whitman v. Porter, 107 Mass. 522, §§ 14, 3794.
 Whitman Gold &c. Mining Co. v. Baker, 3 Nev. 386, §§ 5638, 5795, 5807, 7913, 7915.
 Whitmore v. Coats, 14 Mo. 9, § 5036.
 Whitmore v. Fourth Cong. Soc., 2 Gray (Mass.), 306, § 7703.
 Whitney, Re, 14 Nat. Bank Reg. 3, § 1402.
 Whitney v. Atlantic &c. R. Co., 44 Me. 362, § 5885.
 Whitney v. Bank of United States, 13 Pet. (U. S.) 6, § 6245.
 Whitney v. Butler, 118 U. S. 655, §§ 3192, 3285, 3286.
 Whitney v. Cammann, 137 N. Y. 342, § 4228.
 Whitney v. Cammann, 18 N. Y. Supp. 200, § 4233.
 Whitney v. First Nat. Bank, 50 Vt. 388, § 5951.
 Whitney v. Mayo, 15 Ill. 251, §§ 4566, 4583, 4584.
 Whitney v. Ragsdale, 33 Ind. 107, §§ 2866, 2876.
 Whitney v. South Paris Man. Co., 39 Me. 316, §§ 4851, 5756, 5759.

TABLE OF CASES CITED. Whitney—Williams

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 Whitney v. Union Trust Co., 65 N. Y. 578. §§ 3945, 5106.
 Whitney v. Wyman, 101 U. S. 392. §§ 2992, 5322.
 Whitney Arms Co. v. Barlow, 63 N. Y. 62; 68 N. Y. 62; 6 Jones & S. (N. Y.) 554. §§ 3398, 4187, 4223, 4247, 4333, 5743, 6015, 6021, 6026.
 Whitney Nat. Bank v. Parker, 41 Fed. Rep. 402. §§ 2863, 2872, 2883.
 Whiton v. Chicago & C. R. Co., 25 Wis. 424. §§ 7468, 7470.
 Whittaker v. Charleston Gas Co., 16 W. Va. 717. § 2622.
 Whittaker v. Johnson County, 10 Iowa, 161. § 1118.
 Whittaker v. Kershaw, 45 Ch. Div. 320. § 3324.
 Whittmore v. Amoskeag Bank, 25 Fed. Rep. 819. § 4570.
 Whittmore v. Amoskeag Bank, 134 U. S. 527. § 7436.
 Whittenton Mills v. Upton, 10 Gray (Mass.), 582. §§ 5838, 5970.
 Whitthorne v. St. Louis & C. Co., 3 Tenn. Ch. 147. § 4695.
 Whittington v. Farmers' Bank, 5 Har. & J. (Md.) 489. §§ 1972, 3801, 4441, 5175, 7665.
 Whittlesey v. Delaney, 73 N. Y. 571. §§ 6950, 6951.
 Whittlesey v. Frantz, 74 N. Y. 456. § 6864.
 Whittton v. Whittton, 38 N. H. 127. § 3383.
 Whitwell v. Brigham, 19 Pick. (Mass.) 117. § 3842.
 Whitwell v. Putnam Fire Ins. Co., 6 Lams. (N. Y.) 168. § 5265.
 Whitwell v. Warner, 20 Vt. 425. 444. §§ 2943, 2944, 2973, 2974, 3008, 3970, 4349, 6496.
 Whitworth v. Pelton, 81 Mich. 98. §§ 7810, 7818.
 Whyte v. Nashville, 2 Swan (Tenn.), 364. § 1021.
 Wichita Sav. Bank v. Atchison & C. R. Co., 20 Kan. 519. § 6331.
 Wick China Co. v. Brown, 164 Pa. St. 449. § 7782.
 Wickersham v. Brittan, 93 Cal. 34. § 3881.
 Wickersham v. Chicago Zinc Co., 18 Kan. 481. §§ 5204, 5205, 5206, 5207.
 Wickersham v. Crittenden, 93 Cal. 17. §§ 3913, 4381, 4389, 4479, 4480, 4500, 4554, 4555, 4566, 4578, 4581, 7415, 7582.
 Wickes v. Adirondack Co., 2 Hun (N. Y.), 112. § 6064.
 Wicks v. Monihan, 8 N. Y. Supp. 121. § 4393.
 Widdy v. Washburn, 16 Johns. 49. § 788.
 Widening Bushwick Avenue, Matter of, 48 Barb. (N. Y.) 9. § 5595.
 Widrig v. Newport Street R. Co., 82 Ky. 511. § 4029.
 Wieland v. White, 109 Mass. 392. § 4943.
 Wiggin v. Coffin, 3 Story (U. S.), 1. § 6381.
 Wiggin v. Dorr, 3 Sumn. (U. S.) 410, 414. § 7045.
 Wiggin v. Freewill Baptist Church in Lowell, 8 Met. (Mass.) 301. § 715.
 Wiggin v. New York, 9 Paige (N. Y.), 16, 20, 21. § 7774.
 Wiggin v. United States, 1 Ct. of Cl. (U. S.) 182. § 5621.
 Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 144. § 6839.
 Wiggins v. Bodding, 3 Car. & P. 544. § 6373.
 Wiggins v. Hathaway, 6 Barb. (N. Y.) 632. § 6363.
 Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365. §§ 8094, 8096, 8124, 8125.
 Wiggins Ferry Co. v. Ohio & C. R. Co., 142 U. S. 396. § 6239.
 Wiggs v. Shuttleworth, 13 East, 87. § 1048.
 Wight v. People, 15 Ill. 417. §§ 6792, 6795.
 Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4. §§ 1081, 1149, 1224, 1311, 1393, 1849, 1958.
 Wightman v. Townroe, 1 Mau. & Sel. 412. §§ 1377, 1909, 3330.
 Wigon, Town of, v. Pilkington, 1 Keb. 597. § 836.
 Wigwall v. Union Coal Min. Co., 37 Iowa, 129. § 8077.
 Wilber v. Glen Iron Works, 18 Nat. Bank Reg. 178. §§ 3097, 3302.
 Wilbur v. Lynde, 49 Cal. 290. §§ 4044, 4046, 4060.
 Wilbur v. Stockholders of the Corporation, 18 N. B. R. 178. § 1695.
 Wilbur v. Stoepel, 82 Mich. 344. §§ 2058, 4455, 5659.
 Wilcox v. Bickel, 11 Neb. 154. §§ 4480, 4520.
 Wilcox v. Continental Life Ins. Co., 56 Conn. 468. §§ 7720, 7724.
 Wilcox v. Matteson, 53 Wis. 23. § 2436.
 Wilcox v. Paddock, 65 Mich. 23. § 611.
 Wilcox v. Toledo & C. R. Co., 43 Mich. 584. § 503.
 Wild v. Deig, 43 Ind. 455. §§ 5, 55, 5596.
 Wild v. Passamaquoddy Bank, 3 Mason (U. S.), 505. §§ 4748, 4789, 4790, 4791, 4804, 5133.
 Wilde v. Jenkins, 4 Paige (N. Y.), 481. §§ 4590, 6577, 6582.
 Wilde v. Milne, 26 Beav. 504. § 4548.
 Wilder v. Bailey, 3 Mass. 289. § 6898.
 Wilder v. Maine Central R. Co., 65 Me. 332. §§ 70, 5504.
 Wilds v. St. Louis & C. R. Co., 64 How. Pr. (N. Y.) 418. § 6095.
 Wildy v. Washburn, 16 Johns. (N. Y.) 49. § 761.
 Wile & Co. v. Onsel (Pa. C. P.), 10 Pa. County Ct. 659. § 7335.
 Wiles v. Maddox, 26 Mo. 77. § 1084.
 Wiles v. Suydam, 64 N. Y. 173. §§ 3321, 3398, 4164, 4335.
 Wiley, Re, 4 Biss. (U. S.) 172. § 2615.
 Wiley v. First Nat. Bank, 47 Vt. 546. § 5951.
 Wilkie v. Silliman, 62 Ill. 170. § 590.
 Wilkes v. Davis, 3 Meriv. 507. § 7408.
 Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281. §§ 6359, 7625, 7781.
 Wilkesbarre City Hospital v. Luzerne, 84 Pa. St. 59. § 1013.
 Wilkins v. Allen, 18 How. (U. S.) 385, 393. § 5788.
 Wilkins v. Despard, 5 T. R. 112. § 6587.
 Wilkins v. Fry, 1 Meriv. 244. § 3725.
 Wilkins v. Thorne, 60 Md. 253. § 8011.
 Wilkinson's Case, L. R. 2 Ch. 636. §§ 1438, 1444, 1446.
 Wilkinson v. Anglo-California Co., 17 Jur. 231. § 1179.
 Wilkinson v. Baerle, 41 N. J. Eq. 635. §§ 4071, 6494, 6530.
 Wilkinson v. Culver, 23 Blatchf. (U. S.) 416. § 7334.
 Wilkinson v. Delaware & C. R. Co., 22 Fed. Rep. 353. § 7891.
 Wilkinson v. Hoffman, 61 Wis. 637. § 7753.
 Wilkinson v. Leland, 2 Pet. (U. S.) 627. §§ 590, 2939, 3014.
 Wilkinson v. Parry, 4 Russ. 272. § 4582.
 Wilkinson v. Providence Bank, 3 R. I. 22. § 2445.
 Wilkinson v. Scott, 17 Mass. 249, 251. § 2026.
 Wilkinson v. Yale, 6 McLean (U. S.), 16. § 3060.
 Wilks v. Back, 2 East, 142. §§ 5074, 5080, 5089, 5090, 5146.
 Wilks v. Davis, 3 Meriv. 507. § 7754.
 Willamette Falls & Co. v. Williams, 1 Or. 112. §§ 7507, 7513.
 Willamette Freighting Co. v. Stannus, 4 Or. 261. §§ 1739, 1914.
 Willamette Man. Co. v. Bank of British Columbia, 119 U. S. 191. §§ 5361, 5363, 5374, 6133, 6134.
 Willamette Valley The. 66 Fed. Rep. 565; affirming 62 Fed. Rep. 293. § 7342.
 Willard v. Killingworth, 8 Conn. 247. § 1017.
 Willard v. Warren, 17 Wend. (N. Y.) 257. § 5933 a.
 Willard v. White, 56 Hun (N. Y.), 561. § 2708.
 Willare v. Dubois, 29 Ill. 48. § 7068.
 Willcocks, Ex parte, 7 Cow. (N. Y.) 402, 410. §§ 726, 732, 734, 745, 958, 2624.
 Willets v. Phoenix Bank, 2 Duer (N. Y.), 121. §§ 4814, 4816.
 Willey v. Parratt, 3 Exch. 209. § 447.
 Williams' Case, 1 Ch. Div. 576. §§ 3203, 3211, 3256, 3257.
 Williams' Case, 2 Keb. 558. § 829.
 Williams' Case, L. R., 9 Eq. 225, note. §§ 3255, 3257.
 Williams Ex parte, L. R. 2 Eq. 214. § 459.
 Williams v. Augusta, 4 Ga. 509. § 1025.
 Williams v. Babcock, 25 Barb. (N. Y.) 109. §§ 7233, 7234.
 Williams v. Bank of Illinois, 1 Gilm. (Ill.) 667. § 6600.
 Williams v. Bank of Michigan, 7 Wend. (N. Y.) 542; 5 Wend. (N. Y.) 478. §§ 14, 220, 518, 524, 7661, 7665, 7666, 7689, 7696.
 Williams v. Bank of United States, 2 Pet. (U. S.) 102. § 2674.
 Williams v. Benet, 34 S. C. 112. § 1591.
 Williams v. Boice, 38 N. J. Eq. 364. § 2136.
 Williams v. Bruffy, 95 U. S. 176, 183. § 5427.
 Williams v. Cammack, 27 Miss. 224. § 1118.
 Williams v. Cheney, 3 Gray (Mass.), 215. §§ 4639, 4698, 7954.
 Williams v. Cheney, 8 Gray (Mass.), 206. §§ 7950, 7953, 7954.
 Williams v. Chester & C. R. Co., 5 Eng. L. & Eq. 497. §§ 4697, 5060.

Williams—Wilson TABLE OF CASES CITED.

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Williams v. Colby, 6 N. Y. Supp. 459. § 4155.
Williams v. College Corner & Co. Road Co., 45 Ind. 170. § 4408.
Williams v. Colonial Bank, 38 Ch. Div. 388. §§ 2591, 2592, 2609, 2636, 2746.
Williams v. Controllers, 18 Pa. St. 275. § 7758.
Williams v. Creaswell, 51 Miss. 817. §§ 682, 7889.
Williams v. Delaware & Co. R. Co., (Pa. C. P.) 28 W. N. C. 282. § 8019.
Williams v. Dorrier, 135 Pa. St. 445. § 4783.
Williams v. Evans, 87 Ala. 725. §§ 1308, 1562, 1668.
Williams v. Fletcher, 129 Ill. 356. §§ 2400, 2593.
Williams v. Franklin Township Assn., 26 Ind. 310. §§ 513, 1825, 1827, 7658, 7670.
Williams v. Fullerton, 20 Vt. 346. § 4733.
Williams v. Gage, 49 Miss. 777. § 1084.
Williams v. Gregg, 2 Strobb. Eq. (S. C.) 297. §§ 4992, 4994.
Williams v. Halliard, 38 N. J. Eq. 373. §§ 4103, 4128, 4732.
Williams v. Hanna, 40 Ind. 535. §§ 3170, 3173, 3221, 4206.
Williams v. Harding, L. R. 1 H. L. 9. §§ 2017, 3208.
Williams v. Hedley, 8 East, 378. §§ 5714, 5745.
Williams v. Hingham & Co. Turnp. Corp., 4 Pick. (Mass.) 341. § 6360.
Williams v. Ingersoll, 89 N. Y. 508. § 8073.
Williams v. Jackson Co. Patrons, 23 Mo. App. 132. §§ 6503, 6504, 6567.
Williams v. Jersey, 1 Craig & P. 91. § 5246.
Williams v. Jones, 38 Md. 555. § 7812.
Williams v. Kelsey, 6 Ga. 365. § 4756.
Williams v. Land, 4 Taunt. 729. § 7432.
Williams v. Lash, 8 Minn. 496. § 7866.
Williams v. Lowe, 4 Neb. 382. §§ 1707, 2317.
Williams v. McDonald, 42 N. J. Eq. 392; 37 N. J. Eq. 409. §§ 4103, 4109.
Williams v. McKay, 46 N. J. Eq. 25. §§ 3962, 4071, 4072, 4107, 4108, 4109, 4671, 4732.
Williams v. McKay, 40 N. J. Eq. 189. §§ 4104, 4108, 4109.
Williams v. Mechanics' Bank, 5 Blatchf. (U. S.) 59. §§ 2392, 2511.
Williams v. Merritt, 23 Ill. 623. § 5300.
Williams v. Meyer, 41 Hun (N. Y.), 545. § 2003.
Williams v. Missouri & Co. R. Co., 3 Dill. (U. S.) 267. §§ 7449, 7465.
Williams v. Nolan, 58 Tex. 708. § 4943.
Williams v. Page, 24 Beav. 654. §§ 440, 443, 444, 445, 446, 2057, 4009, 4014.
Williams v. Page, 34 Beav. 661. § 4009.
Williams v. Parker, 136 Mass. 204, 207. §§ 2042, 2265, 2274.
Williams v. Perrin, 73 Ind. 57. § 2530.
Williams v. Piggett, 2 Exch. 201. §§ 432, 1908.
Williams v. Planters Ins. Co., 57 Miss. 759. §§ 6276, 6312.
Williams v. Price, 1 Sim. & St. 581. § 2661.
Williams v. Prince of Wales & Co., 23 Beav. 333. §§ 4424, 4426, 4427.
Williams v. Riley, 34 N. J. Eq. 398. § 4732.
Williams v. Salmon, 2 Kay & J. 463. §§ 440, 445.
Williams v. Savage Man. Co., 3 Md. Ch. 418. §§ 2056, 2069, 3277.
Williams v. School District in Lunenburg, 21 Pick. (Mass.) 75. § 792.
Williams v. School District, 33 Vt. 271. §§ 5592, 5594, 5598.
Williams v. Smith, 6 Cow. (N. Y.) 166. § 7756.
Williams v. State, 6 Lea (Tenn.), 549. §§ 635, 636.
Williams v. State, 23 Tex. 264. § 6608.
Williams v. St. George Harbour Co., 2 De Gex & J. 547. § 5297.
Williams v. Storm, 6 Coldw. (Tenn.) 203. § 5299.
Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 357. § 694.
Williams v. Supervisors, 122 U. S. 154. §§ 590, 2878, 2884.
Williams v. Taylor, 120 N. Y. 244. §§ 1702, 1705, 2003.
Williams v. Telegraph Co., 93 N. Y. 187. § 2128.
Williams v. Transportation Company, 14 Off. Gaz. (U. S.) 523. § 7484.
Williams v. Tripp, 11 R. I. 447. § 7373.
Williams v. Walbridge, 3 Wend. (N. Y.) 415. § 5740.
Williams v. Weaver, 75 N. Y. 30; affirmed, 100 U. S. 547. § 2871.
Williams v. Western Union Tel. Co., 93 N. Y. 162. §§ 2167, 2173, 2192.
Williams v. Wilkes, 14 Pa. St. 228. § 3571.
Williams & Co. v. Smith, 33 Wis. 530. § 7668.
Williamsburg & Co. Ins. Co. v. Frothingham, 122 Mass. 391. § 7666.
Williamsen, Ex parte, L. R. 5 Ch. 309. §§ 5699, 5702, 5979.
Williamson v. Keokuk, 44 Iowa, 88. § 619.
Williamson v. Kokomo & Co. Assn., 89 Ind. 390. § 240.
Williamson v. Mason, 12 Hun (N. Y.), 97 §§ 4745, 4802.
Williamson v. New Albany R. Co., 1 Biss. (U. S.) 138. § 6833.
Williamson v. New Jersey, 130 U. S. 189. § 5440.
Williamson v. New Jersey & Co. R. Co., 25 N. J. Eq. 13. § 6145.
Williamson v. New Jersey & Co. R. Co., 26 N. J. Eq. 398. § 330.
Williamson v. Smoot, 7 Mart. (La.) 31. §§ 1071, 1072, 7791.
Williamson v. Wadsworth, 49 Barb. (N. Y.) 294. § 3146.
Williamson v. Washington City & Co. R. Co., 33 Gratt. (Va.) 624. §§ 6932, 7114, 7116, 7118.
Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534. § 4943.
Williamsport v. Kent, 14 Ind. 306. § 5669.
Williamsport County v. Williamsport, 120 Pa. St. 12. § 5421.
William v. Berkeley Plowd. 239. § 5793.
Willis v. Child, 13 Beav. 117. §§ 820, 828, 891.
Willis v. Erie Tel. & Co., 37 Minn. 347. § 5606.
Willis v. Fry, 13 Phila. (Pa.) 33. §§ 1493, 1498.
Willis v. Mabon, 48 Minn. 140. §§ 3004, 3025, 3087.
Willis v. Swartz, 28 Pa. St. 413. § 1486.
Willis v. Vallette, 4 Met. (Ky.) 186. §§ 5194, 5197.
Willison v. Pateson, 7 Taunt. 440. § 1094.
Williston v. Michigan Southern & Co. R. Co., 13 Allen (Mass.), 400. § 4465.
Willits v. Waite, 25 N. Y. 577. §§ 7334, 7338, 7342.
Willlocks, Ex parte, 7 Cow. (N. Y.) 402, 410. §§ 3912, 3913, 3914.
Willoughby v. Chicago Junction R. & Co. Co., 50 N. J. Eq. 656. § 6032.
Willoughby v. Comstock, 3 Hill (N. Y.), 389. §§ 1815, 4075, 4235.
Will v. Sutherland, 4 Fxch. 211; 5 Exch. 715. § 1815.
Willson v. Blackbird Creek Marsh Co., 2 Pet. (U. S.) 245. §§ 5530, 5589, 5611.
Willson v. Nicholson, 61 Ind. 241. § 5169.
Willyard v. Hamilton, 7 Ohio, pt. 2, 111. §§ 5588, 5601.
Wilms v. Bank, 6 Ill. 667. §§ 531, 632, 6598.
Wilmarth v. Crawford, 10 Wend. (N. Y.) 341. § 1660.
Wilmer v. Atlanta & Co. R. Co., 2 Woods (U. S.), 409 427. § 6855.
Wilmerdoerffer v. Lake Mahopac Imp. Co., 12 Hun (N. Y.) 387. §§ 4539, 6636, 6775.
Winnington & Co. R. Co. v. Alsbrook, 110 N. C. 137. § 5571.
Winnington & Co. R. Co. v. Baker, 3 Dev. & B. (N. C.) 79. § 1841.
Winnington & Co. R. Co. v. Brunswick County, 72 N. C. 10. § 5561.
Winnington & Co. R. Co. v. Downward (Del.), 14 Atl. Rep. 720. § 5370.
Winnington & Co. R. Co. v. Reid, 13 Wall. (U. S.) 264; reversing, 64 N. C. 226. §§ 5570, 5659, 5677.
Winnington & Co. R. Co. v. Robeson, 5 Ired. L. (N. C.) 301. § 1337.
Winnington & Co. R. Co. v. Saunders, 3 Jones L. (N. C.) 126, 128. §§ 496, 18 0, 7689.
Winnington & Co. R. Co. v. Smith, 99 N. C. 131. § 5626.
Winnington & Co. R. Co. v. Thompson, 7 Jones L. (N. C.) 387. § 1846.
Winnington Railway Bridge Co. v. New Hanover County, 72 N. C. 15. § 5561.
Wilmot v. Corp. of Coventry, 1 You. & C. (Ex.) 513. §§ 5058, 5297.
Wilmoth v. Wilmoth, 34 W. Va. 426. § 5801.
Wilson's Case, L. R. 8 Eq. 240. §§ 3271, 3274.
Wilson, Ex parte, L. R. 8 Ch. 45. § 4157.
Wilson v. Abma Ins. Co., 27 Vt. 98. § 1034.
Wilson v. Allen, 6 Barb. (N. Y.) 542. §§ 6918, 6979.
Wilson v. Am. Academy of Music, 2 Pa. County Ct. 280. § 737.
Wilson v. Atlantic & Co. R. Co., 2 Fed. Rep. 453. § 2427.

- Wilson v. Bank of Montgomery County, 29 Pa. St. 537. § 1249.
- Wilson v. Brannan, 27 Cal. 253. § 2656.
- Wilson v. Bryant, 134 Mass. 291. § 7047.
- Wilson v. Boyce, 92 U. S. 320. § 6195.
- Wilson v. Carver, 4 Hayw. (Tenn.) 90. § 2771.
- Wilson v. Central Bridge, 9 R. I. 590. §§ 6681, 6685.
- Wilson v. Church, 9 Ch. Div. 552. § 7412.
- Wilson v. Church, 13 Ch. Div. 1. § 1205.
- Wilson v. Codman, 3 Cranch (U. S.), 193. § 5136.
- Wilson v. Com., 7 Bush. (Ky.), 536. § 5936.
- Wilson v. Commissioners, 7 Watts & S. (Pa.) 197. § 7758.
- Wilson v. Curzon, 5 Ry. Cas. 24. § 429.
- Wilson v. First Nat. Bank, 1 Wyo. T. 103. § 4476.
- Wilson v. Fuller, 3 Ad. & El. (N. S.) 63, 77. §§ 4783, 4929.
- Wilson v. Gaines, 9 Baxt. (Tenn.) 546. § 5569.
- Wilson v. Gaines, 103 U. S. 417. § 5545.
- Wilson v. Greenwood, 1 Swanst. 471, 480. § 6834.
- Wilson v. Hardesty, 1 Md. Ch. 66. § 590.
- Wilson v. Hunter, 14 Wis. 683. § 5295.
- Wilson v. Keating, 27 Beav. 121; 4 De Gex & J. 588. § 3203.
- Wilson v. Kelly, 30 S. C. 483. § 7056.
- Wilson v. Kings County Elevated R. Co., 114 N. Y. 487. §§ 3900, 5973, 5974.
- Wilson v. Little, 2 N. Y. 443. §§ 2619, 2622, 2645, 2648, 2668, 2670.
- Wilson v. Lord Bury, 5 Q. B. Div. 518. § 2663.
- Wilson v. Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24. §§ 7997, 8025, 8059.
- Wilson v. Metropolitan & C. R. Co., 120 N. Y. 145. § 4444.
- Wilson v. Metropolitan & C. R. Co., 6 N. Y. St. Rep. 234. § 5738.
- Wilson v. Moore, 1 Myl. & K. 126. § 4587.
- Wilson v. New York & C. R. Co., 2 N. Y. Supp. 65. § 620.
- Wilson v. Ohio & C. R. Co., 64 Ill. 542. § 5507.
- Wilson v. Perry, 29 W. Va. 169. § 652.
- Wilson v. Pittsburgh & C. Coal Co., 43 Pa. St. 424. §§ 1082, 3392, 4331.
- Wilson v. Proprietors of Central Bridge, 9 R. I. 590. § 731.
- Wilson v. Rockford & C. R. Co., 59 Ill. 273. § 5626.
- Wilson v. Rockland Man. Co., 2 Harr. (Del.) 67. § 5176, 6276.
- Wilson v. Rogers, 1 Wyo. 51. §§ 4473, 4733.
- Wilson v. Seligman, 144 U. S. 41; 36 Fed. Rep. 154. § 3606.
- Wilson v. Sprague Mowing Machine Co., 55 Ga. 672. §§ 7658, 7661, 7679.
- Wilson v. Spring & C. Co., 10 Cal. 445. § 3363.
- Wilson v. St. Louis & C. R. Co., 108 Mo. 589. §§ 2412, 2768, 3603, 3606.
- Wilson v. Stockholders, 43 Pa. St. 424. §§ 2008, 3402.
- Wilson v. Strobach, 59 Ala. 488. § 1084.
- Wilson v. Susquehanna Turnp. Co., 21 Barb. (N. Y.) 68. § 6360.
- Wilson v. Tesson, 12 Ind. 285. §§ 530, 4901, 6907.
- Wilson v. Townsend, 1 Barn. & Ald. 608. § 4959.
- Wilson v. Trustees, 8 Ohio, 174. § 7589.
- Wilson v. Vanacker, 1 Ld. Raym. 498. § 6611.
- Wilson v. Viscount Curzon, 15 Mees. & W. 577. § 1908.
- Wilson v. Webber, 2 Gray (Mass.), 558. § 7412.
- Wilson v. West Hartlepool & C. R. Co., 4 De Gex, J. & S. 475; 34 Beav. 187. § 5059, 5297.
- Wilson v. Williams, 14 Wend. (N. Y.) 146. § 5740.
- Wilson v. Wilson, 1 Barb. Ch. (N. Y.) 592. §§ 6979, 7135.
- Wilson v. Wills Valley R. Co., 33 Ga. 468. §§ 72, 74, 1287, 1748.
- Wilson Banking Co. v. Hunter, 7 Reporter, 455. § 7484.
- Wilson Sewing Machine Co. v. Boyington, 73 Ill. 534. § 4933.
- Wiltbank's Appeal, 6 Pa. St. 256. §§ 2194, 2199, 2215.
- Wiltbank v. Insurance Co., 7 Phila. (Pa.) 327. § 2215.
- Wilton v. Wilks, 2 Ld. Raym. 1129; 1 Salk. 203; 3 Salk. 349; Holt. 187. § 7624.
- Wilton Town Co. v. Humphrey, 15 Kan. 372. §§ 7613, 7865.
- Wiltz v. Peters, 4 La. An. 339. § 787.
- Winans v. McKean R. & C. Co., 6 Blatchf. (U. S.) 215, 221. §§ 2952, 6963.
- Winbourn's Case, 30 Fed. Rep. 167. § 7160.
- Winch v. Birkenhead & C. R. Co., 5 De Gex & S. 562; 16 Jur. 1035. §§ 315, 4519, 4566, 4578, 4585, 5358, 5880.
- Winch v. Conservators, 31 L. T. (N. S.) 128. § 6358.
- Winch v. Conservators of the Thames, L. R. 7 C. P. 458; L. R. 9 C. P. 378. §§ 6363, 6364.
- Winchel v. Stiles, 15 Mass. 230. § 3363.
- Winchester v. Baltimore & C. R. Co., 4 Md. 231. §§ 4657, 5205, 5206, 5207.
- Winchester & C. R. Co. v. Colfelt, 27 Gratt. (Va.) 777. § 6570.
- Winchester & C. Turnp. Co. v. Vimont, 5 B. Mon. (Ky.) 1. §§ 6570, 7853.
- Wincock v. Turpin, 96 Ill. 135, 141. §§ 3095, 3414, 3435, 3442, 3460.
- Windham Prov. Inst. v. Sprague, 43 Vt. 502. §§ 3020, 3173, 3178, 3581, 4206, 4317.
- Windram v. China, 151 Mac. 547. § 2358.
- Windsor v. China, 4 Me. 298. § 3944.
- Windsor v. Gover, 2 Saund. 302, 305 d. § 5045.
- Winstead v. City of Hudson, 28 N. J. L. 255. § 6064.
- Winfield Town Co. v. Maris, 11 Kan. 128, 147. § 4601.
- Wing v. Glick, 56 Iowa, 473. § 5169.
- Wing v. Harvey, 5 De Gex, M. & C. 265. § 5191.
- Wingate v. Wheat, 6 La. An. 238, 241. § 7342.
- Winget v. Quincy Building & C. Asso., 128 Ill. 67. § 522, 599.
- Winhall v. Sawyer, 45 Vt. 466. § 7283.
- Winkler v. Railroad Co., 21 Mo. App. 109. § 1619.
- Winkler v. Winkler, 40 Ill. 179. § 5596.
- Winn v. Macon, 21 Ga. 275. §§ 690, 1118.
- Winne v. Hampton, 3 Ark. 473, 475. §§ 5048, 5058.
- Winneshiek Ins. Co. v. Holzgrafe, 46 Ill. 422. § 7539.
- Winona & C. R. Co. v. Blake, 94 U. S. 180; affirming 19 Minn. 418. §§ 5530, 5535, 5543.
- Winona & C. R. Co. v. St. Paul & C. R. Co., 23 Minn. 359. § 4590.
- Winona & C. R. Co. v. Waldron, 11 Minn. 515. § 5626.
- Winship v. Bank of United States, 5 Pet. (U. S.) 582, 574. §§ 1377, 1909.
- Winship v. Smith, 61 Me. 118. §§ 5146, 5165.
- Winslow v. Cummings, 3 Cush. (Mass.) 358. § 295.
- Winslow v. Merchants' Ins. Co., 4 Met. (Mass.) 306. § 6141.
- Winslow v. Staten Island & C. R. Co., 51 Hun (N. Y.) 298; 4 N. Y. Supp. 169. § 7513.
- Winsor, Ex parte, 3 Story (U. S.), 411. §§ 1705, 2131, 2133, 2134, 3946, 3973, 4743, 4752.
- Winsor v. Savage, 3 Met. (Mass.) 346. § 3794.
- Winspear v. Holman, 37 Iowa, 542. § 25.
- Winthrop v. Brooks, 21 N. E. 514. §§ 1402, 1590.
- Winston v. Dorsett & C. Co., 129 Ill. 94. §§ 1402, 1590.
- Wint v. Webb, 3 Dev. (N. C.) 27. § 6728.
- Wintemute v. New Jersey Cent. R. Co., 5 Pa. County Ct. 648. §§ 7545, 8026.
- Winter v. Baker, 34 How. Pr. (N. Y.) 183; 50 Barb. (N. Y.) 432. §§ 4100, 4137, 4150, 4479.
- Winter v. Baldwin, 89 Ala. 483. § 4414.
- Winter v. Belmont Min. Co., 53 Cal. 428. §§ 2587, 2592.
- Winter v. Iowa & C. R. Co., 2 Dill. (U. S.) 487. § 6708.
- Winter v. Montgomery Gaslight Co., 69 Ala. 544. §§ 2544, 2545, 2593, 2595.
- Winter v. Muscogee R. Co., 11 Ga. 438. §§ 67, 68, 72, 74, 1272, 5638.
- Winterfield v. Milwaukee & C. R. Co., 29 Wis. 589. §§ 8076, 8077.
- Winters v. Armstrong, 37 Fed. Rep. 508. §§ 2079, 3563, 3564, 3692, 4465, 7091, 7092, 7282, 7296.
- Winters v. Hughes, 3 Utah, 443. § 643.
- Winthrop Sav. Bank v. Jackson, 67 Me. 570. § 2656.
- Wintringham v. Rosenthal, 25 Hun (N. Y.), 580. § 3223.
- Wisconsin & C. Bank v. Flier, 83 Mich. 496; 80 Mich. 87. §§ 4616, 4622.
- Wisconsin & C. R. Co. v. Wisconsin River Land Co., 71 Wis. 94. § 6189.
- Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32. § 5606.
- Wise v. Morgan, 13 Daly (N. Y.), 402; affirmed, 103 N. Y. 682. §§ 381, 7227.
- Wiseman v. Northern Pac. R. Co., 20 Or. 425. § 7738.
- Wiser v. Blachly, 1 Johns. Ch. (N. Y.) 607. § 5052.
- Wishmier v. State, 97 Ind. 79. § 620.
- Wiswall v. Sampson, 14 How. (U. S.) 52. §§ 6898, 6931, 7794.
- Wiswell v. Starr, 48 Me. 401. §§ 3092, 3345, 6671, 6868.

Wiswell—Woodward TABLE OF CASES CITED.

- Wiswell v. Starr**, 50 Me. 381. §§ 6870, 6902, 6908.
Witham v. Osburn, 4 Cr. 318. § 5586.
Witherhead v. Allen, 4 Abb. App. Dec. (N. Y.) 623. §§ 3078, 3360, 3623.
Witherhead v. Allen, 28 Barb. (N. Y.) 661. § 3623.
Witherington's Case, Sid. 71. § 829.
Witherley v. Regent's Canal Co., 12 O. B. (N. S.) 2: 3 Fost. & Fin. 61. § 6358.
Withnell v. Garthan, 6 T. R. 388. § 3914.
Witmer v. Schlatter, 2 Rawle (Pa.), 359. § 3039.
Witte v. Derby Fishing Co., 2 Conn. 260. §§ 4887, 5020, 5126, 5646.
Witter v. Grand Rapids Flouring Mill Co., 78 Wis. 543. §§ 5303, 5304.
Witter v. Mississippi & R. Co., 20 Ark. 463. §§ 72, 85, 1284, 1291.
Witter v. Miss. R. Co., 20 Ark. 483. § 72.
Witter v. Richards, 10 Conn. 37. § 1094.
Witters v. Foster, 26 Fed. Rep. 737. § 7283.
Witters v. Sowles, 31 Fed. Rep. 1: 24 Blatchf. (U. S.) 332. §§ 4103, 4111, 4261, 4262.
Witters v. Sowles, 33 Fed. Rep. 542; 32 Fed. Rep. 762. § 4829.
Witters v. Sowles, 32 Fed. Rep. 130, 767; 25 Fed. Rep. 168; 35 Fed. Rep. 640. §§ 3103, 7284, 7302.
Witters v. Sowles, 33 Fed. Rep. 700. §§ 1096, 1097.
Witts v. Steere, 13 Ves. 363. §§ 2199, 2212.
Wcoat v. Winnick, 3 N. H. 473. § 3035.
Woburn v. Boston & R. Co., 109 Mass. 283. § 4376.
Woburn v. Henshaw, 101 Mass. 193. § 4376.
Woford v. Gaines, 53 Ga. 485. § 3187.
Wolf v. Boettcher, 64 Ill. 316. §§ 6305, 7394.
Wolf v. Fink, 1 Pa. St. 435. § 1220.
Wolf v. Godard, 9 Watts (Pa.), 544. §§ 5061, 5176, 7658, 7664, 7665.
Wolf v. Schleifer, 2 Brewst. 563. § 5167.
Wolf v. Prosser, 73 Cal. 219. § 3672.
Wolfe v. Hartford & C. Ins. Co., 143 U. S. 389. § 7456.
Wolfe v. Mersereau, 4 Duer (N. Y.), 473. § 6298.
Wolfe v. Underwood, 91 Ala. 523. § 6695.
Wolfe v. Underwood, 96 Ala. 329. § 4557.
Wolfe v. Underwood, 97 Ala. 375. § 6695.
Wolffiel v. Mason, 16 Abb. Pr. (N. Y.) 221. § 5437.
Wolverhampton Water Works v. Hawksford, 7 C. B. (N. S.) 795. § 1959.
Woman's Christian Temperance Union v. Taylor, 8 Colo. 75. § 4955.
Womson v. Fenn, 129 Mass. 405. § 2432.
Wontner v. Shairp, 4 C. B. 404. §§ 1377, 1387, 1430, 1462, 1500.
Wood's Case, 3 De Gex & J. 85. §§ 1320, 1332, 1577.
Wood's Claim, 9 Week. Rep. 366; 10 Week. Rep. 662. § 5702.
Wood's Succession, 30 La. An. pt. II, 1002. § 4472.
Wood v. Auburn & R. Co., 8 N. Y. 160. § 7754.
Wood v. Bedford & R. Co., 8 Phila. (Pa.) 91. §§ 5353, 5356, 5359, 6140.
Wood v. Benson, 2 Cromp. & J. 94; 2 Tyrwh. 93. § 1048.
Wood v. Boney (N. J.), 21 Atl. Rep. 574. §§ 2730, 3933.
Wood v. Brooklyn, 14 Barb. (N. Y.) 425. § 1013.
Wood v. Coosa & R. Co., 32 Ga. 273. §§ 518, 1216, 1217, 1322, 1933, 6598, 7700, 7702, 7705.
Wood v. Corry Water Works Co., 44 Fed. Rep. 146. §§ 5316, 5705, 6016, 6019, 6025, 6033.
Wood v. Doane, 20 Vt. 612. § 5363.
Wood v. Draper, 24 Barb. (N. Y.) 187. §§ 4564, 4565.
Wood v. Dubuque & R. Co., 28 Fed. Rep. 910. § 6094.
Wood v. Duke of Argyll, 6 Mau. & G. 928. §§ 421, 435, 1908.
Wood v. Dummer, 3 Mason (U. S.), 308. §§ 1063, 1569, 1571, 1573, 1576, 2951, 2957, 2962, 2963, 3430, 3495, 3509, 3541, 3564, 3970, 4150, 4152, 6555, 6746, 7068, 7282, 7570.
Wood v. Fahnestock, 8 Watts (Pa.), 489. § 5194.
Wood v. Finch, 2 Fost. & Fin. 447. § 5167.
Wood v. Guarantee Trust & C. Co., 128 U. S. 416, §§ 6117, 7053, 7121.
Wood v. Hammond, 16 R. I. 98. §§ 5775, 5787.
Wood v. Hartford Fire Ins. Co., 13 Conn. 202. § 7421.
Wood v. Hayes, 15 Gray (Mass.), 375. § 2693.
Wood v. Independent School District, 44 Iowa, 27. § 6348.
Wood v. Jefferson Co. Bank, 9 Cow. (N. Y.) 194. §§ 508, 1931, 7665, 7669, 7639, 7690, 7702.
Wood v. Lake, 13 Wis. 85. § 6211.
Wood v. Lary, 47 Hun. (N. Y.), 550. § 2169.
Wood v. Lost Lake & C. Co., 23 Or. 20. §§ 4390, 4392, 4682, 4683.
Wood v. Maitland, 10 Phila. (Pa.) 84. § 2594.
Wood v. Meyer, (Miss.), 7 South. Rep. 359. §§ 6131, 6132.
Wood v. Peake, 8 Johns. (N. Y.) 69. §§ 761, 788.
Wood v. Pearce, 2 Disn. (Ohio) 411. §§ 2929, 2932.
Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619, 624. § 5265.
Wood v. Robbins, 11 Mass. 504. § 3821.
Wood v. Searle, J. Bridg. 141; 3 Leon. 8. §§ 849, 1040.
Wood v. Shaw, 3 Dow. Can. Jur. 169. § 4698.
Wood v. Steel, 6 Wall. (U. S.) 80. § 85.
Wood v. Stoddard, 2 Johns. (N. Y.) 194. § 7756.
Wood v. Strother, 76 Cal. 545. § 7778.
Wood v. Tate, 2 Bos. & Pul. (N. S.) 247. § 5045.
Wood v. Union Gospel Church Building Assn., 63 Wis. 9. §§ 238, 4507, 4508, 4568.
Wood v. Wellington, 30 N. Y. 218. § 5678.
Wood v. Whelen, 93 Ill. 153. §§ 4-0, 6033, 6178.
Wood v. Wiley Const. Co., 56 Conn. 87. §§ 220, 1847, 4875, 4891.
Wood v. Wood, L. R. 9 Exch. 190, 196. §§ 881, 926, 1806.
Wood v. Wood, 40 Ill. App. 182. §§ 3333, 3539.
Wood v. Wood, 4 Russ. 558. § 6999.
Woodard v. Fitzpatrick, 2 B. Mon. (Ky.) 61. § 6245.
Woodard v. Holland Medicine Co., 39 N. Y. St. Rep. 411. § 3489.
Woodbridge v. Addison, 6 Vt. 204. §§ 5291, 5293.
Woodbury v. Taylor, 3 Jones L. (N. C.) 504. § 85.
Woodruff's Case, 3 De Gex & S. 63. §§ 1605, 1643.
Woodfolk v. Nashville & C. R. Co., 2 Swan (Tenn.). 422. § 5626.
Woodford v. Union Bank, 3 Coldw. (Tenn.) 488. §§ 52, 72.
Woodhams v. Anglo-Australian Co., 2 De Gex, J. & S. 162. § 3595.
Woodhouse v. Commonwealth Ins. Co., 54 Pa. St. 307. § 1276.
Woodhouse v. Crescent Mut. Ins. Co., 35 La. An. 238. §§ 2464, 2489.
Wood Hydraulic & C. Co. v. King, 45 Ga. 34. §§ 3933, 4731, 5955, 7883.
Woodlawn Cemetery v. Everett, 118 Mass. 354. §§ 5470, 5486.
Woodman v. Hubbard, 25 N. H. 67. § 7959.
Woodman v. York & R. Co., 50 Me. 549. §§ 5070, 5071.
Wood Mowing Machine Co. v. Caldwell, 54 Ind. 270. §§ 7943, 7956.
Woodring v. Forks Township, 28 Pa. St. 375. § 6373.
Woodroof v. Howes, 88 Cal. 184. §§ 1516, 4480, 4559, 4581, 4595.
Woodruff's Estate, Tuck. (N. Y. Surr.) 55. § 2199.
Woodruff v. Dubuque & R. Co., 30 Fed. Rep. 91. §§ 734, 741, 2056, 4533.
Woodruff v. Erie R. Co., 25 Hun (N. Y.). 246; reversed, 93 N. Y. 609. §§ 5880, 5881, 5887, 5888, 5889, 6996, 7162.
Woodruff v. Hinman, 11 Vt. 592. § 1048.
Woodruff v. McDonald, 33 Ark. 97. § 1152.
Woodruff v. Farham, 8 Wall. (U. S.) 123. § 8115.
Woodruff v. Rochester & R. Co., 108 N. Y. 39. § 5974.
Woodruff v. Trapnall, 10 How. (U. S.) 190. §§ 3310, 5397, 5761.
Woodruff & Beach Iron Works v. Chittenden, 4 Bosw. 406. §§ 3095, 3443, 3759, 3787.
Woods v. Burke, 67 Mich. 674. § 7733.
Woods v. De Figanieri, 1 Robt. (N. Y.) 659. § 14.
Woods v. Godwin, 19 N. Y. Supp. 658. § 4209.
Woods v. Lawrence County, 1 Black (U. S.), 386. § 1118.
Woods v. Memphis & C. R. Co., 5 Rail. & Corp. L. J. 372. §§ 4523, 5719, 6405.
Woods v. Miller, 55 Iowa, 168. § 7738.
Woods v. Russell, 5 Barn. & Ald. 942. § 431.
Woodson v. Bank, 4 B. Mon. (Ky.) 203. §§ 518, 7639.
Woodstock v. Gallup, 28 Vt. 587. § 5597.
Woodstock Bank v. Downer, 27 Vt. 482. § 2802.
Woodstock Iron Co. v. Richmond & C. Extension Co., 129 U. S. 643. §§ 4017, 4020.
Woodstock Iron Co. v. Roberts, 87 Ala. 436. § 3774.
Woodward v. Central Bank, 4 Ga. 323. § 7068.
Woodward v. Com. (Ky.), 7 S. W. Rep. 613; 9 Ky. Law Rep. 670. § 8108.

- Woodward v. Ellsworth, 4 Colo. 580. §§ 2862, 7324.
 Woodward v. Spear, 10 Vt. 420. § 7547.
 Woodward v. St. Louis & C. R. Co., 85 Mo. 142. § 6312.
 Woodward v. Webb, 65 Pa. St. 254. § 6289.
 Woodward v. Payne, 74 N. Y. 196. § 5816.
 Woodward v. Wentworth, 133 Mass. 309. § 4017.
 Wooley v. Pole, 4 Barn. & Ald. 1. § 6064.
 Wooley v. Bates, 2 Car. & P. 417. § 4376.
 Woolf v. City Steamboat Co., 7 C. B. 103. § 7658.
 Woolf v. Hamilton, 2 Utah, 121. § 6264.
 Woollaston's Case, 4 De Gex & J. 437. §§ 1550, 1552, 1792, 1795, 1799.
 Woollaston's Case, 5 Jur. (N. S.) 617. § 1792.
 Woolley v. Idle, 4 Burr. 1951. § 1038.
 Woolley v. Kelly, 1 Barn. & C. 68. § 3072.
 Woolsey v. Dodge, 6 McLean (U. S.), 142. § 5570.
 Woolverton v. Taylor, 132 Ill. 197. §§ 4267, 4280, 4309.
 Woolwich v. Forrest, 2 N. J. L. 84. §§ 294, 7597.
 Woonsocket Union R. Co. v. Sherman, 8 R. I. 564. § 1353.
 Wooster v. Van Vechten, 10 Johns. (N. Y.) 467. § 5621.
 Wooten v. State, 24 Fla. 335. § 5488.
 Worcester v. Georgia, 6 Pet. (U. S.) 515. § 669.
 Worcester v. Norwich & C. R. Co., 109 Mass. 103. §§ 77, 5895.
 Worcester v. Railroad Comm'rs, 113 Mass. 161. § 5595.
 Worcester v. Western R. Corp., 4 Met. (Mass.) 556. § 5356.
 Worcester & C. R. Co. v. Hinds, 8 Cush. (Mass.) 110. §§ 1724, 1732, 3993.
 Worcester & C. R. Co. v. Railroad Comm'rs, 118 Mass. 561. § 5623.
 Worcester Corn Exchange Co., Re, 3 De Gex, M. & G. 180. § 5702.
 Worcester Medical Institution v. Harding, 11 Cush. (Mass.) 285. §§ 220, 518, 1853, 4354.
 Worcester Turnpike Co. v. Willard, 5 Mass. 80. §§ 1138, 1187, 1550, 1784, 3929, 7381, 7392.
 Wordsworth v. Davis, 75 N. C. 158. § 6726.
 Workingmen's Accommodation Bank v. Converse, 29 La. An. 369. § 5651, 7368.
 Workingmen's Banking Co. v. Rautenberg, 103 Ill. 460. §§ 4267, 4286.
 Workman v. Campbell, 46 Mo. 305. §§ 1206, 1832.
 Works v. Junction R. Co., 5 McLean (U. S.), 425. § 5691.
 Wormley v. Wormley, 8 Wheat. (U. S.) 421. § 7453.
 Wormwell v. Hallstone, 6 Bing. 668; 4 Moore & P. 512. §§ 14, 4348.
 Worrall v. Judson, 5 Barb. (N. Y.) 210. §§ 3192, 3224, 3283, 3284, 3358.
 Worrall v. Munn, 5 N. Y. 229. §§ 1253, 5077, 5109, 5295.
 Worsley v. Scarborough, 3 Atk. 392. § 5194.
 Worster v. Forty-Second Street R. Co., 50 N. Y. 203. § 5235.
 Worth, Ex parte, 4 Drew. 529. § 1387.
 Worth v. Commissioners, 82 N. C. 420. §§ 2812, 2848.
 Worth v. Commissioners, 90 N. C. 409. § 2848.
 Worth v. Petersburg R. Co., 89 N. C. 301. §§ 2828, 2829, 2830.
 Worth v. Wilmington & C. R. Co., 89 N. C. 291. § 2829.
 Worthington v. Sebastian, 25 Ohio St. 1. § 2848.
 Worthington v. Torney, 34 Md. 182. §§ 2622, 2671.
 Worts v. Watertown, 14 Fed. Rep. 534. § 7509.
 Woven Tape Skirt Co., Re, 8 Hun (N. Y.), 508. § 6692.
 Woven Tape Skirt Co., Re, 12 Hun (N. Y.), 111. § 6923.
 Wray v. Hazlett, 6 Phila. (Pa.) 155. § 7128.
 Wray v. Jamison, 10 Humph. (Tenn.) 186. § 6979.
 Wray v. Tuskegee Ins. Co., 34 Ala. 58. § 5745.
 Wreford v. People, 14 Mich. 41. § 1024.
 Wren, Ex parte, 63 Miss. 512. § 634.
 Wright's Appeal, 99 Pa. St. 425. §§ 1499, 2596.
 Wright's Case, L. R. Ch. 55. L. R., 12 Eq. 331. §§ 1429, 1441, 1446, 1559, 1553, 1555.
 Wright v. Boyd, 3 Barb. (N. Y.) 523. §§ 4758, 4802, 5151, 7592.
 Wright v. Boynton, 37 N. H. 9. § 5300.
 Wright v. Bundy, 11 Ind. 398. §§ 406, 3968, 6189, 7897.
 Wright v. Central & C. Water Co., 67 Cal. 532. § 765.
 Wright v. Com, 109 Pa. St. 560. §§ 756, 784.
 Wright v. Compton, 53 Ind. 337, 339. § 6288.
 Wright v. Crockery Ware Co., 1 N. H. 281. § 1220.
 Wright v. Dame, 1 Met. (Mass.) 237. § 7409.
 Wright v. Davenport, 66 Pa. St. 148. § 4302.
 Wright v. Delafield, 23 Barb. (N. Y.) 498. § 4957.
 Wright v. Douglass, 2 N. Y. 373. § 7790.
 Wright v. Douglass, 10 Barb. (N. Y.) 97. §§ 7952, 8079.
 Wright v. Fawcett, 4 Burr. 2041, 9045. § 834.
 Wright v. Field, 7 Ind. 376. §§ 3476, 3496.
 Wright v. Fire Ins. Co., 12 Mont. 474. § 7677.
 Wright v. Horton, 12 App. Cas. 371. § 6152.
 Wright v. Hughes, 119 Ind. 324. §§ 5697, 6016, 6020, 6041, 6082.
 Wright v. Lee, 2 S. Dak. 596. §§ 3865, 6466, 6467, 6473, 6474, 6478.
 Wright v. Lee, 4 S. Dak. 237. § 7957.
 Wright v. Malden & C. R. Co., 4 Allen (Mass.), 283. § 6352.
 Wright v. McCormack, 17 Ohio St. 86. §§ 3018, 3040, 3057, 3417, 3470, 3560, 3835.
 Wright v. Merchants' Bank, 1 Flipp. (U. S.) 568. § 7262.
 Wright v. Milwaukee & C. R. Co., 25 Wis. 46. §§ 263, 6239.
 Wright v. National Bank, 1 Flipp. (U. S.) 583. § 7263.
 Wright v. Nutt, 1 H. Black. 136. § 4369.
 Wright v. Oroville Min. Co., 40 Cal. 20. §§ 4010, 4479, 4517, 4520, 7868.
 Wright v. Petrie, 1 Smedes & M. Ch. 282. § 2958.
 Wright v. Petrie, 1 Smedes & M. Ch. (Miss.) 319. § 6555.
 Wright v. Pipe Line Co., 101 Pa. St. 204. §§ 6016, 6018, 6025.
 Wright v. Rogers, 26 Ind. 218. §§ 4629, 6734.
 Wright v. Shelby R. Co., 16 B. Mon. (Ky.) 4. § 1253.
 Wright v. Sill, 2 Black (U. S.), 544. § 5570.
 Wright v. Simpson, 6 Ves. 714. § 4369.
 Wright v. Springfield & C. R. Co., 117 Mass. 226. § 3858.
 Wright v. Steinkemeyer, 6 Mo. App. 575. § 3284.
 Wright v. Storrs, 32 N. Y. 691. § 4227.
 Wright v. Tuckett, 1 Johns. & H. 266. §§ 2199, 2206.
 Wright v. Turkey, 3 Cush. (Mass.) 297. § 52.
 Wright v. Warren, 4 De Gex & S. 357. § 2206.
 Wright v. Wilcox, 19 Wend. (N. Y.) 343. §§ 4096, 6290, 6298.
 Wrigley, Matter of, 8 Wend. (N. Y.) 141. § 1349.
 Wrought Iron Co. v. Johnson, 84 Ga. 754. § 5463.
 Wurtzberger v. Anniston Rolling Mills, 94 Ala. 640. § 1856.
 Wyandotte v. Corrigan, 35 Kan. 21. § 4861.
 Wyandotte v. Wood, 5 Kan. 603. §§ 582, 598.
 Wyandotte & C. R. Co. v. Waldo, 70 Mo. 629. § 5626.
 Wyatte v. Darenth Valley R. Co., 2 Com. B. (N. S.) 110. § 3357.
 Wych v. East India Co., 3 P. Wms. 309. § 7409.
 Wych v. Meal, 3 P. Wms. 310. §§ 7409, 7410.
 Wyckoff v. Cleveland Union Loan & C. Co., 33 N. Y. St. Rep. 423; 11 N. Y. Supp. 423. § 7610.
 Wyckoff v. Johnson, 2 S. Dak. 91. § 7741.
 Wyckoff v. Union & C. Co., 11 N. Y. Supp. 423; 33 N. Y. St. Rep. 422. §§ 7608, 7610.
 Wycoff v. Leamhead, 2 Dall. (U. S.) 92. § 6053.
 Wylam's Steam Fuel Co. v. Street, 10 Ex. 849. § 3209.
 Wylie v. White, 10 Rich. Eq. (S. C.) 294. § 2771.
 Wyman v. American Powder Co., 8 Cush. (Mass.) 168. § 4458.
 Wyman v. Berry, 3 Wash. 734. § 6466.
 Wyman v. Gray, 7 Har. & J. (Md.) 409. §§ 5126, 5132.
 Wyman v. Hollowell & C. Bank, 14 Mass. 58. §§ 256, 3971, 4777, 4917, 5174.
 Wyman v. Railroad Co., 4 Mo. App. 95. § 327.
 Wynhamer v. People, 13 N. Y. 378. §§ 5482, 6700.
 Wynn v. Booker, 22 Ga. 359, 362. § 7552.
 Wyon v. Garland, 19 Ark. 23. § 5018.
 Wynn Hall Coal Co., Re, L. R. 10 Eq. 515. § 6152.
 Wynne v. Newborough, 1 Ves. Jr. 165. § 6977.
 Wynne v. Price, 3 De Gex & S. 310. § 3308.
 Wyoming Fair Asso. v. Talbot, 3 Wyo. 244. § 2790.
 Yadin Nav. Co. v. Benton, 1 Hawks (N. C.) 422. § 7426.
 Yale v. Hampden & C. Turnp. Corp., 18 Pick. (Mass.) 357. § 6360.
 Yarborough v. Bank of England, 16 East. 6. §§ 4473, 6275, 6276, 6298, 6303, 7396.
 Yard v. Pacific Mut. Ins. Co., 10 N. J. Eq. 480. §§ 1635, 4485.
 Yardley v. Clothier, 49 Fed. Rep. 337. §§ 7299, 7300.
 Yater v. Mulien, 24 Ind. 277. § 2479.

- Yates v. Meadville, 56 Pa. St. 21. § 7759.
 Yates v. Nash, 8 C. B. (N. S.) 581. § 5126.
 Yates v. Van De Bogert, 56 N. Y. 526. § 5791.
 Yeager v. Scranton Trust Co. (Pa.), 14 Week Not. Cas. 296. § 3650.
 Yeager v. Wallace, 44 Pa. St. 294. §§ 6925, 6979.
 Yeates v. Hines, 24 Mo. App. 619. § 1717.
 Yeaton v. Bank of the Old Dominion, 21 Gratt. (Va.) 593. §§ 5416, 5691.
 Yeaton v. Eagle Oil & C. Co., 4 Wash. 183. § 2060.
 Yeaton v. Lynn, 5 Pet. (U. S.) 224. § 7665.
 Yeaton v. United States, 5 Cranch (U. S.), 281. §§ 4168, 6756.
 Yeldell v. Stemmons, 15 Mo. 443. § 2771.
 Yellow Jacket & C. Min. Co. v. Stevenson, 5 Nev. 224. §§ 4622, 4647.
 Yellow River Improvement Co. v. Arnold, 46 Wis. 214, 222. §§ 591, 612, 623.
 Yellow Stone Kit v. State, 88 Ala. 196. § 5483.
 Yelverton v. Conant, 18 N. H. 123. § 6211.
 Yick Wo v. Hopkins, 118 U. S. 356. § 5460.
 Yonkum v. Selph, 83 Tex. 607. § 7159.
 York's Appeal, 110 Pa. St. 69, 79. § 4072.
 York v. North Midland R. Co., 16 Beav. 485. § 4031.
 York v. Passaic Rolling Mill Co., 30 Fed. Rep. 471. §§ 1252, 2432.
 York v. Pilkington, 1 Atk. 282. § 3527.
 York v. State, 73 Tex. 651. § 7556.
 York & C. R. Co. v. Hudson, 16 Beav. 485. §§ 4022, 4024.
 York & C. R. Co. v. Hudson, 16 Beav. 495. §§ 4009, 4016, 4060, 4066.
 York & C. R. Co. v. Pratt, 40 Me. 447. § 1733.
 York & C. R. Co. v. Ritchie, 40 Me. 425. §§ 1769, 3945.
 York & C. R. Co. v. The Queen, 1 El. & Bl. 858. § 7827.
 York & C. R. Co. v. Winans, 17 How. (U. S.) 39. § 5356.
 York & C. Steamboat Co. v. Jersey Co., Hopk. (N. Y.) 460. § 7045.
 York County v. Small, 9 Watts & S. (Pa.) 320. § 783.
 Yost's Report, 17 Pa. St. 524. § 590.
 Youghiogheny Shaft Co. v. Evans, 72 Pa. St. 331. 3020. §§ 3020, 3502 a.
 Youmans v. Heartt, 34 Mich. 397, 401. § 3158.
 Young v. Booe, 11 Ired. L. (N. C.) 347. § 2617.
 Young v. Brice, 39 N. Y. St. Rep. 532. § 6516.
 Young v. Brice, N. Y. Supp. 123. §§ 3362, 3370, 3714.
 Young v. Cole, 3 Bing. (N. C.) 724. § 2741.
 Young v. Commissioners of Roads, 2 Nott & McC. (S. C.) 537. § 6363.
 Young v. Davis, 7 Hurlst. & N. 760; 2 Hurlst. & C. 197. § 6363.
 Young v. Drake, 15 N. Y. Super. 61. § 4479.
 Young v. Erie Iron Co., 65 Mich. 111. §§ 1364, 1618, 1619, 1841, 2934.
 Young v. Farwell, 139 Ill. 326. §§ 3424, 3434, 3460, 3481.
 Young v. Frier, 1 N. J. Eq. 465. § 6839.
 Young v. Glasscock, 79 Mo. 374. § 1430.
 Young v. Godwin, 19 N. Y. Supp. 656. § 4209.
 Young v. Grote, 4 Bing. 253. § 2563.
 Young v. Harrison, 6 Ga. 130. §§ 5381, 6598, 6600.
 Young v. Heermans, 66 N. Y. 374. § 6477.
 Young v. Hudson, 99 Mo. 102. §§ 4756, 4789.
 Young v. Marine Ins. Co., 1 Cranch C. C. (U. S.) 452. § 7757.
 Young v. McKay, 50 Fed. Rep. 394. §§ 3285, 3286.
 Young v. McKenzie, 3 Ga. 31. § 5595.
 Young v. Moses, 53 Ga. 628. §§ 4566, 7578.
 Young v. New York & C. Steamship Co., 15 Abb. Pr. (N. Y.) 69. §§ 3173, 3500, 3623.
 Young v. Rollins, 85 N. C. 485. §§ 256, 6848, 6874, 6881.
 Young v. Rondout Gas Light Co., 39 N. Y. St. Rep. 602; 15 N. Y. Supp. 443. §§ 4520, 4528, 4533.
 Young v. Rosenbaum, 39 Cal. 646. §§ 3074, 3077, 3078, 3368, 3380, 3735.
 Young v. South Tredegar Iron Co., 85 Tenn. 189. §§ 2353, 2414, 2591, 2607, 2765, 2786, 2787, 7422.
 Young v. Toledo & C. R. Co., 76 Mich. 485. § 4051.
 Young v. Vough, 23 N. J. Eq. 325. §§ 1032, 1898, 2319, 3236.
 Young v. Wempe, 46 Fed. Rep. 354. §§ 3046, 3221, 3419, 3751, 7265, 7286, 7288.
 Youngblood v. Georgia Imp. Co., 83 Ga. 797. § 1275.
 Youngblood v. Sexton, 32 Mich. 406. § 1028.
 Young ove v. Steinman, 80 Cal. 375. §§ 1711, 1715.
 Youngman v. Elmira & C. R. Co., 65 Pa. St. 278. § 7848.
 Young Men's Christian Assn. v. Dubach, 82 Mo. 475. §§ 7664, 7666, 7681.
 Yowell v. Dodd, 3 Bush. (Ky.), 581. §§ 5126, 5132, 5149.
 Yuba County v. Adams & Co., 7 Cal. 35. § 6898.
 Zabriskie v. Cleveland & C. R. Co., 23 How. (U. S.) 381. §§ 97, 101, 1102, 1118, 1869, 1870, 3033, 3990, 4497, 4520, 5020, 5247, 5249, 5250, 5303, 5868, 5970, 6064.
 Zabriskie v. Hackensack & C. R. Co., 18 N. J. Eq. 178. §§ 68, 71, 80, 91, 354, 3980, 4517, 4520, 5381.
 Zambrino v. Galveston & C. R. Co., 38 Fed. Rep. 449. § 7488.
 Zanesville v. Gas Light Co., 47 Ohio St. 1. §§ 5340, 5530.
 Zeigler v. First Nat. Bank, 22 Alb. L. J. 114. § 5226.
 Zeigler v. South & C. R. Co., 58 Ala. 594. § 5452.
 Zelaya Min. Co. v. Meyer, 8 N. Y. Supp. 487. §§ 1393, 1562.
 Zelnicker v. Brigham & C. Co., 74 Ala. 598. § 7409.
 Zeugner v. Best, 44 N. Y. Super. Ct. 393. § 4765.
 Ziegler v. Hoagland, 52 Hun (N. Y.), 385; 5 N. Y. Supp. 305. § 4480.
 Zimmer v. Schleeauf, 115 Mass. 52. § 3112.
 Zimmer v. State, 30 Ark. 677. §§ 326, 365, 371, 5338.
 Zimbleman v. Veeder, 98 Ill. 613. § 2664.
 Zinn v. Mendel, 9 W. Va. 580. §§ 4138, 4150.
 Zion Church v. St. Peter's Church, 5 Watts & S. (Pa.) 215. §§ 3363, 7658, 7665.
 Zirkel v. Joliet Opera House Co., 79 Ill. 334. §§ 1524, 1579.
 Zoll v. Soper, 75 Mo. 460. § 2775.
 Zoller v. Ide, 1 Neb. 439. § 5074.
 Zoltman v. San Francisco, 20 Cal. 96. § 5018.
 Zuccarello v. Nashville & C. R. Co., 12 Heisk. (Tenn.) 364. § 6358.
 Zugner v. Best, 12 Jones & Sp. (N. Y.) 393. § 4745.
 Zulueta's Claim, L. R. 5 Ch 444; reversing L. R. 9 Eq. 270. § 2054.
 Zurcher v. Magee, 2 Ala. 253, 255. § 6931.
 Zwang, Re, 39 Mo. App. 356. § 6534.

INDEX.

INDEX.

[This brief index, compiled by MR. CHARLES T. BOONE, author of treatises on the Law of Corporations, Mortgages, Real Property, etc., consists chiefly of an arrangement, under alphabetic heads, of the index lines preceding the sections, and of such cross-references thereto as will enable the searchers to find readily the principal subject matters. A thorough indexing of a work of such magnitude must be a long and laborious task, and must result, if thoroughly done and decently printed, in a volume of considerable magnitude.]

The sections number six thousand three hundred and thirty-three, and these contain many times that number of distinct propositions, each of which is supported by distinct cases or groups of cases, and each of which must be separately indexed. These, exclusive of matters of importance in the notes and exclusive of cross references, would make, according to the fullness of statement employed in making the index, a volume of from four hundred to eight hundred pages. Such an index it is hoped the author will be enabled to prepare within a reasonable time, and such an index, separately published, will, it is believed, constitute the most convenient and useful part of this great work.

Meanwhile the author's section-heads, which are given in the table of contents and here consolidated under alphabetic titles, will direct the reader to all the subject matters treated in this "monumental" work, and serve the purposes of ordinary and present use.

The publication of an elaborate index in a volume which had already exceeded one thousand pages was clearly impracticable, and to delay the publication of a volume which was announced for November until the lapse of a sufficient time to enable the author to prepare a thorough index would, it is thought, be an injustice to those having frequent occasion to consult the work.]

JANUARY, 1896.

THE PUBLISHERS.

Abandonment.

See DISSOLUTION; FORFEITURES.

of office of director. § 3887.

Abatement of actions.

See ACTIONS; PARTIES.

Abuse of franchises.

See FRANCHISES; FORFEITURES.

Acceptance.

See CHARTERS, subd. 1.

of special charters. §§ 52-63.

of office of director, proof. § 3885.

of subscription. §§ 1175-1178.

Accommodation paper.

See CORPORATE POWERS, subd. 4; NEGOTIABLE PAPER.

Accounting.

See ASSETS; RECEIVERS.

Actions.

See ASSESSMENTS; FOREIGN CORPORATIONS, subds. 5, 6; REMEDIES; STOCKHOLDERS; SUBSCRIPTIONS.

Actions—(Continued).

- by receivers. See RECEIVERS, subd. 9.
- against receivers. See RECEIVERS, subd. 15.
- by foreign corporations. §§ 7977-7984.
- against foreign corporations. §§ 7988-8012.
- against corporations created by concurrent legislation of several States. § 8012.
- by foreign corporations to recover back taxes. § 8135.
- 1. *By and against corporations, power to sue and be sued, in general.*
 - common-law power of corporations to sue and be sued. § 7360.
 - power to sue coextensive with the power to make contracts. § 7361.
 - exception as to liability for breach of corporate duties. § 7362.
 - this power conferred by statute and constitutional provisions. § 7363.
 - by what statutes. § 7364.
 - by what statutes not conferred. § 7365.
 - corporations deemed "persons" for remedial purposes. § 7366.
 - suable in what manner. § 7367.
 - power how affected by want of organization. § 7368.
 - de facto* corporations. § 7369.
 - power how affected by dissolution. § 7370.
 - what if the State is a member. § 7371.
 - sovereign States may sue as corporations. § 7372.
 - corporation cannot sue as a common informer. § 7373.
 - power to sue exercised by directors. § 7374.
 - corporation may maintain an action against its own members. § 7375.
- 2. *Actions by corporations.*
 - corporations entitled to what remedies. § 7380.
 - may maintain actions of *assumpsit*. § 7381.
 - may sue in trespass. § 7382.
 - may maintain actions sounding in damages. § 7383.
 - may have summary remedies. § 7384.
 - special statutory remedies in favor of corporations. § 7385.
 - remedies on commercial paper. § 7386.
 - action by corporation on promise made to its officer. § 7387.
 - demand in actions by corporations. § 7388.
- 3. *What actions lie against corporations.*
 - in general. § 7391.
 - when *assumpsit* will lie against corporations. § 7392.
 - when not. § 7393.
 - trespass. § 7394.
 - case. § 7395.
 - trover. § 7396.
 - replevin. § 7397.
 - ejectment. § 7398.
 - forcible entry and detainer. § 7399.
 - slander—libel—slander of goods. § 7400.
 - book account. § 7401.
 - account stated. § 7402.
 - use and occupation. § 7403.
 - actions on clauses of charter. § 7404.

Actions—(Continued).

actions on by-laws. § 7405.

actions for violations of public duties. § 7406.

specific performance. § 7407.

mode of compelling performance of agreement to arbitrate. § 7408.

bills in equity for discovery. § 7409.

mode of procedure to compel discovery in equity. § 7410.

further of this subject. § 7411.

statutory substitutes for discovery. § 7412.

bill of interpleader by agent of corporation. § 7413.

actions to recover payments voluntarily made. § 7414.

demand in actions against corporations. § 7415.

4. *Jurisdiction as depending upon residence and citizenship.* See JURISDICTION.
jurisdiction of State courts. §§ 7421-7440.

federal jurisdiction as dependent upon adverse citizenship. §§ 7447-7458.

removal of such actions from State to Federal courts. §§ 7462-7478.

inhabitaney of corporation for the purposes of Federal jurisdiction. §§ 7484-7489.

5. *Jurisdiction as depending upon process and its service.* See PROCESS.

what process used in actions against corporations. §§ 7495-7498.

service of process on corporations. §§ 7502-7547.

6. *Jurisdiction as dependent upon voluntary appearance.* See JURISDICTION.

7. *Parties to such actions.* See PARTIES.

8. *Names in which actions brought by corporations.* See NAME.

9. *Pleadings in such actions.* See PLEADINGS.

10. *Evidence in such actions.* See EVIDENCE.

11. *Matters of practice in such actions.* See PRACTICE.

12. *Injunctions in such actions.* See INJUNCTIONS.

13. *Limitations and laches.* See LIMITATIONS, STATUTE OF.

14. *Executions against corporations.* See EXECUTIONS.

Additional capital.

See CAPITAL STOCK, subd. 10.

Adjourned meetings.

See MEETINGS.

Admission.

See CORPORATE EXISTENCE; PLEADINGS.

of corporate existence by pleading general issue. § 1848.

Admissions.

See EVIDENCE; DECLARATIONS; AGENTS, subd. 2.

Adoption.

of by-laws. See BY-LAWS, subd. 2.

Adverse Possession.

See TITLE.

corporations may acquire title by. § 7837.

Agency.

See AGENTS.

Agents.

See ATTORNEYS; DIRECTORS; MANAGING AGENT.

1. *Powers of—in general.*

subordinate officers and agents' appointment, tenure, salaries, control of directors over. § 4873.

Agents—(Continued).

- corporations bound by the acts of their agents the same as natural persons. § 4874.
- individual stockholders and directors no inherent authority as agents. § 4875.
- sources of power in officers of corporations. § 4876.
- certain powers ascribed to certain officers by implication of law. § 4877.
- distinction between general and special agents. § 4878.
- this attempted classification disapproved. § 4879.
- general rule that the corporation is not bound by the officer's or agent's representations as to his authority. § 4880.
- both appointment and powers of agent proved by recognition, adoption, and habitual action. § 4881.
- theory that the fact that a corporate officer or agent exercises certain powers is evidence of authority. § 4882.
- further of the legal implication of rightful power from the habit of exercising it. § 4883.
- the governing principle: the corporation must have consented to the appearance of power exhibited by the agent. § 4884.
- illustrations of the principle. § 4885.
- authority not proved by previous isolated acts. § 4886.
- extent to which persons dealing with corporations are bound to take notice of the authority of their officers and agents. § 4887.
- bound to notice the extent of the power, but not chargeable with regularity of its exercise in the particular case. § 4888.
- may take the representation of the agent that it is rightly exercised. § 4889.
- bound to take notice of limitations of authority contained in the by-laws. § 4890.
- proof of the appointment of the agent. § 4891.
- what officers and agents held out as having powers commensurate with the general usages of the business. § 4892.
- proof of authority of agent. § 4893.
- further of this subject. § 4894.
- authority presumed from corporate seal and proper signatures. § 4895.
- antecedent authority proved by subsequent recognition and adoption. § 4896.
- time and place of doing official acts. § 4897.
- delivery and possession. § 4898.
- interpretation of grants of power to corporate agents: powers included by implication. § 4899.
- power of agent cannot exceed power of corporation. § 4900.
- power of agent ends with power of corporation. § 4901.
- but corporation responsible for acts of officers and agents holding over. § 4902.
- acts done in excess of authority by mere mistake. § 4903.
- determination of office or agency releases sureties on official bond. § 4904.
- but not so with the power of the directors. § 4905.
- corporate agents acting for each other. § 4906.

2. Declarations and admissions.

- the general rule stated. § 4912.
- declarations *dum ferve opus*. § 4913.
- declarations as to present matters. § 4914.
- admissible also when made with reference to past transactions. § 4915.

Agents—(Continued).

- authority to make scrutinized. § 4916.
- must have been made with reference to a matter within the scope of his agency. § 4917.
- must have been external—not internal. § 4918.
- declarations of individual stockholders not binding. § 4919.
- declarations of individual directors. § 4920.
- declarations of things contrary to law. § 4921.
- declarations by solicitors. § 4922.
- by insurance agents. § 4923.
- instances under the foregoing rules. § 4924.
- personal responsibility for erroneous declarations. § 4925.
- 3. *Liability of corporation for frauds of agents.*
 - grounds of this liability. § 4929.
 - innocent strangers not concerned with the rightful exercise by corporate agents of their powers. § 4930.
 - corporation responsible for the frauds of its officers and agents within the scope of their powers. § 4931.
 - corporation responsible for the illegal exercise of granted powers. § 4932.
 - illustrations of this principle. § 4933.
 - evidence of fraud in such cases. § 4934.
- 4. *Ratification of acts of.*
 - ratification tantamount to a precedent authorization. § 4938.
 - estops the corporation from proceeding against the agent. § 4939.
 - ratification of appointment of agent. 4940.
 - ratification by one agent of the act of another agent. § 4941.
 - ratifying a submission to arbitration. § 4942.
 - ratifying a compromise by attorneys. § 4943.
 - ratifying voidable contracts of insurance after loss. § 4944.
 - ratifying the employment of a surgeon by a railway station agent. § 4945.
 - what acts have been held ratifications. § 4946.
 - facts which have been held no ratification. § 4947.
- 5. *Powers touching particular acts.*
 - convey land. § 4951.
 - mortgage land. § 4952.
 - make lease of land. § 4953.
 - take a lease. § 4954.
 - purchase goods. § 4955.
 - sell goods. § 4956.
 - appoint agents. § 4957.
 - borrow money. § 4958.
 - execute commercial paper. § 4959.
 - power to indorse. § 4960.
 - power to indorse for accommodation. § 4961.
 - such notes *prima facie* corporate obligations. § 4962.
 - parties to actions upon promissory notes due corporation. § 4963.
 - corporation may be bound, though agent contract in his own name. § 4964.
 - such powers inferred from the public habit of exercising them. § 4965.
 - power to appoint agents to draw, indorse, etc. § 4966.

Agents—(Continued).

- power to arrange a novation. § 4967.
- to increase capital stock. § 4968.
- to make discovery. § 4969.
- pay broker in shares for procuring loan. § 4970.
- assign notes, choses in action, etc. § 4971.
- release contracts. § 4972.
- authority in special cases. § 4973.

6. *Matters relating to particular agents.*

- local insurance agents. § 4978.
- what acts of recognition bind the company. § 4979.
- liability of such agents to the company. § 4980.
- their liability to third parties. § 4981.
- trustees of bondholders in possession. § 4982.
- station agent of railroad company. § 4983.
- liability of company for surgical assistance employed by station agent. § 4984.
- civil engineer of railroad company. § 4985.
- railway contractors. § 4986.
- cashiers, book-keepers, etc., of manufacturing companies. § 4987.
- toll-gatherers. § 4988.

7. *Other matters.*

- responsibility of officers and agents to the corporation. § 4992.
- their personal liability for trespasses. § 4993.
- personal liability for *ultra vires* contracts. § 4994.
- their criminal responsibility. § 4995.
- their criminal responsibility for nuisances. § 4996.
- accepting assignments of wages of other employés. § 4997.
- liability of directors and officers for conspiracy to defraud. § 4998.
- statutes making embezzlement and conversion of corporate funds larceny. § 4999.
- statutes defining such offenses as embezzlement. § 5000.
- statutes making such offenses misdemeanors. § 5001.
- declared a felony, but civil remedies not merged. § 5002.
- sufficiency of indictments under such statutes. § 5003.
- questions in the interpretation of such statutes. § 5004.
- voluntary associations answerable for contracts of their agents. § 5005.

Agricultural fairs.

- organization of. § 133.

Alienation.

- See CONVEYANCES; TRANSFERS OF SHARES.
- of corporate franchises. See FRANCHISES, subd. 3.

Allotment of shares.

- See SHARES.

Alteration.

- See CONTRACTS; SUBSCRIPTIONS, subd. 6.
- of contract of subscription for stock. §§ 1267-1299.

Alumni.

- organization of. § 134.

Amalgamation.

- See CONSOLIDATION.

Amendments.

See CHARTERS.

of charters, generally. §§ 66-86.

of charters, by special laws. § 5465.

in case of failure to plead corporate existence. § 7679.

Amotion.

See DIRECTORS; REMOVAL.

distinction between amotion and disfranchisement. § 799.

observations of Mr. Willcock on this question. § 800

these observations applicable to corporations other than municipal. § 801.

power of amotion inherent in corporations. § 802.

power resides in corporation alone. § 803.

power resides in the body at large, not in the trustees. § 804.

removal of officers who hold at will. § 805.

Lord Mansfield's classification of grounds of amotion. § 806.

in what case there must be a previous trial and conviction. § 807.

misappropriating money: false charges of money. § 808.

bribery. § 809.

misconduct in respect of duties toward the corporation. § 810.

offenses touching the corporate record. § 811.

neglect of duty. § 812.

non-attendance at corporate meetings. § 813.

ineligibility: subsequent election to another office. § 814.

other grounds of removal. § 815.

statutory or charter power of removal. § 816.

what corporate action necessary. § 817.

power must be exercised at a corporate meeting. § 818.

and by a majority vote. § 819.

necessity of notice and a judicial inquiry. § 820.

exception in the case of continued desertion and non-residence. § 821.

conduct of the trial: the evidence. § 822.

assembling the meeting for the trial: notifying the members. § 823.

instances under the foregoing rule. § 824.

review of proceedings by *certiorari*. § 825.

extent of relief in equity. § 826.

illustration: dismissal of schoolmaster under English public school act of 1868.
§ 827.

where the power to remove is discretionary in the due exercise of the powers of
the trustees. § 828.

mandamus to reinstate. § 829.

several writs where there are several officers. § 830.

allegations of the writ. § 831.

what if directed to the individuals by name, and not to the corporation. § 832.

the return to the *mandamus*. § 833.

return may show any number of causes. § 834.

when not necessary to aver power of removal. § 835.

instances of good returns in such cases. § 836.

sufficient if made by proper officer until falsified. § 837.

whether the return should be under corporate seal. § 838.

Amotion—(Continued).

variance between writ and return. § 839.

other points of practice in proceedings by *mandamus*. § 840.

principles upon which the judicial courts review sentence of amotion. § 841.

Annual meetings.

See ELECTIONS; MEETINGS.

Annual reports.

See LIABILITY.

Appeal.

See REVIEW.

from order of inspection of books. § 4435.

Appearance.

See PROCESS.

voluntary, by corporation. See JURISDICTION, subd. 6.

Appointment.

See ELECTIONS.

of treasurer of corporation. § 4714.

of bank cashier. § 4739.

of managing agent. § 4847.

of receivers of corporations. See RECEIVERS, subd. 1.

of receiver, effect of. §§ 6893-6912.

of receiver by comptroller of the currency. § 7264.

Apportionment.

of stock, by commissioners. § 1247.

Apprentices.

See AGENTS.

Arbitration.

See CORPORATE POWERS.

by corporations. § 7754.

compelling railroad companies to submit claims to. § 5515.

Articles of association.

See ORGANIZATION.

subscription to. § 1157.

Assessments.

See CAPITAL STOCK, subds. 4-6; TAXATION.

of stock, questions relating to. §§ 2913-2919.

forfeiture of shares for non-payment of. § 1762, *et seq.*

1. Actions for assessments; parties.

action brought in corporate name. § 1815.

action in original name in case of change of name. § 1816.

authority of an agent to sue in the corporate name. § 1817.

actions by assignee of stock subscriptions. § 1818.

by State treasurer. § 1819.

non-joinder of other stockholders. § 1820.

2. Pleading.

form of the action. § 1823.

averments of the declaration. § 1824.

averments of corporate existence. § 1825.

averment of the existence of the board of directors. § 1826.

Assessments—(Continued).

averment of performance of conditions precedent. § 1827.
 such averment not necessary where the action is brought on the statute. § 1828.
 averment of consideration. § 1829.
 averment of notice of the call. § 1830.
 what instrument the foundation of the action. § 1831.
 filing the paper which is the foundation of the suit. § 1832.
 incidents of a good complaint where the subscription is made prior to organization. § 1833.
 averments to show Federal jurisdiction. § 1834.
 plea: answer. § 1835.

3. *Miscellaneous.*

suing for too much and recovering what is due. § 1838.
 instructions: facts essential to recovery must be submitted to the jury. § 1839.
 effect of changes pending such action. § 1840.
 indexes to miscellaneous matters. § 1841.

4. *Evidence—of corporate existence.*

evidence of the existence of the corporation. § 1846.
 burden of proof. § 1847.
 corporate existence admitted by pleading the general issue. § 1848.
 no defense that corporation not legally organized. § 1849.
 provided there is a corporation *de facto*. § 1850.
 theories as to what is necessary to constitute a corporation *de facto*. § 1851.
 validity of organization questionable only by the State. § 1852.
 stockholder estopped to deny it. § 1853.
 this principle limited to corporations which may lawfully exist. § 1854.
 constitutionality of the charter or governing statute. § 1855.
 defense that the charter was obtained by fraud. § 1856.
 illustrations. § 1857.
 where the proceeding against the corporation is by or on behalf of the corporation. § 1858.
 illustrations. § 1859.
 illustrations continued. § 1860.
 illustrations continued. § 1861.
 estoppel to set up non-existence of corporation at time of subscription. § 1862.
 charter forfeited: corporation dissolved. § 1863.
 rule works in favor of stockholder. § 1864.
 effect of payment of installments or assessments. § 1865.
 effect of taking part in organization, attending meetings, etc. § 1866.
 the same where the rights of creditors are involved. § 1867.
 opposing doctrine that the existence of the corporation must be proved. § 1868.
 a judicial review of the decisions on this question. § 1869.
 continued. § 1870.
 continued: the proper distinction stated. § 1871.
 cases where this defense was successful. § 1872.
 view that question not triable in equity. § 1873.

5. *Conduct showing membership; estoppels.*
 general doctrine. § 1877.
 the American doctrine stated. § 1878.

Assessments—(Continued).

- subscription implied from acting as a member. § 1879.
- some contractual basis necessary. § 1879a.
- renders noncompliance with formalities immaterial. § 1880.
- evidentiary character of particular facts. § 1881.
- exceptional cases. § 1882.
- estoppel to deny validity of shares. § 1883.
- further of this principle. § 1884.
- theory that stockholders may repudiate *ultra vires* shares. § 1885.
- notwithstanding the acts of agents of the company. § 1886.
- as in case of a void amalgamation. § 1887.
- otherwise in cases of a good amalgamation or reorganization. § 1888.
- evidence not sufficient under this rule. § 1889.
- effect of passive acquiescence, laches and lapse of time. § 1890.
- acquiescence of the corporation estops it from denying validity of the subscription. § 1891.
- operation of this principle where the shareholder has been released. § 1892.
- subscription prior to incorporation good without acts of ratification. § 1893.
- conduct showing membership. § 1894.
- paying calls. § 1895.
- serving as a director. § 1896.
- serving in a corporate office which can only be filled by a shareholder. § 1897.
- when the principle works to exclude the shareholder from the company. § 1898.
- illustrations of the foregoing. § 1899.
- attending corporate meetings. § 1900.
- voting as a stockholder. § 1901.
- doctrine that pledgee of shares does not make himself a shareholder by voting at corporate meetings. § 1902.
- giving a proxy so as to vote. § 1903.
- participating in management of corporation. § 1904.
- illustrations. § 1905.
- illustrations continued. § 1906.
- conduct ratifying an agreement to take shares in a future company. § 1907.
- acting as member of provisional committee. § 1908.
- receiving dividends. § 1909.
- paying calls, serving as director, attending meetings. § 1910.
- conduct ratifying subscription by unauthorized person. § 1911.
- the person must be held out as shareholder with his knowledge. § 1912.
- view that others must have acquired rights on the faith of the acts of the stockholder. § 1913.
- waiver by conduct of irregularity of assessment. § 1914.
- G. *Books and records of corporation as evidence.*
 - records of the corporation admissible against the corporation. § 1918.
 - books of the corporation not admissible to connect a stranger with the corporation. § 1919.
 - are evidence of acceptance of subscription. § 1920.
 - test by which to determine their admissibility. § 1921.
 - admissibility against those acting as members. § 1922.
 - to what extent explainable by parol. § 1923.

Assessments—(Continued).

view that corporate books presumptive evidence of membership. § 1924.
 further of this subject. § 1925.
 ordinary mode of making proof in actions for assessments under this rule. § 1926.
 books evidence in case of successive transfers. § 1927.
 books transcribed from original subscription papers. § 1928.
 An illustration of the foregoing. § 1929.
 effect of failure to deny under oath. § 1930.
 not evidence against a stockholder in respect of private dealings. § 1931.
 books of account of the corporation in actions against stockholders. § 1932.
 records of the commissioners. § 1933.

7. *Other evidence of membership.*

effect of the charter as evidence. § 1936.
 evidence of assent of subscriber. § 1937.
 the usual evidence. § 1938.
 evidence which has been held sufficient. § 1939.
 declarations and admissions. § 1940.
 sufficient evidence of acceptance of proposal by corporation. § 1941.
 when certified copy of subscription is not evidence. § 1942.
 certificate of the secretary. § 1943.

8. *Other points of evidence.*

genuineness of the other signatures. § 1946.
 depositors in savings banks. § 1947.
 subscription by agent or attorney. § 1948.
 interpretation of particular subscription papers. § 1949.
 burden of proof. § 1950.
 value of the stock. § 1951.
 other points of evidence in such actions. § 1952.

9. *Defenses to actions for assessments.*

scope of the subject. § 1955.
 subscription feigned and fraudulent. § 1956.
 no contract; abandonment of subscription paper. § 1957.
 illegality of the subscription or allotment. § 1958.
 that the shares were not allotted by numbers. § 1959.
 that notes were received from the subscriber instead of money. § 1960.
 release by directors of other shareholders. § 1961.
 non-delivery of stock certificate. § 1962.
 guaranty that company will pay interest on stock. § 1963.
 legality of the assessment. § 1964.
 prior forfeiture. § 1965.
 transfers to escape liability. § 1966.
 that the directors made an assignment of the right of action in fraud of the corporation. § 1967.
 violations of charter. § 1968.
 illustrations: failure to expend the amount required by its charter. § 1969.
 non-feasance, malfeasance, or mismanagement by the directors. § 1970.
 illustrations. § 1971.
 irregularities in corporate action. § 1972.
 irregularity or illegality in the election of directors. § 1973.

Assessments—(Continued).

- non-compliance with charter provisions as to time of commencing operations. § 1974.
- abandonment of the enterprise. § 1975.
- total abandonment and long lapse of time. § 1976.
- illustrations. § 1977.
- inadequacy of means of completing its undertaking. § 1978.
- resolution to wind up. § 1979.
- sale or lease of all the corporate property. § 1980.
- changes in the location, route, termini, of the proposed railroad, plankroad, etc. § 1981.
- illustrations of opposing theories on this question. § 1982.

Assets.

- See **INSOLVENT CORPORATIONS; RECEIVERS.**
- of insolvent corporation — distribution of. § 6555.
- collection of by receiver of corporation. § 6959-6973.

Assignee.

- See **ACTIONS; PARTIES.**
- right of action in, for unpaid stock subscriptions. § 3549, *et seq.*

Assignments.

- See **NEGOTIABLE PAPER; TRANSFERS OF SHARES.**
- by corporations for creditors. See **INSOLVENT CORPORATIONS**, subd. 1.

Associates.

- See **PROMOTERS.**
- who included in the word. § 43.

Association, unincorporated.

- deed by member of. § 5109.
- personal liability of members. § 5167.

Assumpsit.

- See **ACTIONS.**
- corporations may maintain actions of. § 7381.

Attachment.

- See **GARNISHMENT; FOREIGN CORPORATIONS.**
- against stock shares. See **SHARES**, subds. 19, 20.
- of debt due shareholder for shares. § 3576.
- against national banks. §§ 7274-7278.

1. Against corporations, generally.

- corporations are "persons" within the attachment laws. § 7790.
- corporations not attachable in actions against shareholders. § 7791.
- grounds of attachment against corporations. § 7792.
- lien of attachments against corporations. § 7793.
- attachments not leviable after appointment of receiver. § 7794.
- attaching creditors entitled to preference in distribution. § 7795.
- attachments by directors. § 7796.
- what property attachable. § 7797.
- bond for attachment. § 7798.
- liability to attachment of corporations formed by the concurrent legislation of different States. § 7799.

2. Against foreign corporations.

- proceedings *in rem* against foreign corporations. § 8059.

Attachment—(Continued).

foreign corporations when not deemed non-residents within the meaning of attachment laws. § 8060.
 statutes giving such attachments may be retroactive. § 8061.
 effect of a dissolution of corporation upon the attachment. § 8062.
 deposit of foreign insurance company not attachable by foreign creditor. § 8063.
 attachments in courts of the United States. § 8064.
 attachments by non-resident creditors. § 8065.

Attorney-general.

See QUO WARRANTO.

Attorneys.

See AGENTS; MANAGING AGENT.

1. Retainer of by corporation.

preliminary. § 4864.
 appearance evidence of his authority. § 4865.
 what officers and agents of corporations have power to employ counsel. § 4866.
 retainer need not be under seal. § 4867.
 when bind the corporation by admissions. § 4868.
 employment of additional counsel in special cases. § 4869.
 points of professional ethics involved in such engagements. § 4870.

Avenues.

organization. § 135.

Bankrupts' estates.

See INSOLVENCY.

Banks.

See CORPORATE POWERS; CASHIER; TELLER.

banking powers generally. See CORPORATE POWERS, subd. 11.

1. *Status, powers, and duties of cashier.* §§ 4739-4771.
2. *Power of cashier to bind the bank by declarations, etc.* §§ 4777-4785.
3. *Powers of cashier touching negotiable paper.* §§ 4789-1807.
4. *Power of cashier touching certificates of deposit and the certification of checks.* §§ 4812-4820.
5. *Frauds and torts of cashier, liability.* §§ 4824-4829.
6. *Powers and liability of bank teller.* §§ 4832-4842.

Bar associations.

organization of. § 137.

Benevolence.

organization of company for promotion of. § 176.

Benefit societies.

See INSURANCE CORPORATIONS.

Benevolent societies.

organization of. § 176.

Bequests.

See CORPORATE POWERS.

of personalty to foreign corporation. § 5829.

Boards of trade.

organization of. § 146.

Bonus.

stock issued to bondholders as. § 1589.

Books and papers.

See EVIDENCE; INSPECTION; RECORDS.

1. Right of shareholders to inspect.

nature and extent of the right of a shareholder to inspect the corporate books. § 4406.

statutes denouncing penalties for refusing this right. § 4407.

construction of such statutes. § 4408.

such refusal punished criminally. § 4409.

statutes denouncing a forfeiture and damages against the company. § 4410.

statutes punishing the offense as a misdemeanor, fining the corporation, and giving an action for damages. § 4411.

when right guaranteed by statute, motive for its exercise immaterial. § 4412.

view which makes the statutory right a qualified right. § 4413.

other questions under statutes giving right of inspection. § 4414.

statutes giving penalties for refusing to furnish statements to stockholders. § 4415.

statute requiring corporate books to be brought into the state for inspection. § 4416.

by-laws and other corporate regulations declaring or regulating the right. § 4417.

theory that right not enforced unless there is a defined, distinct dispute. § 4418.

right not allowed for speculative purposes, gratification of curiosity, etc. § 4419.

nor where the exercise of the right would produce great inconvenience. § 4420.

right to make copies and extracts. § 4421.

no answer that it is inconvenient to grant the right. § 4422.

willingness of the corporation to buy the relator's shares. § 4423.

stockholder must make the inspection in a peaceable manner. § 4424.

controlling the manner of the inspection. § 4425.

stockholder may exercise the right through agent, attorney, or expert. § 4426.

cases where inspections have been granted. § 4427.

cases where inspections have been refused. § 4428.

directors cannot exclude one of their own number from access to the company's books. § 4429.

inspection of books of a foreign corporation. § 4430.

mandamus the proper civil remedy. § 4431.

whether a remedy also in equity. § 4432.

practice under the writ of *mandamus* in such cases. § 4433.

former proceeding: *res judicata*. § 4434.

appeals and writs of error from orders of inspection. § 4435.

2. Miscellaneous.

as evidence of organization and user. § 7702.

as evidence in actions by and against corporations. §§ 7728-7741.

ratification by corporation not implied from entry of fraudulent transactions. § 4608.

Bona fide purchasers.

See TRANSFERS OF SHARES.

of unpaid shares, rights of. §§ 1680-1687.

Bona fide purchasers—(Continued).

1. *Of shares, in general.*

- certificates of stock not negotiable. § 2587.
- usage of regarding them negotiable not good. § 2538.
- but are *quasi*-negotiable. § 2589.
- grounds upon which the courts uphold their semi-negotiable quality. § 2590.
- view that *bona fide* purchaser takes only title of his vendor. § 2591.
- this view illustrated. § 2592.
- contrary view, where the certificate is delivered with blank power of attorney, etc. § 2593.
- when unregistered transfers are subject to the equity of the corporation. § 2594.
- exception that corporation estopped to deny the validity of certificates formally issued. § 2595.
- thus, corporation liable for fraudulent overissues. § 2596.
- effect of a pledge of such a certificate. § 2597.
- corporation estopped by its books. § 2598.
- purchasers not bound to look beyond the face of the share certificate. § 2599.
- rule limited to cases where the certificates have been issued by the corporate officer empowered to issue certificates. § 2600.
- extent of right of corporation to treat registered shareholder as actual owner. § 2601.

2. *Who are such purchasers.*

- who a *bona fide* purchaser without notice: must have paid the purchase money before notice. § 2603.
- lis pendens*, when not notice. § 2604.
- who not an innocent purchaser. § 2605.
- when purchaser from corporate officer bound to investigate his authority. § 2606.
- who not a purchaser for value. § 2607.
- notice to purchaser from officer acting as his agent. § 2608.
- notice of broker's want of authority implied from failure to execute blank power of attorney. § 2609.
- circumstances sufficient to put a purchaser on inquiry. § 2610.

Bondholders.

- See CORPORATE BONDS.
- remedies of. §§ 6121-6123.

Bonds.

- See CORPORATE BONDS.
- for attachment against corporations. § 7798.

Boom companies.

- powers of, generally. § 5958.

Boycotts.

- See INJUNCTIONS.
- injunctions against. § 7782.

Breeding domestic animals.

- organization of corporation for. § 138.

Bribery.

- See INDICTMENT; TORTS.

Bridge companies—By-laws INDEX.

Bridge companies.

organization of. § 139.

Brokers.

dealings by in shares. See SHARES; subd. 13.

Burden of proof.

See CORPORATE EXISTENCE; EVIDENCE.

to establish corporate existence. § 1847.

By-laws.

See CORPORATE POWERS; ULTRA VIRES.

1. *Nature and interpretation of.*

what is a by-law. § 935.

distinguished from a resolution. § 936.

distinguished from a regulation. § 937.

municipal ordinances. § 938.

to what extent a law. § 939.

may operate as a contract among the members. § 940.

members charged with knowledge of by-laws. § 941.

to what extent binding on third persons. § 942.

formalities required in enacting. § 943.

not noticed judicially, but must be proved. § 944.

waiver of. § 945.

not retroactive. § 946.

where enacted: no extraterritorial force. § 947.

interpretation of by-laws. § 948.

actions upon by-laws. § 949.

action on by-law making members liable for debts of corporation. § 950.

2. *Power to enact and mode of enacting.*

inherent power to make. § 955.

must be made by the incorporators, not by the directors. § 956.

charters conferring this power on the directors. § 957.

what quorum of a select body may adopt. § 958.

delegation of power to select body does not necessarily divest power of general body. § 959.

amendment and repeal of by-laws. § 960.

general statutory power to make by-laws not inconsistent with law, etc. § 962.

for management of property and regulation of affairs. § 963.

for the regulation of its property, management of its affairs and transfer of its stock. § 964.

and as to corporate meetings. § 965.

corporate meetings and voting, forfeiture of shares, penalties, etc. § 966.

concerning officers, meetings, elections, etc. § 967.

management of property, regulation of affairs, transfer of stock, duties of officers. § 968.

same as preceding: also number of directors, penalties, liens upon shares, etc. § 969.

provisions applicable to benevolent, religious, educational, literary, social, and other societies. § 970.

provisions applicable to railroad companies. § 971.

provisions applicable to boom and navigation companies. § 972.

By-laws—(Continued).

various other provisions. § 973.
 as to forfeiting shares. § 974.
 how enacted. § 975.
 how amended, repealed, etc. § 976.
 enacted by the directors, etc. § 978.
 academies, colleges, seminaries, universities. § 979.
 banks of discount. § 980.
 breeding associations. § 981.
 bridge companies. § 982.
 building and construction companies. § 983.
 canal companies. § 984.
 gaslight companies. § 985.
 guano companies. § 986.
 guaranty companies. § 987.
 homestead companies. § 988.
 hotel companies. § 989.
 industrial, co-operative, and mutual benefit societies. § 990.
 inland navigation companies. § 991.
 insurance companies. § 992.
 library companies. § 993.
 manufacturing companies. § 994.
 mining and smelting companies. § 995.
 navigation improvement companies. § 996.
 plank-road and turnpike companies. § 997.
 railroad companies. § 998.
 religious corporations. § 999.
 safe deposit companies. § 1000.
 savings banks. § 1001.
 telegraph companies. § 1002.
 trust companies. § 1003.

3. *Requisites and validity.*

general statements of the requisites of good by-laws. § 1010.
 must not be contrary to the charter. § 1011.
 illustrations. § 1012.
 must not be contrary to law. § 1013.
 limitations of the foregoing rule. § 1014.
 must not be contrary to the articles of incorporation. § 1015.
 must not be contrary to common right. § 1016.
 illustrations of municipal ordinances contrary to common right. § 1017.
 must operate equally. § 1018.
 must not disturb vested rights. § 1019.
 must not be unreasonable, oppressive, or extortionate. § 1020.
 must be reasonable. § 1021.
 reasonableness of corporate by-laws a question of law. § 1022.
 illustrations of by-laws held void because unreasonable. § 1023.
 instances of municipal by-laws held unreasonable and hence void. § 1024.
 illustrations of municipal by-laws held not unreasonable. § 1025.
 by-laws touching the admission of persons to the freedom of a place. § 1026.

By-laws—(Continued).

- by-law compelling elected member to wear livery, and pay initiation fee or a forfeiture. § 1027.
- must not be in restraint of trade. § 1028.
- the ancient law on this subject. § 1029.
- by-laws establishing combinations among workmen to maintain prices. § 1030.
- regulating or restraining transfers of shares. § 1031.
- creating a lien upon shares. § 1032.
- releasing shareholders from their obligation of payment. § 1033.
- restricting the right to sue in the courts. § 1034.
- compelling members to submit their disputes to arbitration. § 1035.
- power to enforce by pecuniary fines. § 1036.
- cannot be enforced by a forfeiture of property. § 1037.
- nor by a forfeiture of shares. § 1038.
- otherwise where power expressly conferred by charter. § 1039.
- the fine or penalty must be certain. § 1040.
- making the corporation a judge in its own case. § 1041.
- views as to the proper measure of such fines. § 1042.
- illustrations: by-laws of building associations imposing excessive fines. § 1043.
- imposing fine for non-acceptance of a corporate office. § 1044.
- imposing fines for non-attendance at corporate meetings. § 1045.
- by-laws regulating the conduct of corporate members. § 1046.
- disinclination of the courts to interfere with the by-laws of societies. § 1047.
- valid in part and void in part. § 1048.
- establishing a quorum of the board of directors. § 1049.
- regulating corporate elections. § 1050.
- forbidding secret societies in colleges. § 1051.
- instances of by-laws which have been held valid. § 1052.
- conclusion of Title One. § 1053.

4. Miscellaneous.

- actions on by corporation. § 7405.
- pleading in actions on. § 7624.
- effect of as evidence. § 7749.

Building associations.

See ORGANIZATION, subd. 1.

Building towns.

- organization of companies for. § 141.

Business purposes.

- organization of companies for. § 142.

Cable railways.

See STREET RAILWAYS.

Calls.

See CAPITAL STOCK, subds. 4-6.

Camp meetings.

- organization of company for conducting. § 143.

Campaign committees.

See POLITICAL CLUBS.

Campbell's act.

See NEGLIGENCE, subd. 1.

Canals.

organization of canal company. § 144.

Cancellation.

See **CONTRACTS; SUBSCRIPTIONS.**

of stock subscription. § 1429.

of deed, as cloud upon title of corporation. § 4556.

Capital stock.

See **SHARES; TAXATION.**

1. Nature of capital stock.

in general. § 1059.

definitions of "capital stock." § 1060.

difference between actual stock and potential stock. § 1061.

distinction between capital stock and tangible property. § 1062.

what is capital stock viewed as a trust fund for creditors. § 1063.

when capital includes profits and surplus. § 1064.

2. Nature of shares in general.

shares sometimes inappropriately called "stock." § 1065.

shares are personal property. § 1066.

so are shares in unincorporated joint stock companies. § 1067.

not goods, wares, and merchandise. § 1068.

not "moneys." § 1069.

are choses in action. § 1070.

shareholders not co-owners. § 1071.

execution against interest in corporate property. § 1072.

shareholders cannot convey corporate property, though all join in the deed.

§ 1073.

incorporating a partnership: mode of succeeding to the partnership assets.

§ 1074.

cannot act for the corporation, or bind it by admissions. § 1075.

not in a trust relation towards the corporation. § 1076.

cannot sue the directors at law. § 1077.

not responsible for its torts. § 1078.

not in privity with each other. § 1079.

not necessary parties to suits in respect of corporate rights. § 1080.

not affected with notice, etc. § 1081.

to what extent in privity with the corporation. § 1082.

no distinction in these respects between incorporated and unincorporated companies. § 1083.

a comparison between shares in a partnership and shares in a company. § 1084.

capital stock a liability of the corporation. § 1085.

3. Surrender of shares and release of shareholders.

subscriber cannot withdraw at pleasure. § 1511.

nor can the corporation release him. § 1512.

invalidity of extrinsic and collateral agreements releasing shareholders. § 1513.

such a release not good as between the corporation and the subscriber. § 1514.

but personal agreements by promoters, directors, or other shareholders to purchase are valid. § 1515.

no right of withdrawal as against existing subscribers. § 1516.

nor as against creditors. § 1517.

Capital stock—(Continued).

further of this subject. § 1518.

English holdings on this subject. § 1519.

further of the English decisions. § 1520.

no power in directors to accept surrender unless expressly granted. § 1521.

directors may not delegate the power. § 1522.

cases illustrative of the English doctrine. § 1523.

what cancellations good as to future creditors. § 1524.

further of this subject. § 1525.

no rescission after insolvency. § 1526.

release or modification of conditional subscriptions. § 1527.

where the company makes radical changes in the original project. § 1528.

refusal to be a shareholder at all. § 1529.

releasing shareholder whose name is not on the register. § 1530.

release of unallotted shares. § 1531.

where there is power to "alter, rescind, or abandon contract." § 1533.

where directors have no express power to accept surrender. § 1538.

influences of the equitable doctrine of laches. § 1534.

effect of the company taking the shares back and reissuing them. § 1535.

no division of the corporate property among shareholders before dissolution.
§ 1536.

release where there has been a transfer of shares. § 1537.

release by act of the creditor. § 1538.

when release of one stockholder by a creditor no release of the others. § 1539.

revocation by fault or neglect of commissioners. § 1540.

refusal by the corporation to receive the subscription. § 1541.

refusal to sign articles of association after signing preliminary contract. § 1542.

the English doctrine on this subject. § 1543.

erasure or revocation of the subscription before delivery. § 1544.

whether a release of one subscriber discharges other subscribers. § 1545.

fraudulent withdrawal of premium notes given to mutual insurance company.
§ 1546.

withdrawal of members of building and mutual fund associations. § 1547.

corporation cannot relieve subscriber by purchasing his shares. § 1548.

illustration. § 1549.

collusive forfeitures. § 1550.

American judicial expressions on this subject. § 1551.

a distinctive doctrine on this subject in England. § 1552.

but *bona fide* compromises with shareholders are valid. § 1553.

no power to cancel valid forfeitures. § 1554.

valid cancellation on invalid ground. § 1555.

municipal subscription discharged in bonds: repurchase of the bonds at a re-
duction. § 1556.

surrendering stock in land companies in exchange of lands. § 1557.

4. *Assessments and calls, in general.* See **ASSESSMENTS.**

what are assessments, and what not. § 1700.

power in the corporation to make. § 1701.

when an assessment necessary to a right of action. § 1702.

when not necessary. § 1703.

Capital stock—(Continued).

- assessments for preliminary expenses. § 1704.
- power of directors to make assessments. § 1705.
- directors cannot delegate power to ministerial officers. § 1706.
- power limited by the charter or governing statute. § 1707.
- statutes authorizing assessments of full-paid stock. § 1708.
- statutes restraining the power to assess. § 1709.
- stockholders cannot question the necessity for the call. § 1710.
- assessments authorized under particular statutes. § 1711.
- after a resolution to discontinue business. § 1712.
- illegality of one assessment will not vitiate subsequent legal assessments. § 1713.
- periodicity of the calls: intervals between them. § 1714.
- regularity of meetings convened to make assessments. § 1715.
- interest on assessments. § 1716.
- action to recover back money paid on an assessment. § 1717.
- in the case of a corporation formed from a partnership. § 1718.
- injunction against the enforcement of calls. § 1719.
- assessments levied against original subscriber after sale and repurchase. § 1720.
- assessments must be equal. § 1721.
- 5. *Conditions precedent; full subscription — organization.*
 - when subscription of entire capital a condition precedent to a valid assessment, § 1724.
 - illustrations of the rule. § 1725.
 - bona fide* subscriptions within this rule. § 1726.
 - where the charter fixes the minimum amount. § 1727.
 - this condition may be waived by the subscriber. § 1728.
 - illustration of such a waiver. § 1729.
 - rule applicable to joint stock companies in New York. § 1730.
 - illustration. § 1731.
 - rule where the capital and number of shares are fixed by the members. § 1732.
 - no valid assessment until capital and shares fixed. § 1733.
 - where the minimum amount of the capital is not fixed at all. § 1734.
 - an illustration of the foregoing. § 1735.
 - the present doctrine in England. § 1736.
 - whether rule applies to new stock. § 1737.
 - whether a condition precedent which corporation must show. § 1738.
 - doctrine that assessments may be laid before all shares taken. § 1739.
 - further of this view. § 1740.
 - sufficient amount not paid in, in order to transact business. § 1741.
 - rule under particular statutes. § 1742.
 - where an organization is a condition precedent. § 1743.
- 6. *Sufficiency and notification of the assessment.*
 - form, substance, language of the call. § 1746.
 - when demand or notice necessary. § 1747.
 - when not necessary. § 1748.
 - theory that no notice is necessary except to forfeit. § 1749.
 - comments on this doctrine: the English doctrine stated. § 1750.
 - English holdings as to the form of notice and mode of giving it. § 1751.
 - for what length of time. § 1752.

Capital stock—(Continued).

sufficiency of the demand. § 1753.

when notice may be by parol. § 1754.

service of the notice. § 1755.

notice by publication. § 1756.

notice given in name of corporation before change of name. § 1757.

7. *Forfeiture of shares for nonpayment of assessments.* See SHARES, subds. 7-9.

8. *Actions by corporation for assessments.* See ASSESSMENTS, subds. 1-3.

9. *Powers of corporation in relation to its own shares.* See SHARES, subd. 10.

10. *Increasing capital stock.*

directors no power to increase capital stock. § 2076.

but may receive subscriptions to capital stock not filled up. § 2077.

bill in equity by stockholder to prevent such increase. § 2078.

no implied authority to increase or diminish. § 2079.

increase beyond charter limitation void. § 2080.

subscriber may recover installments where subscription illegal. § 2081.

irregularities in subscription to increase—departures from the statute. § 2082.

irregularities validated by acquiescence and cured by estoppel. § 2083.

illustrations. § 2084.

further illustrations: when not a defense to an action for calls. § 2085.

shareholders not allowed to set up irregularities after insolvency. § 2086.

effect on the liability of shareholders. § 2087.

authorized increase will not release stockholders. § 2088.

liability where the increase is canceled. § 2089.

statutory individual liability. § 2090.

doctrine that the sharetaker who takes at less than par liable only to subsequent creditors. § 2091.

new doctrine that a corporation can increase its capital and sell the new shares at their market value. § 2092.

increasing the capital by issuing preference shares. § 2093.

new stock to be distributed ratably among existing stockholders. § 2094.

charter vesting directors with a discretion as to the distribution of new stock. § 2095.

stock issued without giving other stockholders an opportunity of *pro rata* subscription cannot be voted. § 2096.

liability of corporation to stockholder for refusing so to distribute. § 2097.

enjoined from charging stockholders a bonus. § 2098.

but stockholder paying a bonus cannot recover it from the corporation. § 2099.

rule does not apply to shares of original stock bought in. § 2100.

imposing a limit as to time when new shares taken. § 2101.

remedy of corporation where shareholder fails to take his proportion. § 2102.

right of rescission where all the new shares are not taken. § 2103.

power of corporation to rescind vote to increase. § 2104.

constitutional prohibitions of the fictitious increase of capital stock. § 2105.

statutory provisions respecting the increase of capital stock. § 2106.

limitations of amount of capital stock. § 2107.

decisions under particular statutes. § 2108.

preferred stock. § 2109.

Capital stock—(Continued).

- [Missouri] cannot be increased except in pursuance of law; notice must be published. § 2110.
 national banks; assent of comptroller of currency. § 2111.
11. *Reducing capital stock.*
 can only be diminished in the manner prescribed by statute. § 2114.
 reducing by order of court under English Companies Act. § 2115.
 preliminary expense is not "lost capital." § 2116.
 reduction of "common stock" only. § 2117.
 when corporation may be compelled to refund to shareholders the whole amount of the reduction. § 2118.
 rights of shareholder in respect of his surrendered shares. § 2119.
 agreement to issue reduced stock binding on company. § 2120.
 issuing certificates of indebtedness to shareholders for their surrendered shares. § 2121.
 effect on the liability to creditors. § 2122.
12. *Dividends.* See DIVIDENDS.
 generally considered. § 2126, *et seq.*
 validity and propriety of. §§ 2152-2164.
 stock and scrip dividends. §§ 2167-2169.
 right to dividends. § 2172, *et seq.*
 remedies to compel payment of. §§ 2227-2234.
13. *Interest-bearing stock.*
 corporation cannot contract to pay interest on its shares. § 2236.
 nor guarantee dividends on shares of another company. § 2237.
 but may guarantee "interest dividends" payable out of profits. § 2238.
 "interest certificates" not shares. § 2239.
 protection of the corporation in case of the loss of such a certificate. § 2240.
 an illustrative case where the contract to pay interest on shares was held void. § 2241.
14. *Issue of preferred stock.*
 power to issue preferred stock as against the dissent of common shareholders. § 2244.
 power to issue as against unregistered shareholders. § 2245.
 whether power to borrow includes power to issue preferred shares. § 2246.
 charter amendment conferring the power not a fundamental alteration. § 2247.
 power may be reserved in articles of association. § 2248.
 or assumed at the outset in its by-laws. § 2249.
 cannot divide its shareholders into two classes after subscription made. § 2250.
 such power not conferred by a power to alter by-laws. § 2251.
 such a change not valid as against unregistered shareholders, though all registered shareholders consent. § 2252.
 such preferences validated by laches and estoppel. § 2253.
 doctrine that persons accepting preferred stock estopped from disputing its validity. § 2254.
 stockholder proceeding in time may rescind. § 2255.
 constitutional and statutory provisions. § 2256.
 privilege of taking in exchange for common stock when exercised. § 2257.
 formalities in the mode of issuing. § 2258.

Capital stock—(Continued).**15. *Rights of preferred shareholders.***

right to preferential dividends depend upon contract. § 2262.

such a contract may consist of a by-law. § 2263.

preferred stock gives a right to interest chargeable upon profits. § 2264.

entitles the holders to dividends only in case they are earned. § 2265.

right to dividends not absolute, but subject to just discretion of directors. § 2266.

illustration. § 2267.

what are "net earnings" to be appropriated in dividends on preferred shares.
§ 2268.

interpretation: dividends on preferred shares not payable out of earnings of subsequent years. § 2269.

earnings not withheld from preferred stockholders in order to accumulate for the liquidation of funded debts maturing in the future. § 2270.

right of the preferred stockholders to participate with the common stockholders in any surplus after receiving their preferred dividends. § 2271.

circumstances under which dividends on preferred stock may be paid, although capital impaired. § 2272.

right to pass the dividend in case of changes of ownership. § 2273.

effect of a guaranty of dividends: whether absolute or conditioned on their being net earnings. § 2274.

doctrine that such a guaranty is a guaranty only in case there are profits. § 2275.

such a guaranty may make the right to dividends cumulative. § 2276.

whether a preferential certificate is of stock or indebtedness. § 2277.

preferred stockholders not entitled to priority over creditors. § 2278.

illustration. § 2279.

nor over other shareholders. § 2280.

preferred stock may be issued without the right to vote. § 2281.

is a question of interpretation. § 2282.

interpretation of the phrase "dividends accruing." § 2283.

"interest dividends," payable when able. § 2284.

right to dividends on preferred stock. § 2285.

rights of preferred shareholders against schemes of "arrangement" under English Railway Companies Act. § 2286.

16. *Remedies of preferred shareholders.*

remedies for the enforcement of this contract. § 2289.

action at law. § 2290.

jurisdiction of equity. § 2291.

scope of the remedy in equity. § 2292.

action brought in behalf of all other preferred shareholders, etc. § 2293.

parties defendant. § 2294.

books of the corporation evidence. § 2295.

laches. § 2296.

17. *Bona fide purchasers of shares.* See BONA FIDE PURCHASERS.**18. *Pledges and mortgages of shares.* See PLEDGES.****19. *Other dealings in shares.* See SHARES, subds.****20. *Miscellaneous; taxation of shares and dividends.* See TAXATION; DIVIDENDS.**

is regarded as a trust fund for creditors. § 2951.

fraudulent issues and overissues. §§ 1490-1506.

Carload lots.

See INTERSTATE COMMERCE; INTERSTATE RAILWAY COMPANIES.

Carriers.

See RAILROAD CORPORATIONS.

Cashier, of bank.

See AGENTS; BANKS.

1. Status, powers, and duties of, in general.

- his appointment, qualification, and tenure of office. § 4739.
- his authority in general. § 4740.
- a judicial statement of his ordinary duties. § 4741.
- whether the directors can delegate their discretionary powers to him. § 4742.
- his power ministerial and not judicial. § 4743.
- his duties varied by usage. § 4744.
- illustrations. § 4745.
- enlarged by special usage or acquiescence of corporation. § 4746.
- statutory limitations not construed as abridging his implied powers. § 4747.
- his power to borrow money and issue evidences of indebtedness therefor. § 4748.
- his powers under particular resolutions of the board. § 4749.
- no power to discharge debts without payment. § 4750.
- nor to release indorsers or sureties. § 4751.
- nor to compromise debts due the bank. § 4752.
- cannot alone work a forfeiture of the charter. § 4753.
- no power to make contracts outside of ordinary business. § 4754.
- contracts in known violation of his duty. § 4755.
- his powers touching litigation. § 4756.
- no authority to transfer judgments. § 4757.
- bank may sue on bills drawn in his favor. § 4758.
- contracts executed in his favor personally. § 4759.
- whether power to transfer non-negotiable instruments. § 4760.
- no power to mortgage its real estate. § 4761.
- nor pledge its securities or credit. § 4762.
- payment of forged checks, notes, etc. § 4763.
- receive payments and give receipts. § 4764.
- receive special deposit. § 4765.
- transfer shares of the bank. § 4766.
- when delivery to him is delivery to the bank. § 4767.
- purchasing on his own account the property of the bank. § 4768.
- when cannot plead statute of limitations. § 4769.
- ratification by cashier of acts of teller. § 4770.
- how sign instruments so as to bind the bank. § 4771.

2. Power of to bind the bank by declarations, etc.

- his declarations when and when not binding upon the bank. § 4777.
- whether his acts and declarations outside of bank building bind the bank. § 4778.
- when release sureties by giving false information. § 4779.
- when bind the bank by statements made before sureties sign. § 4780.
- releasing debtor by giving false information as to payment of debt. § 4781.
- false information as to financial standing of customers. § 4782.

Cashier, of bank—Cemeteries INDEX.

Cashier, of bank—(Continued).

liability of bank for his fraudulent representations. § 4783.

illustrations. § 4784.

opposing view which confines such declarations to present transactions. § 4785.

3. *Power of touching negotiable paper.*

implied power to indorse negotiable paper. § 4789.

may transfer the negotiable funds of the bank in payment of its debts. § 4790.

such transfers presumptively valid. § 4791.

extent to which this power has been upheld. § 4792.

exceptional view that he has no such implied power. § 4793.

his power to re-discount. § 4794.

this power not abridged by general language in charter. § 4795.

implied power to assign stock certificates. § 4796.

indorsement by clerk temporarily acting in place of cashier. § 4797.

no power to indorse his individual paper. § 4798.

nor draw checks officially for his individual debt. § 4799.

nor for the accommodation of third parties. § 4800.

whether indorse on the street outside of business hours. § 4801.

manner of making cashier's indorsements. § 4802.

his power to accept. § 4803.

power to sell bills of exchange and indorse to transfer. § 4804.

his power to guarantee such bills. § 4805.

liability of the bank for his fraudulent indorsements. § 4806.

and for his negligent indorsements in blank. § 4807.

4. *Power of touching certificates of deposit and the certification of checks.*

cashier may issue certificates of deposit. § 4812.

draw and sign checks. § 4813.

the power to certify checks. § 4814.

this power judicially established. § 4815.

bank bound by a fraudulent over-certification of checks. § 4816.

not liable where check fraudulently raised either before or after certification.
§ 4817.

what circumstances will apprise holder of want of power to certify. § 4818.

bank liable where check fraudulently certified by its teller for his own purposes.
§ 4819.

view that an assistant cashier has not this power. § 4820.

5. *Frauds and torts of, liability.*

liability of the bank for his frauds. § 4824.

when bank liable for *ultra vires* torts of cashier. § 4825.

bank liable for subsequent misapplication of money received by its cashier for
third person. § 4826.

liable for his frauds in respect of paper received for collection. § 4827.

his liability to the bank. § 4828.

bank cannot retain an advantage accruing from his torts. § 4829.

Causes of action.

See ACTIONS.

joinder of against stockholder. § 3625.

Cemeteries.

organization of cemetery company. § 145.

Certificates.

See **BONA FIDE PURCHASERS.**

of stock, negotiability. § 2587, *et seq.*

of stock, pledges of. See **PLEDGES.**

of deposit, power of bank cashier to issue. § 4812.

of election. § 757.

receivers' certificates. See **RECEIVERS**, subd. 17.

Certification.

See **CASHIER.**

of check by bank cashier. § 4814.

Certiorari.

See **AMOTION.**

review by, of proceedings for amotion. § 825.

Chambers of commerce.

organization of. § 146.

Chancery.

See **EQUITY.**

Charges.

See **TOLLS.**

Charities.

corporations for promotion of. § 26.

Charters.

See **CORPORATIONS; FRANCHISES.**

1. *Special, acceptance of.*

necessity of acceptance of charter. § 52.

cannot be accepted in part. § 53.

by what body or constituency. § 54.

at meeting held in another State, void. § 55.

illustrations of the foregoing. § 56.

withdrawal or repeal before acceptance. § 57.

illustrations. § 58.

effect of acceptance. § 59.

facts from which acceptance presumed. § 60.

further of evidence to show acceptance. § 61.

evidence of non-acceptance. § 62.

a question for a jury. § 63.

2. *Amendment of.*

preliminary. § 66.

power of legislature to amend charters. § 67.

amendments in furtherance of the original design. § 68.

amendments granting or altering remedy. § 69.

amendments made in the exercise of the police power. § 70.

what amendments release non-assenting subscribers. § 71.

view that majority binds minority except as to fundamental changes. § 72.

view that majority binds minority unless there is a total deviation from the original object. § 73.

what changes are material so as not to bind minorities. § 74.

amendments authorizing consolidation or subdivision. § 75.

other changes deemed fundamental. § 76.

further holdings on this subject. § 77.

Charters—(Continued).

- amendments increasing the capital stock. § 78.
- illustrations. § 79.
- when stockholder bound on principle of acquiescence, ratification, or estoppel. § 80.
- effect of want of knowledge of the change on the part of a shareholder. § 81.
- other alterations immaterial and hence permissive. § 82.
- amendments changing denomination of shares. § 83.
- view that subscription is made subject to legislative power to amend charter. § 84.
- materiality of amendment question for court. § 85.
- what body give assent. § 86.
- when the action of the directors evidence of acceptance. § 87.
- illustration. § 88.
- effect of reservation of power to alter or repeal. § 89.
- whether this power is merely a reservation to State for public purposes. § 90.
- further of this subject. § 91.
- power to alter or repeal, reserved in a general law, applies to future special charters. § 92.
- illustration. § 93.
- subsequent general laws operating as amendments of special charters. § 94.
- amendments authorizing a surrender of franchises. § 95.
- when acceptance of amendment not necessary. § 96.
- evidence of acceptance of amendment by corporation. § 97.
- evidence of acceptance by stockholders. § 98.
- view that assent of stockholder is to be presumed, and dissent proved. § 99.
- instances under the foregoing rule. § 100.
- estoppel to deny acceptance of amendment. § 101.
- view that objections can only be raised by *quo warranto*, etc. § 102.
- amendment by substitution of new charter. § 103.
- objection by third parties: contractors. § 104.
- how minority are protected in England. § 105.

3. *Interpretation of.* See CORPORATE POWERS, subd. 2.

4. *Grounds of forfeiting.* See DISSOLUTION, subd. 3, 4.

Chattels.

See PERSONAL PROPERTY.

Checks.

See CASHIER.

certification of, by bank cashier. § 4814.

Choses in action.

See SHARES.

assignments of by corporations. § 5098.

shares regarded as. § 1970.

Churches.

See RELIGIOUS CORPORATIONS.

Citizen.

See CORPORATION; JURISDICTION.

in what sense corporation is. § 12.

Citizenship.

See CORPORATION.

of corporations for purposes of jurisdiction. See JURISDICTION, subds. 1-4.

Civil corporation.

See CORPORATION.

Claims.

See RECEIVERS.

preferred, in railway receiverships. §§ 7114-7124.

allowance of by receiver. See RECEIVERS, subd. 11.

Classification.

of corporations. § 22.

of directors of corporations. § 791.

of statutory liability of stockholders. § 3071.

of grounds of amotion. § 806.

Club.

See ASSOCIATION, UNINCORPORATED.

Colleges.

organization of. § 147.

Combinations.

See CONSOLIDATION; TRUSTS.

for control of corporations. See TORTS, subd. 7.

injunctions against. § 7782.

Comity.

See FOREIGN CORPORATIONS.

Commercial paper.

See NEGOTIABLE PAPER.

discount and purchase of by banks. § 5950.

remedies of corporation on. § 7386.

Commissions.

See INTERSTATE COMMERCE; RAILROAD CORPORATIONS.

Compensation.

See DIRECTORS, subd. 26.

of directors and officers of corporation. §§ 4380-4389.

of president of corporation. §§ 4682-4684.

of secretary of corporation. §§ 4704-4707.

of receiver. § 7016.

Compromise.

of disputed claims by corporation. § 5842.

Condemnation.

See EMINENT DOMAIN.

by United States of franchises granted by States. § 5624.

Conditional subscriptions.

See SUBSCRIPTIONS, subds. 7-9.

Conditions.

See CONTRACTS.

in contracts of subscription. See SUBSCRIPTIONS, subds. 7, 8.

Conditions precedent.

See ORGANIZATION.

to right to proceed against stockholders. §§ 3340-3388.

Confession of judgment.

See CREDITORS; JUDGMENT.

Conflict of laws.

See CONTRACTS; FOREIGN CORPORATIONS; JURISDICTION.

Congress.

- charter of corporations by.. See CORPORATIONS, subd. 10.
- power of to confer franchises on national corporations. § 671.

Consideration.

- See SUBSCRIPTIONS, subd. 2.
- of contract of subscription. §§ 1200-1213.

Consolidation.1. *Of corporations, in general.*

- statutes providing for consolidations. § 305.
- California: railroad companies. § 306.
- Colorado. § 307.
- Illinois. § 308.
- Michigan: railroad companies. § 309.
- Missouri: railroad companies. § 310.
- New York: railroad companies. § 311.
- Ohio. § 312.
- Pennsylvania. § 313.
- Texas: prohibition. § 314.
- necessity of legislative action. § 315.
- legislature cannot compel consolidation of private corporations. § 316.
- validation by curative statutes. § 317.
- validation by legislative recognition. § 318.
- consolidation with foreign corporation. § 319.
- remains a domestic corporation in each of the concurring States. § 320.
- foreign law not transferred: local law not displaced. § 321.
- with what powers and liabilities. § 322.
- jurisdiction not parted with or transferred. § 323.
- selling out to a foreign corporation and taking its shares in payment § 324.
- illustration. § 325.
- power to consolidate a contract right and inviolable. § 326.
- what steps necessary to effect a consolidation. § 327.
- distinction between consolidation and agreement to consolidate. § 328.
- agreements which do not amount to a consolidation. § 329.
- by one company purchasing the capital stock of the other company. § 330.
- railroad companies combining to purchase another road. § 331.
- when deemed fraudulent in law. § 332.
- illustration. § 333.
- contract of amalgamation an entirety. § 334.
- cannot be rescinded without restoring consideration. § 335.
- obligation of the committee to account for profits. § 336.
- decisions under special statutes. § 337.

2. *Effect upon shareholders.*

- Effect of consolidation upon the rights of dissenting shareholders. § 343.
- illustration: effect of guaranty that stock of precedent corporation shall be at par at a future date named. § 344.
- view that majority can consent on giving security to dissenting shareholders. § 345.
- rule where a statute authorizes consolidation at date of subscription. § 346.
- where there is a reserved power of amending the charter. § 347.

Consolidation—(Continued).

- power to amend articles does not extend to consolidation. § 348.
- when entitled to an injunction to restrain consolidation. § 349.
- extent of injunctive relief afforded. § 350.
- no injunction if interest secured. § 351.
- action in equity against the consolidated company. § 352.
- no right of action for damages against directors. § 353.
- effect of acquiescence of shareholders. § 354.
- rights of consolidated company against shareholders of old companies. § 355.
- action by new company for assessments against shareholders in the old. § 356.
- new company must show its title. § 357.
- stockholders may plead no consolidation. § 358.
- illustration. § 359.
- what in case the original subscription was conditional. § 360.
- 3. *Transmission of rights and liabilities of constituent companies.*
 - new company succeeds to rights and obligations of the old ones. § 365.
 - succeeds to rights of old in respect of municipal aid. § 366.
 - when consolidation revokes power to subscribe. § 367.
 - succeeds to exemption from taxation. § 368.
 - how as to accretions and betterments. § 369.
 - when exemption lost. § 370.
 - special immunities pass by the consolidation. § 371.
 - liability of new for debts of old. § 372.
 - statute of consolidation valid, although not providing for payment of all debts of absorbed company. § 373.
 - act of merger after mortgage foreclosure. § 374.
 - liable in equity to extent of assets received. § 375.
 - observations and illustrations. § 376.
 - rule does not apply to *bona fide* sale of assets. § 377.
 - rights of *bona fide* purchasers from consolidated company. § 378.
 - creditor of old corporation not bound to accept responsibility of new. § 379.
 - power of new company to deal with credits of old. § 380.
 - guaranty by the officers of one company of the obligations of the other. § 381.
 - damages for refusal to carry out obligation of old corporation. § 382.
 - illustration: damages for refusal to exchange bonds for stock of consolidated company. § 383.
 - right of bondholder to notice of privilege given him by the consolidation. § 384.
 - validity of bonds of old company put in circulation by new. § 385.
 - new company must perform public obligations of the old. § 386.
 - illustration. § 387.
 - enforcement of stipulations in the contract of consolidation. § 388.
 - consolidated company subject to existing general law reserving right of alteration or repeal. § 389.
 - illustration. § 390.
- 4. *Effect of remedies and procedure*
 - view that consolidation dissolves the constituent companies. § 395.
 - not necessarily a dissolution of both. § 396.
 - further of this subject. § 397.

Consolidation—Const. restraints INDEX.

Consolidation—(Continued).

- new company estopped from denying its corporate name and character. § 398.
- legal existence of old companies continued in the new company. § 399.
- effect of a consolidation upon pending suits. § 400.
- view that action abates as to old company. § 401.
- view that new process is necessary. § 402.
- view that new process not necessary: effect of appearance and oral evidence of consolidation. § 403.
- substitution after referee's report and before judgment. § 404.
- action by creditors of old company against new company. § 405.
- how fact of consolidation averred. § 406.
- how averment replied to. § 407.
- proof of the consolidation. § 408.
- effect of dissolving consolidation upon judgments against consolidated company. § 409.
- binding effect of admission of one of the precedent corporations. § 410.

Conspiracy.

See COMBINATIONS; TRUSTS.

Constitutional law.

See CONSTITUTIONAL RESTRAINTS; STATUTES.

Constitutional provisions.

See STOCKHOLDERS, subd. 4.

Constitutional restraints.

See CHARTERS.

1. *Restraints imposed by State constitutions.*

- generally considered. § 538.
- corporations not to be created by special laws. § 539.
- but only under general laws. § 540.
- and subject to legislative alteration or repeal. § 541.
- legislature not to extend charter nor remit forfeitures. § 542.
- except on condition of accepting constitutional provisions. § 543.
- legislature may alter, revoke, or annul existing charters. § 544.
- no special law as to more than one corporation. § 545.
- existing charters annulled where no organization has taken place. § 546.
- State aid not to be granted. § 547.
- nor debts to State, nor State's lien, released or commuted. § 548.
- nor municipal aid granted. § 549.
- except upon conditions. § 550.
- neither State nor municipal aid to be granted. § 551.
- provisions of Minnesota constitution as to state aid: "Minnesota railroad bonds." § 552.
- private corporations not to have municipal or taxing powers. § 553.
- laws permitting alienation of corporate franchises prohibited. § 554.
- corporations not to employ Chinese labor. § 555.
- existing rights saved. § 556.
- retrospective laws for benefit of corporations prohibited. § 557.
- two-thirds legislative vote required. § 558.
- duration of corporation limited. § 559.
- power of creating corporations devolved on the courts. § 560.

Constitutional restraints—(Continued).

- saving rights arising during the civil war. § 561.
- provisions as to religious corporations. § 562.
- police power over corporations not to be abridged. § 563.
- bills creating corporations continued till next session of legislature. § 564.
- laws to be passed protecting laborers. § 565.
- bonus to be paid to the State. § 566.
- meaning of the word "corporation" as used in American constitutions. § 567.
- not to authorize investment of trust funds in private corporate securities. § 568.
- 2. *Restraints upon passage of special statutes of incorporation.*
 - restraints upon the passage of special acts conferring corporate powers. § 573.
 - object of such constitutional provisions. § 574.
 - such provisions not retroactive. § 575.
 - accepting charter after date of constitutional prohibition. § 576.
 - general laws perpetuating privileges granted by previous special charters. § 577.
 - conferring corporate privileges on corporations to be thereafter created under general laws. § 578.
 - illustration. § 579.
 - rule in the Federal courts where a State constitution has received conflicting interpretations in the State courts. § 580.
 - further of prohibitions against special acts conferring corporate powers. § 581.
 - States in which applicable only to private corporations. § 582.
 - prohibition against incorporating includes prohibition against amending. § 583.
 - a contrary view. § 584.
 - restrains amendments enlarging existing powers and privileges. § 585.
 - general enabling acts applicable to existing corporations. § 586.
 - distinctions as to what are and what are not corporate powers. § 587.
 - exceptions where general laws cannot be made applicable. § 588.
 - special act not made general by legislative declaration to that effect. § 589.
 - acts curing defects in the organization of particular corporations. § 590.
 - what is a "local" law within the meaning of such a prohibition. § 591.
 - statute is general when uniform in its operation upon all the members of a particular class. § 592.
- 3. *Restraints as to the titles of laws.*
 - constitutional restraints as to the titles of statutes. § 607.
 - such provisions mandatory. § 608.
 - judicial expressions as to the design of these provisions. § 609.
 - construed liberally in support of legislation: general expressions of this doctrine. § 610.
 - the result of the cases. § 611.
 - illustrations: acts granting special charters. § 612.
 - act creating a corporation, etc., need not enumerate powers conferred. § 613.
 - acts "incorporating" railway companies and providing for municipal aid. § 614.
 - setting out in incorporating act the entire constitution of the company. § 615.
 - acts relating to municipal corporations. § 616.
 - instances of statutes embracing more than one subject. § 617.
 - instances of statutes not embracing more than one subject, and hence valid. § 618.

Constitutional restraints—(Continued).

- instances of statutes containing subjects not expressed in their titles. § 619.
- instances of statutes not subject to this constitutional objection. § 620.
- general acts of incorporation. § 621.
- illustrations. § 622.
- acts purporting to amend former acts. § 623.
- illustrations of titles of amendatory acts. § 624.
- void as to matter not expressed in title, though valid as to the rest. § 625.
- distinctions depending upon the use of the words "subject" and "object." § 626.
- long practical construction. § 627.
- provided classification natural and not arbitrary. § 593.
- illustration: invalidity of statutes operative only in cities having a certain number of inhabitants. § 594.
- other cases illustrating these distinctions. § 595.
- corporations carrying on operations in specific localities. § 596.
- creation of a park district outside of the corporate limits of a city. § 597.
- what statutes have been held local or special. § 598.
- instances of statutes held not local or special. § 599.
- special statutes granting "exclusive privileges, immunities, or franchises." § 600.
- conferring certain public police powers upon existing corporations. § 601.
- empowering existing municipal corporations to subscribe for stock in private corporations. § 602.
- 4. *Restraints as to the mode of passing laws.*
 - constitutional provisions requiring assent of two-thirds of each house. § 632.
 - whether provisions as to passing bills directory or mandatory. § 633.
 - whether courts will go behind the enrollment. § 634.
 - presumptions in favor of regularity of passage. § 635.
 - whether parole evidence admissible on the question. § 636.
 - signed by the governor or no law. § 637.
 - constitutional provisions requiring amendments of charters to be submitted to a vote of the people. § 638.
 - that no law shall create, renew, or extend the charter of more than one corporation. § 639.
- 5. *Other restraints and provisions.*
 - objections on the ground of delegations of legislative power. § 643.
 - grounds on which this question to be determined. § 644.
 - prohibition against the delegation of municipal powers to special commissions, private corporations, etc. § 645.
 - further of this subject. § 646.
 - may grant exclusive privileges in the absence of constitutional restraint. § 647.
 - rule under constitutional prohibitions. § 648.
 - further of this subject. § 649.
 - holdings under other constitutions. § 650.
 - rights which the legislature cannot bargain away. § 651.
 - prohibition against granting charters of incorporation to churches or religious denominations. § 652.
 - corporations in aid of rebellion. § 653.

Constitutional restraints—(Continued).

- estoppel to raise question of constitutionality of act creating corporation. § 654.
- validity of a statute allowing a depositor to appoint a person to whom his deposit shall be paid after his death. § 655.
- unconstitutional law may operate as a legislative license. § 656.
- charters exempting corporations from general laws. § 657.
- statutes may be valid in part and void in part. § 658.
- illustrations. § 659.

Construction.

- See INTERPRETATION; ORGANIZATION.
- of particular incorporating statutes. §§ 200-210.
- of statutes imposing liability on stockholders. §§ 3013-3027.
- of grants of franchises. §§ 5345-5349.
- of words "grant, bargain and sell." § 6193.
- of statutes laying taxes upon foreign corporations. § 8104.
- of contracts of subscription. §§ 1258-1259.
- of language creating lien on shares. § 2323.

Constructive notice.

- See NOTICE.

Contempts.

- See INDICTMENT.

By corporations — in general.

- a corporation cannot be attached for contempt. § 6448.
- but may nevertheless be punishable for contempt. § 6449.
- corporate officers punishable for contempt. § 6450.
- whether punishable for a criminal contempt. § 6451.
- contempt in disobeying orders procured by corporations. § 6452

Contracts.

- See AGENTS; CORPORATE POWERS; DIRECTORS; SUBSCRIPTIONS.

1. *Of corporation — formal execution of.*

- how corporations generally make contracts. § 5015.
- in what manner the directors authorize the making of contracts. § 5016.
- statutory formalities must be observed. § 5017.
- statutes requiring contracts of corporations to be in writing. § 5018.
- modified rule: distinction between mandatory and directory statute requirements. § 5019.
- another modified rule: departure from statutory mode validated by a course of practice. § 5020.
- evidence of corporate usage hence admissible. § 5021.
- usage that contract is complete although not delivered. § 5022.
- subsequent recording on corporate books not necessary. § 5023.
- ingenious evasions of statute requirements. § 5024.
- departure from formalities required by deed of settlement of English joint-stock companies. § 5025.
- operation of the statute of frauds upon contracts made by corporations. § 5026.
- rights and liabilities of undisclosed principals. § 5027.
- general grounds of agent's personal liability in executing contracts for corporation. § 5028.

Contracts—(Continued).

presumption of authority and regularity of corporate acts. § 5029.
parol evidence to show whether corporation or agent bound. § 5030.
some illustrations of the foregoing doctrine. § 5031.
parol evidence admissible to charge undisclosed principal. § 5032.
when neither corporation nor agent bound. § 5033.
sufficient if agency appears in the body of the instrument. § 5034.
instrument effective to convey personalty, though not realty. § 5035.
effect of knowledge of corporate regulations and usages. § 5036.
misnomer of the corporation. § 5037.
promise to president and directors is promise to corporation. § 5038.
contracts with individuals who subsequently organize a corporation. § 5039.

2. Sealed instrument — when corporate seal necessary.

ancient rule that a corporation could act only by its seal. § 5044.
relaxation of the ancient rule. § 5045.
consequences of this relaxation: specific performance of unsealed contracts—
 assumpsit on express or implied promises. § 5046.
corporations can act without seal whenever natural persons can. § 5047.
but not where natural persons cannot. § 5048.
seal not required in banking transactions. § 5049.
not required in a lease. § 5050.
when corporate seal still necessary. § 5051.
unsealed bonds, deeds, etc., good in equity. § 5052.
propriety of using corporate seal on simple contract. § 5053.
advantage of using the corporate seal. § 5054.
power not increased by use of seal. § 5055.
effect of alteration of bonds after issue by affixing seals. § 5056.
unsealed instruments validated by ratification. § 5057.
state of the law in England on the subject of corporate seals. § 5058.
in England sealing not required in case of trading corporations. § 5059.
statutory requirements of seal must be observed. § 5060.
appointment of corporate agents need not be under seal. § 5061.
agreements to convey land. § 5062.
corporation may accept deed by parol. § 5063.
answers in chancery cases. § 5064.

3. Manner of executing sealed instruments by corporation.

what is a seal. § 5069.
what devices are good as corporate seals. § 5070.
when a printed seal will be sufficient, and when not. § 5071.
seal affixed by the secretary. § 5072.
when device presumed to be the corporate seal. § 5073.
sealed instruments must be executed in name of corporation. § 5074.
illustrations showing the strictness of this rule. § 5075.
otherwise the agent will bind himself personally. § 5076.
cases in which neither corporation nor agent bound. § 5077.
form of words necessary to show that it is the deed of the corporation. § 5078.
seal must appear to be that of corporation, and how. § 5079.
effect of sealing with the private seals of the signers. § 5080.
not necessary to say parties have affixed their seals. § 5081.

Contracts—(Continued).

affixing seals several times. § 5082.

disposition to relax formal requirements so as to effectuate the intent of the parties. § 5083.

statutes which cure informality in sealing corporate deeds. § 5084.

forms held not the deed of the corporation, but of the agents. § 5085.

other such forms. § 5086.

forms under which the agent was not personally liable. § 5087.

forms held to be the deed of the corporation, and not of its agents. § 5088.

sealing when sufficient without signing. § 5089.

manner of signing. § 5090.

corporate deeds how acknowledged. § 5091.

instances of acknowledgments of corporate deeds which have been held good. § 5092.

of the delivery of the deed, its necessity and effect. § 5093.

sealed instrument signed by some of the officers, and delivered in escrow, not operative. § 5094.

deeds signed by the directors or trustees. § 5095.

effect of deed of all shareholders. § 5096.

deed or mortgage by a corporation by attorney in fact. § 5097.

assignments of choses in action by corporations. § 5098.

4. *Other matters.*

proof of the authenticity of the seal. § 5104.

what the seal proves when its authenticity is proved. § 5105.

presumption and proof of authority to affix seal. § 5106.

what is deemed sufficient authority to affix the seal. § 5107.

the same subject illustrated. § 5108.

deed by one member of unincorporated association. § 5109.

pleading: declaration on a corporate contract unnecessarily sealed. § 5110.

tracing title through a corporation. § 5111.

conveyances to corporations. § 5112.

conveyances to trustees of corporations and associations. § 5113.

deed to corporation not duly created. § 5114.

deeds to inchoate corporations. § 5115.

responsibility of the corporation for negligence in the use of its seal. § 5116.

deed by three of four executors, one of them a disqualified foreign corporation. § 5117.

5. *Negotiable instruments.*

doctrine that corporate seal destroys negotiability. § 5121.

effect of paper seal attached without authority. § 5122.

failure to use negotiable words. § 5123.

orders drawn by a corporation on its own treasurer. § 5124.

authority to execute commercial paper. § 5125.

rule of "undisclosed principal" does not apply in case of commercial paper. § 5126.

promissory note how executed so as to bind corporation. § 5127.

personal liability of the agent executing the instrument. § 5128.

addition of the words "president," "secretary," "agent," "trustee," etc., to signature, surplusage. § 5129.

Contracts—(Continued).

exception where the agent habitually signs that way. § 5130.

English cases in which the official designation was held *descriptio personæ*.
§ 5131.

American cases in which the official designation was held *descriptio personæ*.
§ 5132.

the same principle applicable to indorsements. § 5133.

how agent should indorse for corporation. § 5134.

indorsing by the name of the agent only. § 5135.

illustration. § 5136.

manner of drawing bills of exchange for corporation, and personal liability of
agent. § 5137.

more liberal rule exonerating the agent drawing the bill. § 5138.

effect of direction in a bill to charge a corporation. § 5139.

when sufficient if name of corporation appear on heading of bills. § 5140.

parol evidence when admissible to explain who is bound. § 5141.

when corporation estopped to set up informality of execution. § 5142.

forms of promissory notes importing corporate liability. § 5143.

other forms held to be the promissory note of the corporation. § 5144.

forms helped out by adding the seal of the company. § 5145.

execution by agent "for company." § 5146.

illustrations. § 5147.

further illustrations and qualifications. § 5148.

notes executed in the name of the corporation and signed by the agent officially.
§ 5149.

forms of checks and drafts importing corporate liability. § 5150.

notes and bills made to order of treasurer, cashier, etc. § 5151.

forms importing personal liability. § 5152.

forms in which the words "jointly and severally" have been held to import a
personal liability. § 5153.

acceptance by agent in his own name. § 5154.

acceptance by a bank cashier. § 5155.

personal liability of agent as acceptor of bills of exchange. § 5156.

acceptance by the president. § 5157.

indorsements by bank cashiers. § 5158.

indorsements to bank cashiers. § 5159.

when corporation liable over to accommodation indorser. § 5160.

6. *Other written contracts.*

personal liability of agent on simple contracts. § 5164.

forms held to be the obligation of the corporation. § 5165.

forms where the agent was held personally liable. § 5166.

personal liability of members of associations, clubs, committees, etc. § 5167.

corporation not bound if not mentioned in any way. § 5168.

officers liable unless corporation mentioned. § 5169.

cases of informal execution where the corporation was held bound. § 5170.

instrument in the name of the signer, but signed with addition designating
agency. § 5171.

7. *Parol contracts.*

parol contracts by corporations. § 5174.

Contracts—(Continued).

what corporate acts provable by parol evidence. § 5175.

growth of the doctrine on this subject: *Bank of United States v. Dandridge*. § 5176.

agency and authorization provable by parol. § 5177.

8. *Implied contracts of corporations.*

doctrine of implied contracts. § 5180.

corporations bound by implied contracts the same as individuals. § 5181.

person rendering services to corporation under informal contract may recover *quantum meruit*. § 5182.

when implied in favor of director or officer. § 5183.

limitations of the doctrine of this chapter. § 5184.

9. *Ratification of contracts by corporation.* See RATIFICATION.

10. *Miscellaneous.*

of foreign corporations — *situs* of for purpose of jurisdiction. § 7970.

by foreign corporations — recovery on, defeated when. §§ 7950–7963.

between corporations having same directors. §§ 4079–4087.

between directors and corporation. §§ 4059–4075.

of promoters, liability on. §§ 415–437.

injunction against breaches of. § 7769.

Contracts of subscription.

See SUBSCRIPTIONS.

Contribution.

See STOCKHOLDERS.

1. *Contribution among stockholders.*

shareholder paying more than his proportion entitled to contribution. § 3816.

but only after exhausting remedy against corporation. § 3817.

right given by statute. § 3818.

theories of contribution in winding-up proceedings. § 3819.

extent to which shareholders liable to contribute as among themselves. § 3820.

whether interest recoverable in a suit for contribution. § 3821.

form of the decree enforcing contribution. § 3822.

cases denying the right of contribution without reason. § 3823.

cases denying contribution with good reason. § 3824.

voluntary payment does not create right of contribution. § 3825.

no contribution where the aggregate debts exceed the liabilities of all the stockholders. § 3826.

liability for contribution under special contracts. § 3827.

actions for contribution against non-resident stockholders. § 3828.

contributions in actions at law. § 3829.

2. *Miscellaneous.*

enforcement of among stockholders in national banks. § 7291.

among wrong-doing directors of corporation. §§ 4376–4378.

Conversion.

See TORTS.

by president of corporation, liability. § 4675.

of stock pledged, action by pledgor. §§ 2684–2689.

Conveyances.

See CORPORATE POWERS; subd. 5; CONTRACTS, subd. 4; DEEDS; MORTGAGES.
to corporations. §§ 5112–5115.

Co-operative assns.—Corp. bonds INDEX.

Co-operative associations.

organization of. § 143.

Corporate bonds.

See CORPORATE POWERS.

1. *Power to issue, etc.*

power to issue bonds. § 6050.

further of this power. § 6051.

power to issue corporate bonds never maturing. § 6052.

power in respect of interest thereon and usury. § 6053.

power to guarantee the bonds of another corporation. § 6054.

power to lend its credit by issuing bonds. § 6055.

power to sell its bonds at a discount. § 6056.

power to exchange its bonds for property in kind. § 6057.

prohibited bonds or mortgages. § 6058.

further of this subject. § 6059.

prohibition against increasing bonded indebtedness without consent of stockholders. § 6060.

power of a corporation to pledge its own bonds. § 6061.

bonds valid though mortgage void. § 6062.

bonds which are mortgages by force of statute. § 6063.

coupon bonds negotiable although sealed. § 6064.

non-payment of interest does not render bonds non-negotiable. § 6065.

when bonds issued in blank, the holder may fill up blank. § 6066.

whether the negotiable quality of the bonds extends to the mortgage. § 6067.

rights of *bona fide* purchasers for value. § 6068.

defense of *ultra vires* unavailing against such purchaser. § 6069.

doctrine illustrated in the case of fraudulent overissues. § 6070.

bona fide purchaser of bonds indorsed by the State. § 6071.

when purchaser bound to take notice of governing statute. § 6072.

circumstances putting purchasers upon inquiry. § 6073.

whether put on inquiry by the numbers on the bonds. § 6074.

put upon inquiry by a reference in the bonds to the mortgage. § 6075.

whether put upon inquiry by the presence of past-due coupons. § 6076.

put on inquiry by what circumstances where bonds have been stolen. § 6077.

other circumstances putting purchasers upon inquiry. § 6078.

stipulations detached from such bonds. § 6079.

distinction between redeemability and payability in respect of the question whether bonds are past due. § 6080.

who is a "*bona fide*" holder. § 6081.

purchaser not bound to see to application of purchase-money. § 6082.

who is a purchaser "for value." § 6083.

liability of railroad company for negotiating void municipal bonds. § 6084.

liability of railroad company as indorser of municipal bonds. § 6085.

rights of the heir of the trustee. § 6086.

lien of new bonds exchanged for old ones. § 6087.

interpretation of bond and mortgage with reference to date of maturity. § 6088.

payment or purchase of bonds. § 6089.

demand of payment where made. § 6090.

Corporate bonds—(Continued).

- rights in respect of lost or destroyed bonds. § 6091.
- suits in equity for surrender and cancellation. § 6092.
- bonds convertible into stock. § 6093.
- right of holders of mortgage bonds of land grant railroad to exchange bonds for land. § 6094.
- sinking fund arrangements. § 6095.
- effect of consolidation. § 6096.
- bonds guaranteed or indorsed by the State. § 6097.
- further of such bonds. § 6098.
- subscriptions to bonds on condition that a certain number of bonds shall be subscribed for. § 6099.
- non-liability of subscribers to creditors. § 6100.
- taxation of bonded indebtedness assessed upon payment of interest. § 6101.

2. Coupons of such bonds.

- coupons are negotiable instruments. § 6107.
- status of coupons which have been detached from the bonds. § 6108.
- actions upon detached coupons. § 6109.
- coupons when due and payable. § 6110.
- interest on overdue coupons. § 6111.
- the question as a question of pleading and burden of proof. § 6112.
- interest runs from date of demand and refusal. § 6113.
- interest runs at what rate. § 6114.
- when statute of limitations runs against coupons. § 6115.
- payment of coupons by third persons. § 6116.
- coupons share *pro rata* in mortgage foreclosure. § 6117.

3. Remedies of bondholders.

- remedies available to individual bondholders. § 6121.
- remedies of single bondholder not concluded by action or non-action of majority. § 6122.
- unless such be the true construction of the entire contract. § 6123.
- separate bondholder cannot levy execution upon mortgaged property. § 6124.
- when separate bondholder may sue for interest, but not for principal. § 6125.
- bondholders represented in litigation by the trustee in the mortgage. § 6126.
- measure of damages for failure to deliver bonds. § 6127.
- cross-bill by bondholders. § 6128.

Corporate existence.

See ASSESSMENTS, subd. 4; CHARTERS; EVIDENCE; ORGANIZATION.

1. Questions relating to—in general.

- preliminary. § 7641.
- validity of corporate existence not questioned collaterally. § 7642.
- not even in case of a fraudulent organization. § 7643.
- suing a corporation as such admits its corporate existence. § 7644.
- a general appearance by a corporation admits corporate existence. § 7645.
- corporate existence admitted by taking an appeal. § 7646.
- defendant contracting with plaintiff as a corporation estopped to deny that it is such. § 7647.
- extent and illustrations of this estoppel. § 7648.
- cases denying this principle. § 7649.

Corporate existence—(Continued).

assumed corporation contracting as such estopped to deny its own existence. § 7650.

this estoppel extends to officers, directors, and members. § 7651.

the question of corporate existence in criminal proceedings. § 7652.

2. Questions of pleading. See PLEADINGS.

when not necessary to allege corporate existence. § 7658.

doctrine that it is necessary to allege corporate existence. § 7659.

necessary when suing for rights which can only inhere in a corporation. § 7660.

what averments of corporate existence sufficient. § 7661.

whether necessary to repeat averment of corporate existence in successive counts. § 7662.

declaring against a corporation which has changed its name. § 7663.

question of corporate existence must be raised by defendant. § 7664.

plea to the merits admits corporate existence. § 7665.

how question of corporate existence raised in pleading. § 7666.

statutory rule in New York requiring plea in abatement or in bar. § 7667.

when must be raised by a denial under oath. § 7668.

question raised by plea of *nul tiel corporation*. § 7669.

this plea raises only question of existence *de facto* of corporation. § 7670.

nul tiel corporation, how pleaded. § 7671.

further as to particularity of averment in raising question of corporate existence. § 7672.

particularity of statement where defendant pleads corporate existence. § 7673.

particularity in replication to plea of *nul tiel corporation*. § 7674.

burden of proof under this plea. § 7675.

plea of *nul tiel corporation* defendant. § 7676.

nul tiel corporation defendant, how pleaded. § 7677.

stage of the proceedings at which defense of *nul tiel corporation* pleadable. § 7678.

amendments in case of failure to plead corporate existence. § 7679.

defense that plaintiff corporation was organized for unlawful purposes. § 7680.

corporate existence, how put in issue in actions before justices of the peace. § 7681.

manner of pleading dissolution. § 7682.

3. Proof of corporate character.

by proving charter and user thereunder. § 7689.

proof of the charter. § 7690.

judicial notice of charters and general statutes of incorporation. § 7691.

distinction between judicial notice of charter and judicial notice of corporation. § 7692.

presumption of ancient charter. § 7693.

proof of corporate existence by reputation. § 7694.

proof under statutes by showing that the body acted as a corporation. § 7695.

proof of user under a charter. § 7696.

user proved by proving a corporation *de facto*. § 7697.

user under a general law. § 7698.

proving corporate existence where corporation is organized under general laws. § 7699.

filing of articles and election of officers. § 7700.

Corporate existence—(Continued).

- organization in fact and user thereunder. § 7701.
- corporate books and records as evidence of organization and user. § 7702.
- records need not show acceptance of charter. § 7703.
- proof by witnesses under notice to produce corporate books. § 7704.
- where the corporation is unconditionally incorporated. § 7705.
- judicial notice of the existence of corporation. § 7706.
- proof by acts or admissions by the opposite party. § 7707.
- letters patent, certificate of incorporation, articles of association, etc. § 7708.
- conclusiveness of certificate issued by public official. § 7709.
- certificate of commissioners that conditions precedent have been performed. § 7710.
- presumptions in favor of the regularity of organization. § 7711.
- proof of the existence of a foreign corporation. § 7712.
- proof of corporate existence in criminal cases. § 7713.

4. *Effect of dissolution.*

- effect of dissolution of the corporation. § 7720.
- insolvency of corporation no defense to actions against it. § 7721.
- dissolution by reason of non-user not pleadable. § 7722.
- what actions abate and what survive. § 7723.
- effect of dissolution on suits commenced by attachment. § 7724.

Corporate name.

See CORPORATIONS, subd. 4; NAME.

Corporate powers.

See CONTRACTS; DIRECTORS; EMINENT DOMAIN.

1. *Corporate powers in general.*

- no powers except those expressly granted or necessarily implied. § 5638.
- can do no acts not authorized by charter or governing statute. § 5639.
- subject to the same inferences and intendments as natural persons. § 5640.
- implied power to carry into effect purposes of creation. § 5641.
- implied power to do whatever necessary to effectuate express powers. § 5642.
- instances of powers implied under this rule. § 5643.
- presumption that corporate acts are within corporate powers. § 5644.
- limits of the power of corporations to make contracts. § 5645.
- powers of corporation as founded upon or affected by custom. § 5646.
- corporations held to a reasonable exercise of their powers. § 5647.
- validity of contracts as depending upon consent of stockholders. § 5648.
- power of corporations to deal with their own stockholders. § 5649.
- and with their own directors. § 5650.
- powers of *de facto* corporations. § 5651.
- status* of contracts of unconstitutional corporations. § 5652.

2. *Interpretation of charters.*

- general principle of interpretation. § 5656.
- words to have their natural meaning. § 5657.
- illustration of this principle: meaning of the term "perpetual succession." § 5658.
- construed most strongly in favor of the public. § 5659.
- but not unreasonably so. § 5660.
- judicial expressions of this rule. § 5661.

Corporate powers—(Continued).

the same rule where the question involves the rights of third persons. § 5662.
whether express words necessary to impair privileges of others. § 5663.
rule where the question involves conflicting rights of different corporations.
§ 5664.
conflicting provisions to be harmonized if possible. § 5665.
exceptions interpreted so as not to destroy the grant. § 5666.
interpretation of saving clause repugnant to the body of the act. § 5667.
illustrations of this principle. § 5668.
conditions expressed exclude those not expressed. § 5669.
grants of exclusive privileges not implied. § 5670.
general words construed in subordination to general laws. § 5671.
powers to be exercised for the public good imperative. § 5672.
when grants *in presenti* interpreted as promises to grant. § 5673.
restrictive provisions which are deemed directory merely. § 5674.
not construed retroactively, or as impairing vested rights. § 5675.
release of public penalties. § 5676.
application of the rule that words are to be taken in the strongest sense against
the party using them. § 5677.
general provision of law no effect upon subsequent special charters. § 5678.
special charter provisions not repealed by subsequent general laws. § 5679.
repeals by implication. § 5680.
provisions in derogation of common law strictly construed. § 5681.
in what respect charters construed liberally. § 5682.
whether legislative history examined. § 5683.
communis error facit jus. § 5684.
conditions precedent must be performed or waived. § 5685.
what powers are included in particular grants. § 5686.
what powers not included in particular grants. § 5687.
construction of particular words and phrases. § 5688.
cases in which the word "person" construed to mean "corporation." § 5689.
interpretation of other words. § 5690.
construction and effect of certain amendments. § 5691.

3. Financial powers.

implied financial powers. § 5696.
implied power to borrow money. § 5697.
to what corporations this power ascribed. § 5698.
whether building associations have power to borrow. § 5699.
distinction between the power of the corporation and that of the directors to
borrow. § 5700.
borrowing powers conferred by the shareholders. § 5701.
consequences of a corporation borrowing without power. § 5702.
charters conferring and excluding this power. § 5703.
lender entitled to subrogation. § 5704.
rights of creditors where debts are created in excess of statutory limit. § 5705.
power of officers to borrow for the company. § 5706.
when not necessary to show that the company received the benefit. § 5707.
when advances to officers treated as advances to corporation. § 5708.
constitutional restrictions as to the manner of creating corporate debts. § 5709.

Corporate powers—(Continued).

- church corporation cannot raise money by a public excursion. § 5710.
- power of corporations to lend their funds. § 5711.
- charters under which this power denied. § 5712.
- power to lend on particular securities. § 5713.
- doctrine that corporation can recover the money lent in an action for money had and received. § 5714.
- improper conditions upon corporate loans attempted to be imposed by promoters. § 5715.
- power to assign securities given for loans. § 5715 a.
- power to assign stock assessments. § 5716.
- power to raise money by means of a lottery. § 5717.
- power to levy a tax. § 5718.
- power to hold shares in other corporations. § 5719.
- usury by corporations. § 5720.
- no power to become surety for or lend credit to another person or corporation. § 5721.
- illustrations of the foregoing doctrine. § 5722.
- reasons and limitations of the principle. § 5723.
- exceptions to the principle. § 5724.
- power to assume debts of precedent partnership. § 5725.
- 4. *Powers relating to negotiable paper.*
 - power to issue negotiable paper. § 5730.
 - implied from the power to borrow. § 5731.
 - implied from the power to purchase property. § 5732.
 - implied from the power of making contracts generally. § 5733.
 - to what corporations this power has been ascribed. § 5734.
 - no such power under the English law. § 5735.
 - distinction between want of power to issue negotiable instruments and irregularities in the exercise of the power. § 5736.
 - ultra vires* commercial paper good in the hands of *bona fide* purchasers for value. § 5737.
 - illustrations of this principle. § 5738.
 - no power to make or indorse for accommodation. § 5739.
 - but such paper good in the hands of an innocent purchaser for value. § 5740.
 - presumption in favor of validity. § 5741.
 - cases denying this presumption. § 5742.
 - notes prohibited by statute. § 5743.
 - distinction between power to contract the debt and power to give instrument by which it is evidenced. § 5744.
 - issuing notes intended to circulate as money. § 5745.
 - authority of officers of corporations to execute commercial paper. § 5746.
 - such authority, how proved. § 5747.
 - power to take negotiable securities. § 5748.
 - when cannot employ its funds for this purpose. § 5749.
 - power to purchase and discount bills in other States and other places. § 5750.
 - distinction between the power to purchase and the power to discount commercial paper. § 5751.
 - “stock notes.” § 5752.

Corporate powers—(Continued).

- defenses to notes given to corporations. § 5753.
- power to assign or transfer negotiable paper. § 5754.
- further of this subject. § 5755.
- authority of officers to indorse and transfer. § 5756.
- assignments and indorsements, how made so as to bind corporation. § 5757.
- consequences of such assignments. § 5758.
- liability of the corporation as indorser. § 5759.
- liability of indorsers of *ultra vires* corporate paper. § 5760.
- validity of bills of credit issued by State banks. § 5761.
- power to issue certificates of deposit. § 5762.
- draft by one officer of a corporation upon another. § 5763.
- damages for non-payment of circulating notes. § 5764.
- 5. *Powers relating to ownership and transfer of property — real property and title thereto.*
 - power of corporations to take and hold land at common law. § 5770.
 - effect of statutes of mortmain. § 5771.
 - cannot take and hold for purposes foreign to the objects of their creation. § 5772.
 - constitutional and statutory restrictions upon this power. § 5773.
 - instances of such restrictions upon religious corporations. § 5774.
 - whether exclusion of power to hold excludes power to take. § 5775.
 - whether a corporation can take land except by deed. § 5776.
 - power to acquire land by adverse possession under the statute of limitations. § 5777.
 - power to acquire an easement by prescription. § 5778.
 - power to take for the purpose of saving a debt. § 5779.
 - power to purchase land at judicial sales. § 5780.
 - power to take by mortgage. § 5781.
 - power to take by devise. § 5782.
 - operation of statutes of wills. § 5783.
 - devises to foreign corporations. § 5784.
 - devises to the United States. § 5785.
 - whether the power to take by purchase includes the power to take by devise. § 5786.
 - devises to corporations where the statutory limit has been reached. § 5787.
 - devise to a corporation where there are two corporations of the same name. § 5788.
 - whether the power to take by subscriptions or contributions includes the power to take by devise. § 5789.
 - doctrine of equitable conversion where corporation is not capable of taking land. § 5790.
 - what estate in lands a corporation may take. § 5791.
 - illustrations in the case of railroad companies. § 5792.
 - power to take as joint tenant or tenant in common. § 5793.
 - transfer of title to corporations by legislative act. § 5794.
 - doctrine that the State alone can question the title of the corporation. § 5795.
 - rule enables corporations to defend against trespassers. § 5796.
 - and to pass a good title to its grantee. § 5797.
 - power to hold and convey presumed. § 5798.
 - and cannot be questioned collaterally. § 5799.

Corporate powers—(Continued).

- cases in which the rule does not apply. § 5800.
- curing the incapacity of the corporation to take. § 5801.
- grants to corporations before being organized. § 5802.
- conveyances to non-existent and *de facto* corporations. § 5803.
- rescission of conveyances to corporations not empowered to take. § 5804.
- rescission on the ground of misuser. § 5805.
- rescission on ground that grantee corporation is non-existent. § 5806.
- statutory limitations upon the amount of land which may be held. § 5807.
- taking in the name of another as trustee. § 5808.
- power of educational corporations to hold. § 5809.
- power of religious corporations to hold. § 5810.
- power of turnpike and plank-road companies to hold. § 5811.
- power of canal companies to hold. § 5812.
- titles of British eleemosynary corporations not affected by the revolution. § 5813.
- banking companies. § 5814.
- conveyances to corporations upon conditions subsequent. § 5815.
- illustrations of conveyances upon conditions subsequent. § 5816.
- forfeiture of the estate for non-performance of conditions subsequent. § 5817.
- courts will not aid a diversion of such a trust. § 5818.
- donation of land to a corporation with a condition against alienation. § 5819.
- burial certificates issued by religious corporations. § 5820.
- construction of enabling statutes. § 5821.
- 6. *Power to take, hold, and transfer personal property.*
 - power to acquire and hold personal property. § 5827.
 - make isolated purchase of goods. § 5828.
 - bequests of personalty to foreign corporations. § 5829.
- 7. *Power to do various acts.*
 - to appoint agents. § 5832.
 - power to act as agent for another. § 5833.
 - power to be attorney in fact. § 5834.
 - power to act as trustee. § 5835.
 - power to be beneficiary in a trust. § 5836.
 - power to act as executor or administrator. § 5837.
 - power to enter into a partnership. § 5838.
 - no power to take an oath. § 5839.
 - power to incur expense on account of injured employés. § 5840.
 - power to contract for the payment of a pension. § 5841.
 - power to compromise disputed claims. § 5842.
 - power to create forfeitures. § 5843.
 - power to establish transportation lines. § 5844.
 - power to make extra-territorial contracts. § 5845.
 - liability of corporations for the acts of their dummy corporations. § 5846.
- 8. *Powers ascribed and denied to particular corporations—insurance corporations.*
 - insurance companies may make and negotiate promissory notes. § 5849.
 - insurance companies cannot engage in banking. § 5850.
 - whether establish a guaranty fund. § 5851.
 - cannot pension their retiring officers. § 5852.

Corporate powers—(Continued).

- whether divide business into classes. § 5853.
- cannot purchase obligation of policy-holder to be used as an offset. § 5854.
- cannot change the beneficiary prescribed in its charter. § 5855.
- cannot transfer its assets to reinsuring company. § 5856.
- mutual company may insure on the all-cash plan. § 5857.
- but cannot turn itself into a stock company without legislative sanction. § 5858.
- mutual company authorized to insure for cash may take note for policy. § 5859.
- what policies may and may not be issued. § 5860.
- validity of policies issued by foreign insurance companies. § 5861.
- 9. *Railroad corporations.*
 - preliminary. § 5865.
 - make and negotiate promissory notes. § 5866.
 - guarantee bonds. § 5867.
 - circumstances under which this power upheld. § 5868.
 - receive municipal subscriptions. § 5869.
 - dedicate land for highway. § 5870.
 - contract to carry beyond their own lines. § 5871.
 - make contracts with connecting carriers. § 5872.
 - to what extent contract joint obligations. § 5873.
 - own steamboats. § 5874.
 - contract to promote business of another road. § 5875.
 - contract to allow municipal corporation to prescribe motive power. § 5876.
 - contract to make stock gaps and road crossings. § 5877.
 - license erection of buildings on its right of way. § 5878.
 - purchase railroad already built. § 5879.
 - railway leases void unless authorized by express law. § 5880.
 - illustrations of the rule. § 5881.
 - right and duty of rescission. § 5882.
 - railway company cannot lease its telegraph line unless so authorized. § 5883.
 - responsibility of the lessor for the torts of the lessee. § 5884.
 - illustrations. § 5885.
 - responsibility of the lessee for negligence in operating the road. § 5886.
 - what grants of power authorize such leases. § 5887.
 - recovering rent under an *ultra vires* lease. § 5888.
 - statutes conferring the power to lease. § 5889.
 - statutory expressions not conferring this power. § 5890.
 - prohibition in case of competing lines. § 5891.
 - consent of the stockholders. § 5892.
 - lessee takes subject to what burdens. § 5893.
 - formalities in the execution of such leases. § 5894.
 - right of eminent domain does not pass. § 5895.
 - validity of leases extending beyond term of corporate existence. § 5896.
 - actions by third parties on the covenants of such leases. § 5897.
 - covenants to repair. § 5898.
 - offer reward for criminals. § 5899.
 - make contracts before completion of line. § 5900.
 - contract to transport freight at specific rates for ten years. § 5901.

Corporate powers—(Continued).**10. Turnpike corporations.**

- powers in respect of establishing route. § 5904.
- changing the route and termini. § 5905.
- power to build its road upon the public highway. § 5906.
- protecting right of way from encroachment. § 5907.
- manner of constructing the road. § 5908.
- liability for damages in building the road. § 5909.
- right to erect toll-gates at particular places. § 5910.
- further of this subject. § 5911.
- right to erect toll-houses, dig wells, etc., upon right of way. § 5912.
- whether the turnpike company can change its gates after having erected them. § 5913.
- when the right to demand toll arises. § 5914.
- right to demand tolls for the whole distance from gate to gate. § 5915.
- whether toll demandable for traveling between two gates. § 5916.
- right to demand prepayment of tolls. § 5917.
- power to detain travelers for non-payment of tolls. § 5918.
- fraudulent evasion of the payment of tolls. § 5919.
- exemptions from payment of tolls. § 5920.
- construction of statutes creating such exemptions. § 5921.
- further of such statutes. § 5922.
- continued. § 5923.
- construction of contracts creating such exemptions. § 5924.
- no right to charge unreasonable tolls. § 5925.
- forfeiture of franchise for exacting illegal tolls. § 5926.
- right to exact tolls within cities and towns. § 5927.
- vehicles, how rated for the purpose of tolls. § 5928.
- penalties against toll-gatherers. § 5929.
- actions to recover tolls. § 5930.
- defenses to such actions. § 5931.
- whether a defense that the road is not properly constructed or repaired. § 5932.
- actions to recover back tolls illegally exacted. § 5933.
- penalties for forcibly passing toll-gates without paying toll. § 5933 a.
- breaking the toll-gate and passing. § 5934.
- further of this subject. § 5935.
- penal liability of officers. § 5936.
- liability for failure to perform its public duties. § 5937.
- effect of an abandonment by the turnpike company. § 5938.
- what will be evidence of an abandonment. § 5939.
- public proceedings to vacate such roads and to open them as common highways. § 5940.
- acts which turnpike companies may and may not do. § 5941.
- powers as depending upon a valid organization. § 5942.

11. Miscellaneous corporations.

- savings banks. § 5948.
- other banking corporations. § 5949.
- distinction between discounting and purchasing commercial paper. § 5950.

Corporate powers—Corporations INDEX.

Corporate powers—(Continued).

- power of banks to receive special deposits. § 5951.
 - illegal banking. § 5952.
 - dry dock company cannot engage in navigation. § 5953.
 - incorporated common carriers. § 5954.
 - mining corporations. § 5955.
 - power to locate mining claims. § 5956.
 - power of mining companies to borrow money. § 5957.
 - boom companies. § 5958.
 - whaling companies. § 5959.
 - land improvement companies. § 5960.
 - when manufacturing corporations may purchase in order to resell. § 5961.
 - other powers conceded to manufacturing corporations. § 5962.
 - what powers have been denied to manufacturing corporations. § 5963.
12. *Doctrine of ultra vires.* See tit. ULTRA VIRES.
 13. *Power to issue bonds, etc.* See CORPORATE BONDS.
 14. *Power to mortgage property.* See MORTGAGES.

Corporations.

See FOREIGN CORPORATIONS.

1. *Nature and kinds of.*

- what is a corporation? § 1.
- judicial definitions of a corporation. § 2.
- a collection of incidents which make a corporation. § 3.
- none the less a corporation because members liable for its debts. § 4.
- nor because it cannot sue or be sued in its corporate name. § 5.
- nor because acts of parliament declare that it shall not be a corporation. § 6.
- a collection of natural persons. § 7.
- corporations sole. § 8.
- ordinary power of a corporation. § 9.
- immortality—"perpetual succession." § 10.
- in what sense a "person." § 11.
- in what sense a "citizen." § 12.
- distinction between a corporation and a partnership. § 13.
- differences between corporations and joint stock companies. § 14.
- distinction between a corporation and a guild, fraternity, or society. § 15.
- composed of what body or constituency. § 16.
- further of this subject. § 17.
- illustrations of this distinction. § 18.
- sense in which the State may be a corporation. § 19.
- quasi*-corporations. § 20.
- official boards of municipal corporations. § 21.
- kinds of corporations. § 22.
- the definition given by Chancellor Kent. § 23.
- public and private corporations. § 24.
- public school corporations. § 25.
- corporations to promote charities of a public nature. § 26.
- corporations formed to promote public objects for private gain. § 27.
- when municipal corporations deemed private. § 28.
- illustrations of public corporations. § 29.

Corporations—(Continued).

2. *Creation of, by special charters.* See CHARTERS.
 - corporations are created by legislative power. § 35.
 - to what extent this power may be delegated. § 36.
 - exercised by judicial or ministerial action under general laws. § 37.
 - to what extent exempt from judicial review. § 38.
 - corporation need not be declared such in express words. § 39.
 - theories as to when charters take effect. § 40.
 - creation by reference to another act. § 41.
 - legislative deviations from rules of the common law. § 42.
 - who included in the word "associates." § 43.
 - how legislative grant made and corporation organized. § 44.
 - what if the commissioners refuse to act. § 45.
 - when charter provisions deemed a substitute for provisions of a general act. § 46.
 - whether corporations created by concurrent action of two States. § 47.
 - decisions adhering to the view that this cannot be done. § 48.
3. *Creation of, under general laws.* See ORGANIZATION.
 - purposes for which incorporation permitted. §§ 132-192.
 - steps necessary to perfect organization. §§ 215-249.
 - reorganization. §§ 255-279.
4. *Names of.*
 - importance of the corporate name. § 284.
 - distinction between the names of natural persons and of corporations. § 285.
 - acquired by usage and reputation. § 286.
 - petition to change corporate name. § 287.
 - change of name by corporate action. § 288.
 - effect of changing corporate name. § 289.
 - the corporate name in suits. § 290.
 - misnomer of corporation in pleading. § 291.
 - effect of variances in corporate name. § 292.
 - what misnomers amendable. § 293.
 - effect of misnomer of corporations in written obligations. § 294.
 - misnomer in devises and bequests. § 295.
 - corporation protected in use of corporate name. § 296.
 - illustrations. § 297.
 - discretion of Secretary of State as to issuing certificates of incorporation for a corporation having a similar name to the one already existing. § 298.
 - illustration: "Kansas City real estate exchange"—"Kansas City real estate and stock exchange." § 299.
 - prohibition in Missouri statute against use of name of person or firm. § 300.
5. *Consolidation of.* See CONSOLIDATION.
 - in general. §§ 305-337.
 - effect of, upon shareholders. §§ 343-360.
 - transmission of rights and liabilities of constituent companies. §§ 365-390.
 - effect on remedies and procedure. §§ 395-410.
6. *Promoters and liability of.* See PROMOTERS.
 - liability of, on contracts. § 415-437.
 - liability of, to subscribers. §§ 440-453.

Corporations—(Continued).

liability of, to the company. §§ 456-476.

non-liability of the company for contracts of promoters. §§ 480-490.

7. *De facto corporations.*

divergence of views on the subject of *de facto* corporations. § 495.

when rightfulness of corporate existence presumed. § 496.

presumed from user of corporate powers. § 497.

especially where rights have been acquired thereunder. § 498.

corporations by prescription or user. § 499.

what necessary to give rise to this presumption. § 500.

validity of corporate existence not litigated collaterally. § 501.

limitations of this doctrine. § 502.

what is meant by existing *de facto*. § 503.

rule under California Civil Code. § 504.

rule applies only where the corporation might exist. § 505.

effect of this doctrine upon the rights of shareholders and creditors. § 506.

validates irregularities in organization. § 507.

except where the thing to be done is a condition precedent. § 508.

further observations and illustrations. § 509.

State precluded by lapse of time from questioning regularity of corporate organization. § 510.

corporation suing for rights which can only inhere in it as a corporation. § 511.

corporations by legislative recognition. § 512.

illustrations. § 513.

8. *Corporations by estoppel.* See ESTOPPEL.

obligor in contract with corporation estopped to deny corporate existence. § 518.

illustrations of the rule. § 519.

various statements of this rule. § 520.

corporate existence proved by showing that the objecting party has dealt with it as such. § 521.

rule restrained to cases of *de facto* corporations. § 522.

this estoppel not raised where there is no law authorizing the corporation. § 523.

view that incorporation must be stated in the contract. § 524.

except where party is induced by fraud to recognize corporate existence. § 525.

party dealing with corporation permitted to show corporate knowledge. § 526.

party claiming under legislation creating a corporation estopped to deny its existence. § 527.

stockholder estopped to deny corporate existence. § 528.

estoppel to set up fraudulent organization. § 529.

exception where the corporation has expired by lapse of time. § 530.

forfeiture for misuser or nonuser not pleadable collaterally. § 531.

corporation estopped to deny corporate existence. § 532.

corporations for illegal purposes. § 533.

9. *Constitutional restraints upon creation of.* See CONSTITUTIONAL RESTRAINTS.

provisions of State constitutions. §§ 538-568.

restraints upon passage of special acts. §§ 573-602.

restraints as to the titles of laws. §§ 607-627.

restraints as to the mode of passing laws. §§ 632-639.

other restraints and provisions. §§ 643-659.

Corporations—(Continued).

10. *National corporations.* See NATIONAL BANKS.
 definition—division—introduction. § 665.
 within the States: historical sketch: national banks. § 666.
 transcontinental railway companies. § 667.
 maritime canal company of Nicaragua. § 668.
 other corporations chartered by Congress. § 669.
 formation of national corporations. § 670.
 power of Congress to confer franchises on them: exemption from State control and taxation. § 671.
 power to confer right of eminent domain within the State. § 672.
 may confer on Federal courts exclusive jurisdiction of suits by and against. § 673.
 protection under the fourteenth amendment. § 674.
 status of national corporations within the States: jurisdiction over them. § 675.
 further of this subject. § 676.
 how dissolved. § 677.
 power of Congress to revoke their charters. § 678.
 effect of reservation of right to amend. § 679.
 not dissolved by State action. § 680.
 corporations of the territories. § 681.
 corporations of the district of Columbia. § 682.
 State corporations holding Federal franchises. § 683.
11. *Place of meeting and of doing corporate acts.*
 generally considered. § 686.
 corporations anciently named as of some place. § 687.
 a corporation cannot have two domiciles. § 688.
 resides where it exercises its functions. § 689.
 power to establish agencies at other places. § 690.
 whether loses its corporate character by migrating. § 691.
 distinction between citizenship and residence of a corporation. § 692.
 enjoining a corporation from removing its assets out of the State. § 693.
 constituent acts must be performed within the State of creation. § 694.
 corporation when estopped from raising the question. § 695.
 validity of corporate election held outside the State. § 696.
 meetings held at what place within the State. § 697.
12. *Corporate elections.* See ELECTIONS.
 assembling the meeting. §§ 700–722.
 the quorum. §§ 725–729.
 right to vote. §§ 730–743.
 conduct of the election. §§ 745–758.
 right to the office, and contesting the election. §§ 761–794.
13. *Amotion of officers.* See AMOTION.
 power of amotion, and proceedings to remove. §§ 799–841.
14. *Expulsion of members..* See MEMBERS, EXPULSION OF.
 power to expel, and grounds of expulsion. §§ 846–876.
 corporate proceedings to expel. §§ 881–899.
 judicial proceedings to reinstate. §§ 904–930.
15. *Corporate by-laws.* See BY-LAWS.
 nature and interpretation of. §§ 935–950

Corporations—Corporation sole INDEX.

Corporations—(Continued).

- power to enact and mode of enacting. §§ 955-960.
requisites and validity of. §§ 1010-1053.
16. *Capital stock and subscriptions thereto.* See CAPITAL STOCK; SHARES; SUBSCRIPTIONS.
nature of capital stock. §§ 1059-1064.
nature of shares in general. §§ 1065-1085.
17. *Who may be shareholders.* See SHAREHOLDERS.
natural persons as shareholders. §§ 1090-1098.
private corporations. §§ 1102-1111.
municipal corporations. §§ 1115-1133.
18. *Contract of subscription for stock.* See SUBSCRIPTIONS.
theories as to nature and formation of the contract. §§ 1136-1194.
theories as to the consideration. §§ 1200-1213.
theories as to the necessity of paying the statutory deposit. §§ 1216-1232.
theory that the full amount of the capital must be subscribed. §§ 1235-1242.
other theories and holdings. §§ 1245-1262.
alteration of the contract of subscription. §§ 1267-1299.
19. *Conditional stock subscriptions.* See SUBSCRIPTIONS, subds. 7-9.
validity of conditional subscriptions. §§ 1305-1328.
effect of conditions in subscriptions. §§ 1332-1345.
interpretation of particular conditions. §§ 1349-1356.
20. *Effect of fraud on stock subscriptions.* See SUBSCRIPTIONS, subds. 10-15.
general principles applicable. §§ 1360-1379.
what frauds will and will not avoid the contract. §§ 1382-1418.
remedies of defrauded shareholder. §§ 1424-1434.
time within which to claim rescission. §§ 1438-1456.
remedies against persons guilty of the fraud. §§ 1460-1487.
fraudulent issues and overissues. §§ 1490-1506.
21. *Corporate books and records as evidence.* See ASSESSMENTS, subd. 6.
22. *Powers of corporation in relation to its own shares.* See SHARES, subd.
23. *Powers of corporate agents.* See AGENTS.
24. *Corporate contracts.* See CONTRACTS.
25. *Notice to corporation.* See NOTICE.
26. *Ratification by corporations.* See title RATIFICATION.
27. *Police power—exercise of over corporations.* See POLICE POWER.
28. *Powers of corporations.* See CORPORATE POWERS.
29. *Civil liability of corporations for torts.* See TORTS; FRAUDS; NEGLIGENCE.
30. *Indictment of corporations.* See INDICTMENT.
31. *Contempts by corporations.* See CONTEMPTS.
32. *Dissolution of corporations.* See DISSOLUTION; WINDING UP.
33. *Actions by and against corporations.* See ACTIONS; CITIZENSHIP; JURISDICTION; PROCESS.
34. *Attachments against corporations.* See ATTACHMENTS.
35. *Garnishment of corporations.* See GARNISHMENT.
36. *Mandamus against corporations.* See MANDAMUS.
37. *Executions against corporations.* See EXECUTIONS.

Corporation sole.

what is. § 8.

Counsellors.

See ATTORNEYS.

Coupons.

of corporate bonds. See CORPORATE BONDS, subd. 2.

Courts.

See CHARTERS; JURISDICTION.

power of to grant corporate charters. §§ 110-127.

Creation.

of corporations. See CHARTERS; ORGANIZATION; STATUTES.

Creditors.

See STOCKHOLDERS, subd. 27.

remedies of to enforce stockholders' liability. §§ 3413-3476.

assignments for by corporations. §§ 6466-6487.

preference of, by insolvent corporation. §§ 6492-6507.

of corporation, priorities among. §§ 3833-3843.

priorities among, on mortgage foreclosure. §§ 6256-6268.

Creditors' bill.

See CREDITORS' SUIT.

Creditors' suit.

See STOCKHOLDERS, subd. 34.

to enforce liability of stockholders. §§ 3518-3545.

jurisdiction, etc. §§ 6555-6571.

Criminal offense.

See INDICTMENT.

Cruelty to animals.

organization of company for prevention of. § 149.

Cruelty to children.

organization of society for prevention of. § 150.

Cumulative voting.

See ELECTION, subd. 4; VOTING.

Custom.

See USAGES.

Damages.

See ACTIONS; EXEMPLARY DAMAGES; NEGLIGENCE.

award of, for torts of corporations. See TORTS, subds. 5, 6.

Dealings.

See BROKERS.

in stock shares. See SHARES, subd. 13.

Death.

See NEGLIGENCE, subd. 1.

Debentures.

See CORPORATE BONDS.

Debts.

See STOCKHOLDERS.

for which stockholders are held liable. §§ 3110-3127.

for which directors are liable by statute. §§ 4182-4201.

Deceit.

See FRAUDS.

Declarations.

See AGENTS, subd. 2.

Declarations—(Continued).

of corporate officers and agents, etc., effect of. §§ 4912-4925.

De facto corporations.

See CORPORATIONS, subds. 6, 7.

power to sue and be sued. § 7369.

De facto officers.

See DIRECTORS.

directors *de facto* of corporation. §§ 3893-3901.

Defenses.

See ASSESSMENTS, subd. 9; LIMITATIONS, STATUTE OF; PLEAS; PLEADING; SET-OFF.

1. *Defenses to actions by creditors against stockholders—in general.*
 - scope of subject. § 3679.
 - general theories as to defenses which can be interposed. § 3680.
 - defenses that the stockholders are estopped from raising. § 3681.
2. *Defenses affecting the corporation and its management.*
 - that the corporation had no legal existence. § 3683.
 - that the corporation has been guilty of illegal acts. § 3684.
 - that the corporate enterprise has been abandoned. § 3685.
 - that the corporation has ceased to exist, etc. § 3686.
 - that the corporation changed its name after the defendant subscribed for the shares. § 3687.
 - that the corporate officers have been guilty of misconduct. § 3688.
3. *Defenses affecting the status and liability of the defendant as a shareholder.*
 - that the defendant never was a stockholder. § 3691.
 - when a shareholder estopped from making this defense. § 3692.
 - that the defendant did not become a stockholder in the regular mode. § 3693.
 - that some of the new stock was not taken. § 3694.
 - that some of the stock is owned by the corporation itself. § 3695.
 - that the full amount was not subscribed. § 3696.
 - that the subscription was made prior to the formation of the corporation. § 3697.
 - that the defendant became a stockholder after the debt was contracted. § 3698.
 - that the defendant was a holder of preferred stock merely. § 3699.
 - that the shares were held by the defendant for another. § 3700.
 - that the shares were held for the corporation itself. § 3701.
 - that the defendant held the shares as pledgee of the corporation. § 3702.
 - that the stockholder is a sovereign State. § 3703.
 - that the officers are liable before stockholders. § 3704.
 - that one of the members of the company has died, it being unincorporated. § 3705.
 - that the stockholders have a right of renewal. § 3706.
 - that the stockholder was induced to subscribe by fraud. § 3707.
4. *Defenses affecting the discharge and release of the shareholder.*
 - that the defendant has paid his subscription in full. § 3711.
 - that such payment was made in property, services, etc. § 3712.
 - that the defendant has discharged his liability by payment to other creditors. § 3713.
 - further of this subject. § 3714.

Defenses —(Continued).

that the defendant purchased the shares in good faith, believing them to have been fully paid up. § 3715.

burden of showing non-payment. § 3716.

manner of proving payment. § 3717.

that the defendant was released from his obligation by the corporation. § 3718.

that the personal liability of the stockholders has been waived or released by contract. § 3719.

interpretation of such contracts of waiver. § 3720.

that the defendant's liability was divested by transfer. § 3721.

that the defendant has been discharged in bankruptcy. § 3722.

whether assignee in bankruptcy can be made a contributory. § 3723.

assignee not bound to indemnify bankrupt against calls. § 3724.

that the defendants are entitled to be discharged as sureties. § 3725.

5. *Defenses affecting the plaintiff's demand.*

that the judgment against the corporation was erroneous or informal. § 3729.

that the judgment against the corporation was collusive. § 3730.

that the demand is invalid, the corporation having admitted it. § 3731.

that the debt was revived after being extinguished. § 3732.

that the debt was usurious. § 3733.

that the debt was *ultra vires*. § 3734.

that the debt has been satisfied in whole or in part. § 3735.

that the corporation has been discharged in bankruptcy. § 3736.

that the plaintiff purchased his demand against the corporation at a discount. § 3737.

6. *Defenses relating to the conduct of the creditor, affecting his demand.*

that the plaintiff has taken out execution against the corporation. § 3740.

that the corporation has gone into bankruptcy, and that the creditor has received dividends. § 3741.

that the complainants have received a dividend from an assignee of the corporation. § 3742.

that the plaintiff failed to present his claim to the receiver. § 3743.

that the plaintiff has been secured by a pledge of the corporate property. § 3744.

that the plaintiff granted extensions of time to the corporation. § 3745.

that the plaintiff has compromised with other stockholders. § 3746.

that the plaintiff has released other stockholders. § 3747.

that the plaintiff took an assignment of debts due the corporation, and then compromised with the debtors. § 3748.

7. *Defenses relating to the conduct of the proceeding to charge the stockholder.*

that the receiver was improperly appointed. § 3751.

that the assessment was irregular. § 3752.

that the defendant did not have notice of the assessment. § 3753.

that the decree of assessment was collusive. § 3754.

that the decree of assessment authorized a compromise. § 3755.

8. *Other defenses.*

that other creditors are entitled to priority of demand. § 3758.

that a prior judgment has been rendered against the defendant. § 3759.

that a prior suit is pending. § 3760.

Defenses—(Continued).

- that the assets of the corporation are unappropriated. § 3761.
- that there is a solvent judgment debtor other than the corporation. § 3762.
- that the receiver or assignee has been guilty of misconduct in dealing with the assets. § 3763.

9. Miscellaneous.

- defenses to actions for assessments. § 1955, *et seq.*
- to actions seeking to enforce statutory liability of directors. §§ 4354–4372.
- to actions on insurance premium notes. § 7253.
- to indictments of corporations. § 6442.

Deferred stock.

See **DIVIDENDS; PREFERRED STOCK.**

Definitions.

- by-law. § 935.
- corporation. § 1.
- capital stock. § 1060.
- dividend. § 2126.
- debt. § 3110.
- franchise. § 5335.
- national corporation. § 665.
- promoter. § 415.
- seal. § 569.

Delegation.

- See **CORPORATE POWERS.**
- of power to create corporations. § 36.
- of their power by directors. See **DIRECTORS**, subd. 4.
- of power of eminent domain. See **EMINENT DOMAIN.**

Demand.

- See **ACTIONS.**
- in actions by corporations. § 7388.
- in actions against corporations. § 7415.

Deposit.

- payment of. See **SUBSCRIPTIONS**, subd. 3.

Detective associations.

- organization of. § 151.

Directors.

See **ELECTIONS; MEETINGS.**

1. Right to the office.

- necessity of electing a board. § 3850
- effect of failure to elect: tenure of the office holding until successor chosen. § 3851.
- mode of compelling election. § 3852.
- power to fill vacancies. § 3853.
- power to remove members of the board. § 3854.
- grounds of removal by judicial action. § 3855.
- mandamus* to restore. § 3856.
- who eligible. § 3857.
- when need not be a stockholder. § 3858.
- statutes and by-laws requiring such a qualification. § 3859.

Directors—(Continued).

- whether must be a registered stockholder. § 3860.
- convening the meeting to elect. § 3861.
- notice of the meeting. § 3862.
- directors elected after date appointed for election. § 3863.
- elections at adjourned meetings. § 3864.
- elections at meetings held outside the State. § 3865.
- manner of voting. § 3866.
- frauds and irregularities in the conduct of the election. § 3867.
- majority of all the shares necessary to elect. § 3868.
- effect of voting for ineligible candidates. § 3869.
- right to vote. § 3870.
- voting in respect of shares held by executors or trustees. § 3871.
- right to vote as between pledgor and pledgee. § 3872.
- voting in respect of shares held by other corporations. § 3873.
- statutory limit as to the number of votes which can be cast by a single shareholder. § 3874.
- disqualifications of the shareholder claiming the right to vote. § 3875.
- right to vote by proxy. § 3876.
- no superintendence of such elections in equity. § 3877.
- but equity possesses an imperfect jurisdiction. § 3878.
- jurisdiction by *quo warranto*. § 3879.
- reviewing such elections under New York statute. § 3880.
- under California statute. § 3881.
- persons suing for the office must prove qualification. § 3882.
- directors suing at law must show title. § 3883.
- evidence to prove such title: adoption: recognition. § 3884.
- evidence to prove acceptance of the office. § 3885.
- resignation or abandonment of the office. § 3886.
- abandonment of forfeiture by reason of becoming disqualified. § 3887.
- 2. *Directors and officers de facto.*
 - general statement of doctrine. § 3893.
 - who are directors *de facto*. § 3894.
 - persons ineligible to the office. § 3895.
 - who are not directors *de facto*. § 3896.
 - title to office cannot be impeached collaterally. § 3897.
 - what if two boards are in existence and acting. § 3898.
 - acts of directors *de facto* bind the stockholders. § 3899.
 - cases showing the extent of protection under the rule. § 3900.
 - personal liability of *de facto* directors. § 3901.
- 3. *Quorum of directors and number that can act.*
 - preliminary. § 3904.
 - directors must act together as a board. § 3905.
 - individual directors have no authority as such. § 3906.
 - but may be agents by special appointment. § 3907.
 - separate assent of a majority not binding. § 3908.
 - cannot vote at board meetings by proxy. § 3909.
 - where the act is private all must join: where it is public a majority may act. § 3910.

Directors—(Continued).

rule as to public acts applicable to private corporations: a majority of the directors rule. § 3911.

distinction between a select and indefinite body in respect of a quorum. § 3912.

majority of all the directors necessary to a quorum. § 3913.

but a majority of the assembled quorum may act. § 3914.

acts at board meeting without a quorum voidable. § 3915.

must be a quorum of each integral part. § 3916.

rule in case of unfilled vacancies. § 3917.

in the case of a special committee a majority of all must concur. § 3918.

effect of the disqualification of a member of the quorum. § 3919.

what is a quorum where the directory has been enlarged by a consolidation with another corporation. § 3920.

by-law fixing quorum at less than a majority. § 3921.

whether *ex officio* trustee not a part of the quorum. § 3922.

number that may act in ministerial matters. § 3923.

acts of directory composed of excessive number. § 3924.

directors no power to exclude some of their board. § 3925.

presumption in favor of regular action. § 3926.

extent of this presumption. § 3927.

ratification of acts done by less than the requisite number. § 3928.

power of a quorum to contract with their own members. § 3929.

place of the president in the quorum. § 3930.

when take the sense of the stockholders. § 3931.

majority can act only at a regular meeting. § 3932.

meet outside the State. § 3933.

when record need not affirmatively show notice. § 3934.

manner of assembling the meeting. § 3935.

when notice of the meeting must be given. § 3936.

notice of adjourned meetings must be given. § 3937.

these principles varied by corporate usage. § 3938.

4. Delegation of their power by directors.

how far directors may delegate their authority. § 3944.

further of this subject. § 3945.

directors may not delegate the power of making assessments. § 3946.

may delegate ministerial duties. § 3947.

whether bank directors may delegate power to discount. § 3948.

may appoint and remove subordinate agents. § 3949.

single director no power unless appointed agent. § 3950.

no power in directors to confer permanent and supreme control upon a single officer. § 3951.

may contract through a committee of their own members. § 3952.

power of such committee to make contracts. § 3953.

to mortgage the property of the corporation. § 3954.

authority to convey includes power to execute suitable instruments. § 3955.

powers of committees in respect of litigation. § 3956.

such committee no power to purchase real estate. § 3957.

power of committee appointed to examine and report. § 3958.

power of building committees of church societies. § 3959.

Directors—(Continued).

quorum of such committee necessary to act. § 3960.
ultra vires acts of committees made good by ratification. § 3961.
 corporation bound by acts of such committee within their apparent authority.
 § 3962.

personal liability of the members of such committees. § 3963.

5. Powers of.

nature of the office in general. § 3967.
 divergent views as to the nature and limits of the powers of directors. § 3968.
 English view that they are special agents only. § 3969.
 view that directors may do whatever the corporation may do. § 3970.
 but cannot do more. § 3971.
 effect of by-laws limiting their powers. § 3972.
 their powers not extended by by-laws. § 3973.
 authority within what limits supreme. § 3974.
 the stockholders cannot act for the company. § 3975.
 exceptions and qualifications of this rule. § 3976.
 further of this rule. § 3977.
 directors have no common-law powers. § 3978.
 no power to make constituent changes. § 3979.
 cannot apply for or accept amendment of charter. § 3980.
 nor accomplish this result by indirect means. § 3981.
 cannot make, alter, or annul by-laws. § 3982.
 may not sell out corporate assets and business. § 3983.
 but may alien corporate real estate in course of business. § 3984.
 may mortgage corporate property. § 3985.
 may assign for benefit of creditors. § 3986.
 when assign to other trustees. § 3987.
 may borrow money. § 3988.
 may make and transfer negotiable paper. § 3989.
 may assume or guarantee debts of other persons or corporation, when. § 3990.
 may fix the salaries of corporate officer. § 3991.
 may not fix price of shares of stock. § 3992.
 powers in levying assessments. § 3993.
 when release corporate interest. § 3994.
 cannot give away its assets. § 3995.
 but may make *bona fide* compromises. § 3996
 and conduct corporate, but not private, litigation at corporate expense.
 § 3997.

powers of directors of banking companies. § 3998.
 effect of *ultra vires* acts of directors. § 3999.
 loss of power by lapse of time. § 4000.
 instances of their ordinary contracting powers. § 4001.
 powers under particular instruments. § 4002.
 their contracts not voidable because of errors of judgment. § 4003.
 power to execute mortgages. §§ 6171-6179.

6. Obligation of directors as fiduciaries—in general.

directors are trustees for the stockholders. § 4009.
 bound to exercise their powers for the benefit of the company. § 4010.

Directors—(Continued).

- cannot create any relation which will make their personal interests antagonistic to those of the corporation. § 4011.
- illustrations. § 4012.
- engaging in a rival business. § 4013.
- no power to give away the assets of the company. § 4014.
- paying claims barred by limitation. § 4015.
- bound to act with the utmost good faith. § 4016.
- engagements contrary to their duty voidable. § 4017.
- illustrations. § 4018.
- personally liable for *ultra vires* acts. § 4019.
- to what extent trustees for the public. § 4020.
- to what extent trustees for creditors. § 4021.
- not allowed to make a profit out of their trust. § 4022.
- personally liable for breaches of their trust. § 4023.
- must account to the company for secret profits. § 4024.
- rule not applicable to dealings open and acquiesced in. § 4025.
- rule subject to the maxim that he who seeks equity must do equity. § 4026.
- must account for bribes given to influence their official action. § 4027.
- not chargeable with profits made by a third party out of their trust relation. § 4028.
- illustrations showing liability to account for secret profits. § 4029.
- further illustrations. § 4030.
- illustrations continued. § 4031.
- continued. § 4032.
- cannot buy shares from the company and resell at a profit. § 4033.
- but may purchase the shares of other stockholders. § 4034.
- but not with the funds of the company. § 4035.
- purchasing property from themselves for the company. § 4036.
- buying property for themselves and reselling to the corporation at a profit. § 4037.
- liable for colluding with promoters. § 4038.
- the same subject continued. § 4039.
- cannot buy up claims against the company at a discount and prove them for the full amount. § 4040.
- view that they may recover the amount expended in such purchases. § 4041.
- cannot vote upon question affecting his private interest. § 4042.
- cannot deal for themselves with the corporate property. § 4043.
- illustrations. § 4444.
- cannot conduct their private litigation at corporate expense. § 4045.
- ratification of such contracts by the shareholders. § 4046.
- what will amount to a ratification. § 4047.
- what will not amount to a ratification. § 4048.
- view that corporation cannot condone fraud of officer except by unanimous consent. § 4049.
- rights of third persons in cases of such breaches of trust. § 4050.
- measure of liability for such breaches of trust. § 4051.
- all directors liable who fraudulently conspire. § 4052.
- liability of promoters to account for secret profits. § 4053.

Directors—(Continued).

7. *Contracts between the directors and the corporation.*

- directors may contract with the corporation in good faith. § 4059.
- view that a director cannot contract with the company. § 4060.
- second view that such contracts are not void, but voidable. § 4061.
- third view that their validity depends upon their nature and terms. § 4062.
- such contracts closely scrutinized. § 4063.
- valid when made with unanimous consent. § 4064.
- voidable when a majority of the directors constitute the other contracting party. § 4065.
- director cannot be a secret partner in contracts between the corporation and third persons. § 4066.
- director may recover at law on a contract with the corporation. § 4067.
- general doctrine that directors may lend to the corporation and take security. § 4068.
- are entitled to indemnity against *bona fide* expenses and advances. § 4069.
- may purchase from the corporation. § 4070.
- whether allowed to purchase the corporate property at judicial or other public sale. § 4071.
- such purchasing director holds as trustee for the company. § 4072.
- form of relief in such cases. § 4073.
- circumstances under which such purchases have been upheld. § 4074.
- a mere stockholder may so purchase. § 4075.

8. *Contracts between two corporations having the same directors.*

- contracts between two corporations not void, although some of the officers in one are officers in the other. § 4079.
- contract not voidable if there be a quorum of directors not directors in both corporations. § 4080.
- opposing view that such contracts are voidable. § 4081.
- voidable where the same persons are directors in both corporations. § 4082.
- voidable where the sole contracting agent is an officer in both corporations. § 4083.
- corporate agent employed by the other contracting party. § 4084.
- such contracts validated by acquiescence and ratification. § 4085.
- director or officer may be trustee in corporate mortgage. § 4086.
- contract with stockholder not changeable by corporation without his consent. § 4087.

9. *General view of the liability of directors.*

- status* of directors and general nature of their liability. § 4090.
- their twofold liability for non-feasance and misfeasance. § 4091.
- general view of the remedies given. § 4092.
- evidence of acquiescence to charge a particular director. § 4093.
- cases illustrating this question. § 4094.
- liability joint or several. § 4095.
- director may be jointly liable with the corporation. § 4096.
- directors not necessarily liable for the frauds of subordinate agents appointed by them. § 4097.
- what knowledge imputable to directors and officers. § 4098.

10. *Liability of directors for negligence.*

- directors may be liable for negligence. § 4100.

Directors—(Continued).

- distinction, in respect of this liability, between discretionary and ministerial acts. § 4101.
- not liable for discretionary acts: liable for gross negligence in respect of ministerial duties. § 4102.
- not liable for mistakes of judgment. § 4103.
- bound to exercise ordinary business diligence. § 4104.
- such negligence judged by what standard: by judge or jury. § 4105.
- responsible for losses happening through gross negligence. § 4106.
- their liability for the acts of subordinates. § 4107.
- their liability for negligent ignorance. § 4108.
- liability for negligent acts which are *ultra vires*. § 4109.
- effect of acquiescence on the part of the shareholders. § 4110.
- liability of directors for each other's acts. § 4111.
- liability of *ex officio* members for each other's acts. § 4112.
- application of these principles to banking corporations. § 4113.
- indictment of directors for negligent failure to perform official duties. § 4114.
11. *Remedies of corporation against unfaithful directors.*
- general heads of liability to the company. § 4118.
- corporation may sue its directors either at law or in equity. § 4119.
- action whether legal or equitable. § 4120.
- right of action in receiver, and whether he can impeach corporate acts. § 4121.
- right of action in assignee for creditors. § 4122.
- pendency of actions by creditors prevents subsequent actions by assignee. § 4123.
- directors when jointly liable. § 4124.
- pleading: declaration, bill, or complaint. § 4125.
- actions by assignees and trustees in bankruptcy. § 4126.
- certain defenses considered. § 4127.
- defense of the statute of limitations. § 4128.
12. *Liability of directors to strangers and creditors of corporation outside of statute.*
- general nature of the liability of directors to persons not members of the company. § 4132.
- not liable as partners or original undertakers, except, etc. § 4133.
- personally liable where contract does not show that it was made for the company. § 4134.
- personally liable for acts in excess of their authority. § 4135.
- unless the question of the extent of authority is a mere question of law. § 4136.
- not liable to creditors for non-feasance, negligence, mismanagement, breach of duty to corporation, etc. § 4137.
- bank directors not so liable to depositors. § 4138.
- a limitation of this doctrine suggested, and contrary holdings stated. § 4139.
- but liable to strangers for malfeasance. § 4140.
- such as fraudulent over-issues of corporate stock. § 4141.
- or the fraudulent issuing of second mortgage bonds as "first mortgage bonds." § 4142.
- not liable for overdrafts. § 4143.
- issuing false prospectuses, making false representations, etc., whereby the public are deceived. § 4144.

Directors—(Continued).

- illustrations of this liability. § 4145.
- effect of statute of frauds. § 4146.
- doctrine that there must have been a guilty *scienter* or a fraudulent intent to deceive. § 4147.
- action by sureties against trustees for fraudulent statements. § 4148.
- remedies in equity. § 4149.
- in what sense directors trustees for creditors. § 4150.
- liability for preferring creditors. § 4151.
- personally liable for fraudulently diverting the company's assets from its creditors. § 4152.
- illustrations of this liability. § 4153.
- liability to pay for "qualification shares." § 4154.
- creditor may also follow misappropriated assets as a trust fund. § 4155.
- corporation a party to suit in equity. § 4156.
- liability of a director for allotting shares to his own infant children. § 4157.
- 13. *Statutory liability of directors and officers to creditors—in general.*
 - general nature of this liability. § 4163.
 - these statutes penal and to be strictly construed. § 4164.
 - view that such statutes are not penal. § 4165.
 - such statutes not enforced outside the State enacting them. § 4166.
 - cases in which this doctrine applied. § 4167.
 - effect of a repeal of the statute upon accrued rights. § 4168.
 - whether right of action dies with creditor. § 4169.
 - effect of constitutional provision that "dues from private corporations shall be secured in such manner as shall be prescribed by law." § 4170.
 - validity of a statute imposing a liability after the persons sought to be charged become directors. § 4171.
 - effect of a dissolution of the corporation. § 4172.
 - sense in which directors jointly liable. § 4173.
 - meaning of "jointly and severally liable." § 4174.
 - what if the act was of such a nature that it could not be done by a single director. § 4175.
 - creditor may proceed against one or more. § 4176.
 - theory that under statutes making both the innocent and the guilty liable, all must be joined. § 4177.
 - example of a statute imposing a several liability. § 4178.
- 14. *What debts of the corporation are within such statutes.*
 - liability for torts. § 4182.
 - mere gratuities. § 4183.
 - security debts. § 4184.
 - debts founded in fraud. § 4185.
 - debts due the directors themselves. § 4186.
 - ultra vires* debts. § 4187.
 - certificates of deposit. § 4188.
 - judgments and judgments for costs. § 4189.
 - debts which have been assigned. § 4190.
 - wages of employes. § 4191.
 - debts payable in future. § 4192.

Directors—(Continued).

- unliquidated damages for breaches of contract. § 4193.
- taxes. § 4194.
- debts barred by limitation: obligation of lessee to pay taxes. § 4195.
- renewals. § 4196.
- debts contracted and due in other States. § 4197.
- debts due to participants in the wrongs denounced by the statute. § 4198.
- debts due a partnership dissolved by death. § 4199.
- simple contract debts. § 4200.
- obligation to pay a guaranteed dividend. § 4201.
- 15. *Liability attaches to what directors in respect of the date of the debts being contracted.*
 - liability attaches only to those directors in office at the time of the default. § 4206.
 - illustrations. § 4207.
 - where the statute enjoins the making of a particular financial statement or report. § 4208.
 - such as the New York Manufacturing Corporations Act. § 4209.
 - where the statute prohibits the contracting of particular debts. § 4210.
 - whether liable for debts contracted before the doing of the prohibited act. § 4211.
 - when the debt is deemed contracted "after such violation." § 4212.
 - conclusiveness of action of creditor in fixing date of debt. § 4213.
- 16. *Liability for debts contracted before organization.*
 - the mischief which these statutes were designed to remedy. § 4216.
 - liable for making sham payments of stock subscriptions. § 4217.
 - liable for contracting debts before legal organization. § 4218.
 - not liable on contracts made before being empowered by the by-laws. § 4219.
- 17. *Statutory liability for failing to file certain reports.*
 - introductory. § 4221.
 - time at which the debt is deemed to accrue. § 4222.
 - the same, where the contract is to deliver or receive goods. § 4223.
 - in the county or counties where the corporation may conduct its business. § 4224.
 - meaning of "within twenty days from the first day of January." § 4225.
 - liability contingent upon corporate indebtedness actually due. § 4226.
 - effect of giving time to the corporation. § 4227.
 - what will excuse the filing of such a report. § 4228.
 - need not state how much capital paid in cash and how much in property. § 4229.
 - what is a signing by a majority of the trustees. § 4230.
 - verification. § 4231.
 - signing. § 4232.
 - further of the construction of the New York Manufacturing Act. § 4233.
 - construction of other statutes. § 4234.
 - filing a false report not equivalent to filing no report. § 4235.
 - publication of articles of incorporation under Iowa statute. § 4236.
- 18. *Liability for making false reports.*
 - introductory. § 4240.
 - nature of these statutes. § 4241.
 - such statutes penal: strictly pursued — whether enforceable in other states. § 4242.

Directors—(Continued).

- only those liable who sign the report. § 4243.
- scienter*: doctrine that the report must have been willfully false. § 4244.
- such willfulness a question of fact for a jury. § 4245.
- what facts sufficient to make out a case. § 4246.
- what reports have passed judicial scrutiny. § 4247.
- defense that the report was voluntary, and not such as required by the statute. § 4248.
- each report gives a separate cause of action. § 4249.
- statements of such a report. § 4250.
- whether directors so liable for antecedent debts. § 4251.
- liability to the creditors collectively under Massachusetts statute. § 4252.
- director is an "officer." § 4253.
- no defense that the director is also a creditor. § 4254.
- questions of procedure. § 4255.
- 19. *Liability for debts contracted in excess of a prescribed limit.*
 - introductory. § 4259.
 - the making of such excessive loans a misdemeanor. § 4260.
 - differences among the statutes as to limit of indebtedness. § 4261.
 - loans to the directors themselves. § 4262.
 - individual liability imposed upon what directors. § 4263.
 - extent of the liability imposed. § 4264.
 - to whom liable: to creditors: to the corporation itself. § 4265.
 - provisions for the exoneration of dissenting directors. 4266.
 - whether the corporation also liable for such excessive debts. § 4267.
 - remedies given to enforce these statutes. § 4268.
 - liability both for excessive debts and for deficits occasioned by insolvency. § 4269.
 - no defense that the corporation did not give the benefit. § 4270.
 - no recovery unless on a case strictly within the statute. § 4271.
 - no defense that a receiver has been appointed, etc. § 4272.
 - no defense that proceedings have not been taken to dissolve corporation. § 4273.
 - no defense that another action is pending against defendants as stockholders. § 4274.
 - such statutes not enforceable in other states. § 4275.
 - renewals, substitutions, and application of part payments. § 4276.
 - this liability extends to debts due to stockholders. § 4277.
 - right of action not altered by corporate dissolution. § 4278.
 - what contracts are "debts" within the meaning of such statutes. § 4279.
 - statute of limitations. § 4280.
- 20. *Liability for certain prohibited loans.*
 - loans to the stockholders prohibited. § 4285.
 - construction of these statutes. § 4286.
- 21. *Liability for declaring unlawful dividends.*
 - introductory. § 4288.
 - the general nature of these statutes. § 4289.
 - statutes prescribing the cases in which dividends may and may not be declared. § 4290.

Directors—(Continued).

- what is not a declaration of an illegal dividend under such statutes. § 4291.
- liable to the corporation. § 4292.
- remedies given by these statutes and procedure thereunder. § 4293.
- liable to creditor who is a stockholder. § 4294.
- liability under these statutes for dividends declared. § 4295.
- 22. *Miscellaneous liabilities and penalties.*
 - acting as agent of foreign insurance company which has not complied with the domestic law. § 4298.
 - doing business for the corporation without a license. § 4299.
 - receiving deposits and creating debts while insolvent. § 4300.
 - whether such a constitutional provision self-enforcing. § 4301.
 - official mismanagement. § 4302.
 - liability of directors under the National Banking Act. § 4303.
 - whether the right of action given by this section is lodged alone in a receiver. § 4304.
 - resignation of such directors. § 4305.
- 23. *Remedies and procedure under the statutes.*
 - preliminary. § 4308.
 - whether the remedy is at law or in equity. § 4309.
 - doctrine of Supreme Court of United States: remedy in equity. § 4310.
 - so in Massachusetts. § 4311.
 - so in Georgia. § 4312.
 - so in Alabama. § 4313.
 - so in other States under various statutes and charters. § 4314.
 - in Kentucky, remedy at law. § 4315.
 - so in Missouri, where equitable relief not sought. § 4316.
 - so in Vermont. § 4317.
 - so in New York. § 4318.
 - so, it seems, in Indiana. § 4319.
 - action by single creditor against single director. § 4320.
 - form of the action at law. § 4321.
 - actions by creditors. § 4322.
 - actions by receivers. § 4323.
 - actions by assignees. § 4324.
 - actions by stockholders. § 4325.
 - actions by attorney-general in New York. § 4326.
 - judgment against corporation a condition precedent. § 4327.
 - exception in case of inchoate corporations. § 4328.
 - exception in some States. § 4329.
 - theory that judgment against corporation conclusive. § 4330.
 - theory that such judgment not evidence against the directors. § 4331.
 - whether judgment against corporation by garnishment a sufficient foundation for such an action. § 4332.
 - burden of proof under such statutes. § 4333.
 - parol evidence admissible to identify the judgment. § 4334.
 - misjoinder of such causes of action. § 4335.
 - pleading under such statutes: complaint must allege all the statutory grounds of recovery. § 4336.

Directors—(Continued).

what exceptions of the statute must be negatived. § 4337.
 averment of date of debt. § 4338.
 averment that the debt remains unpaid. § 4339.
 misdescription of the statute immaterial. § 4340.
 not necessary to aver how the damage happened. § 4341.
 other points in such complaints. § 4342.
 plaintiff recovers upon a preponderance of evidence. § 4343.
 procedure in case of the death of a director. § 4344.
 rule in Massachusetts in case of insolvency proceedings against director. § 4345.
 other decisions under statutes of Massachusetts. § 4346.
 costs in proceedings under these statutes. § 4347.
 various matters of practice in such actions. § 4348.

24. *Defenses to such actions.*

defense of no corporation. § 4354.
 when this defense available. § 4355.
 defense of negligence, ignorance of law, want of guilty *scienter*. § 4356.
 statutes creating a presumption of assent. § 4357.
 director exonerated by resigning or abandoning the office. § 4358.
 other evidence of want of assent. § 4359.
 assent of the plaintiff to the prohibited act. § 4360.
 defense of the statute of limitations: statute relating to penalties applicable.
 § 4361.
 view that such liability is in the nature of a specialty, and statutes of limitation
 not applicable. § 4362.
 when the statute begins to run. § 4363.
 limitation as to time when action brought against corporation. § 4364.
 defense not available to director where corporation failed to plead it. § 4365.
 nor unless raised in the trial court. § 4366.
 defense of laches. § 4367.
 defense of pendency of proceedings before assignee or receiver. § 4368.
 defense of waste of corporate assets by assignee or receiver. § 4369.
 defense of set-off. § 4370.
 defense of former adjudication. § 4371.
 other defenses which have been held unavailing. § 4372.

25. *Contribution and subrogation.*

when wrong-doing directors entitled to contribution as among themselves.
 § 4376.
 whether contribution in case of affirmative acts done contrary to statutory pro-
 hibitions. § 4377.
 statutes granting or withholding this right. § 4378.

26. *Compensation of directors and officers.*

directors not entitled to compensation unless, etc. § 4380.
 cannot vote themselves salaries or compensation. § 4381.
 especially after the services have been rendered. § 4382.
 illustrations of the two preceding sections. § 4383.
 directors cannot recover for "extra" services incidental to their official duties.
 § 4384.
 illustrations of the foregoing. § 4385.

Directors—(Continued).

- but may recover for services clearly outside such duties. § 4386.
- illustrations of the foregoing. § 4387.
- services prior to organization of corporation. § 4388.
- recovery of money misappropriated in payment of salaries. § 4389.

Discharge.

- of shareholder. See DEFENSES, subd. 4.
- of receivers. §§ 7192–7199.

Discovery.

- bills in equity for against corporation. § 7409.

Discrimination.

- See CHARGES; INTERSTATE COMMERCE; TOLLS.

Disfranchisement.

- See AMOTION.

Dissolution.

- See INSOLVENT CORPORATIONS; STOCKHOLDERS, subd. 46; WINDING UP.

1. In what manner corporations dissolved.

- four ways in which a corporation may become dissolved. § 6577.
 - when a corporation is deemed dissolved for all purposes. § 6578.
 - dissolution by legislative repeal of the charter. § 6579.
 - legislature the judge whether condition on which right of repeal is predicated has happened. § 6580.
 - further of this subject. § 6581.
 - where the statute, in terms, prescribes that the franchises shall revert to the State. § 6582.
 - when legislative prohibition against dissolution does not conclude the courts. § 6583.
 - when legislature cannot enact a forfeiture of corporate franchises. § 6584.
 - legislature may appoint trustee to wind up. § 6585.
 - forfeiture for non-performance of conditions subsequent. § 6586.
 - doctrine that a corporation ceases to exist *ipso facto*, on failure to perform the prescribed conditions. § 6587.
 - further of this subject: different principles in construing public and private grants. § 6588.
 - illustrations of this principle. § 6589.
 - franchise for building railroads in streets limited to a given time. § 6590.
 - decisions construing such limitations as conditions subsequent. § 6591.
 - other decisions of the same kind. § 6592.
 - still other such decisions. § 6593.
 - a corporation cannot prolong its existence by leasing its franchise to another corporation which complies with the conditions for its own benefit. § 6594.
- 2. Doctrine that forfeitures can only be effected by the State.**
- general rule that the question whether a corporation has forfeited its franchises can be raised only by the State. § 6598.
 - illustrations of this principle. § 6599.
 - further illustrations. § 6600.
 - interpretation of particular statute provisions. § 6601.
 - when the existence of the corporation is made to depend upon a condition subsequent. § 6602.

Dissolution—(Continued).

when courts will not dissolve private unincorporated voluntary associations. § 6603.

evidence insufficient to show a dissolution. § 6604.

private persons may proceed to forfeit charters, under statutory authority. § 6605.

3. *Grounds of forfeiting charters.*

disinclination of courts to forfeit charters. § 6608.

general statement of grounds of forfeiture. § 6609.

the public must have an interest in the act done or omitted. § 6610.

for the non-performance of conditions subsequent. § 6611.

further of this subject. § 6612.

making or procuring fundamental changes in the corporation. § 6613.

attempted violations of law. § 6614.

misprisions of directors and officers. § 6615.

but not unauthorized misprisions and breaches of trust. § 6616.

how far the question of forfeiture rests in judicial discretion. § 6617.

non-user of its franchises. § 6618.

suspending ordinary business for one year. § 6619.

failing to make, file, or publish statements as required by statute. § 6620.

making excessive loans to directors. § 6621.

failure to build a branch railroad. § 6622.

failure to organize in the mode prescribed by the statute. § 6623.

further of this subject. § 6624.

discontinuing a part of its route. § 6625.

failing to keep works in repair. § 6626.

joining a "trust" to stifle competition. § 6627.

violating charter provisions intended for the public protection. § 6628.

making usurious loans, shaving notes, etc. § 6629.

committing frauds upon creditors. § 6630.

serving the public unequally. § 6631.

contracting debts beyond a prescribed amount. § 6632.

issuing paper with intent to defraud. § 6633.

making dividends while refusing specie payments. § 6634.

embezzling deposits of the United States. § 6635.

suspension of specie payments. § 6636.

other violations of duty by banking corporations. § 6637.

neglecting to pay its debts for more than one year. § 6638.

omission to elect officers. § 6639.

changing the corporate name. § 6640.

acts for which the legislature has prescribed a specific penalty. § 6641.

mere insolvency. § 6642.

effect of a clause prohibiting dissolution until debts paid. § 6643.

subsequent good behavior. § 6644.

4. *Ipsa facto forfeitures of charters and de facto dissolutions.*

scope of this chapter. § 6650.

by the expiration of its charter. § 6651.

by the loss of all its members. § 6652.

where all the shares pass into the hands of one owner. § 6653.

Dissolution—(Continued).

- private agreements among the sole stockholders. § 6654.
- omission to elect directors. § 6655.
- resignation of the corporate officers. § 6656.
- when election will not prevent dissolution. § 6657.
- circumstances under which the incapacity to revive exists. § 6658.
- mere non-user of corporate powers. § 6659.
- assignment of all its property. § 6660.
- resolution of directors to wind up as trustees. § 6661.
- sale of all the corporate property to foreclose a lien. § 6662.
- sale or disposal of all its property. § 6663.
- cessation of active business. § 6664.
- attempting to change name. § 6665.
- † insolvency of the corporation. § 6666.
- breaches of conditions subsequent in their charters. § 6667.
- consolidation of two corporations. § 6668.
- / dissolution for the purpose of taxation. § 6669.
- / when deemed dissolved for the purpose of effectuating the rights of its creditors. § 6670.
- when an injunction against a corporation is made perpetual. § 6671.
- dissolution, how pleaded. § 6672.
- † failure to keep alphabetical list of stockholders. § 6673.
- 5. *Surrender of franchises and voluntary dissolutions.*
 - voluntary surrender of franchises. § 6678.
 - doctrine that a surrender must be accepted by the State. § 6679.
 - this doctrine inapplicable to private corporations. § 6680.
 - doctrine that an acceptance by the State not necessary in the case of a private corporation. § 6681.
 - by the act of the directors and officers. § 6682.
 - what will be evidence of a surrender. § 6683.
 - failing to accept charter. § 6684.
 - whether unanimous vote necessary. § 6685.
 - dissolving on the petition of a minority in value. § 6686.
 - constitutionality of statutes providing for the dissolution and winding up of insurance companies. § 6687.
 - pursuing the steps pointed out by statute. § 6688.
- 6. *Winding up at suit of stockholders.* See WINDING UP.
- 7. *Effect of dissolution.*
 - effect of dissolution of a corporation at common law. § 6718.
 - destroys its power to make contracts. § 6719.
 - destroys its power to sue. § 6720.
 - destroys its capacity to be sued. § 6721.
 - abates all actions commenced in its name. § 6722.
 - abates all actions pending against it. § 6723.
 - dissolves attachments levied upon its property. § 6724.
 - judgments rendered against corporation after dissolution are reversible on error. § 6725.
 - doctrine that such a judgment is void. § 6726.
 - doctrine no application to proceedings to enforce liens upon corporate property. § 6727.

Dissolution—(Continued)

- effect of dissolution after judgment. § 6728.
- at common law, dissolution extinguishes liability of stockholders. § 6729.
- modern doctrine that the obligations of corporations survive against their assets.
§ 6730.
- effect of this doctrine on the constitutionality of statutes. § 6731.
- operation of this doctrine where a corporation abandons its franchises. § 6732.
- statutes abrogating the common-law rule. § 6733.
- statutes continuing existence of the corporation for the purpose of suing and
being sued. § 6734.
- further decisions under such statutes. § 6735.
- such statutes applicable to foreign corporations. § 6736.
- what powers may be exercised during the period of continuance. § 6737.
- effect of such statutes upon the remedies of creditors against stockholders.
§ 6738.
- statutes continuing the directors and managers as trustees to wind up. § 6739.
- does not abate actions against directors for malfeasance. § 6740.
- liability of directors continuing business without winding up. § 6741.
- effect on the power to condemn land. § 6742.
- effect upon executory contracts. § 6743.
- when the dissolution of a corporation takes effect. § 6774.
- effect of dissolution upon real property of the corporation. § 6745.
- modern doctrine that real property does not revert nor personal property escheat.
§ 6746.
- effect of dissolution upon secondary franchises, such as rights of way, etc. § 6747.
- effect of the repeal of a charter. § 6748.
- affects rights of its assignees. § 6749.
- extent of title of trustees to wind up. § 6750.
- whether trustee to wind up sues in the name of the corporation. § 6751.
- effect of consolidation of corporations. § 6752.
- effect of dissolution upon unexpired leases. § 6753.
- effect of dissolution in a foreign jurisdiction. § 6754.
- further of foreign dissolutions. § 6755.
- effect on criminal offenses denounced by the charter. § 6756.
- effect of expiration of charter on torts afterward committed. § 6757.
- effect upon highways, railways, etc. § 6758.
- effect of voluntary dissolution. § 6759.
- reviving dissolved corporations. § 6760.
- does not invalidate acts of corporation *de facto*. § 6761.
- further as to effect of dissolution. §§ 7720-7724.

Distribution.

- See EXECUTION; RECEIVERS.
- of proceeds of sale under execution. § 7867.
- of fund in hands of receiver. §§ 7035-7051.

Distringas.

- See PROCESS.

Diverse citizenship.

- See CITIZENSHIP.
- as ground for removal of actions. See JURISDICTION, subd. 3.

Dividends.

See **SHARES.**

1. Generally considered.

what is a dividend. § 2126.

not a debt until declared. § 2127.

declaration of, rests in the discretion of the directors, and not compelled in equity. § 2128.

except in cases of fraud, caprice, or abuse. § 2129.

restraining the declaration of a dividend. § 2130.

corporation cannot appropriate unpaid dividends. § 2131.

banker's liens on cash dividends for unpaid balance. § 2132.

right of set-off for debts due by the shareholder to the corporation. § 2133.

theory that unpaid dividends are assets for creditors. § 2134.

reclamation of dividends improperly declared. § 2135.

reclamation where the capital stock has been divided and the company has become insolvent. § 2136.

construction of the Iowa statute authorizing such reclamation. § 2137.

cannot be forfeited by the corporation. § 2138.

nor appropriated by the State. § 2139.

no discrimination among shareholders in respect of dividends. § 2140.

but the stockholder discriminated against cannot recoup against others. § 2141.

discretion of directors as to time and place of payment. § 2142.

payable at a bank which fails—who bears loss. § 2143.

when considered divided and paid. § 2144.

dividends in liquidation. § 2145.

equalizing stockholders in respect of such dividends. § 2146.

where the stockholders work as partners and draw out annual amounts. § 2147.

taxation of dividends. § 2148.

2. Validity and propriety of dividends.

when *ultra vires* and not permissible. § 2152.

when not *ultra vires* and hence permissible. § 2153.

when declaration of dividends not obligatory. § 2154.

liability of directors for improperly declaring dividends. § 2155.

when acceptance of dividend not a ratification of illegal act of directors. § 2156.

rule for ascertaining what are profits to be divided. § 2157.

an illustrative English case. § 2158.

dividing sum derived from sale of part of undertaking. § 2159.

dividend by consolidated corporation out of earnings of precedent corporation. § 2160.

equalizing appreciation and depreciation. § 2161.

purchase of the shares of a member to be paid out of corporate earnings. § 2162.

a statute of California. § 2163.

status of shareholders of unincorporated joint stock companies. § 2164.

3. Stock and scrip dividends.

stock dividends lawful. § 2167.

what are not stock dividends. § 2168.

bonds in lieu of cash dividends. § 2169.

Dividends—(Continued).

4. *Right to dividends as between successive owners of shares.*

dividends belong to the owner of the stock at the time when the dividend is declared. § 2172.

right to undivided profits passes with the stock. § 2173.

dividend declared does not pass with a future transfer of the stock. § 2174.

dividend declared previously to the transfer, but payable thereafter. § 2175.

custom not admissible to alter these principles. § 2176.

rules of stock exchanges. § 2177.

application of these principles to "option" sales. § 2178.

same rule as to interest as in case of interest-bearing stock. § 2179.

how in case of unrecorded transfers. § 2180.

right of pledgee to dividend ceases after extinguishment of debt. § 2181.

illustration of these principles. § 2182.

right to dividends in cases depending upon particular facts. § 2183.

contract to pay in shares does not include dividends. § 2184.

contract with shareholder respecting dividends extends only to dividends declared. § 2185.

authority of agent to sell shares does not authorize sale of dividend. § 2186.

right to stock dividends as between successive shareholders. § 2187.

what scripholders entitled to dividends where there has been a succession of ownership. § 2188.

5. *Right to dividends as between life tenant and remainderman.*

right to stock dividend as between life tenant and remainderman: general considerations. § 2192.

all dividends presumptively go to the life tenant. § 2193.

profits accruing during the lifetime of the testator, but divided after his death. § 2194.

illustrations of this rule. § 2195.

question of value how determined under Pennsylvania rule. § 2196.

application of the Pennsylvania rule where life tenant dies before the declaration of dividend. § 2197.

profits accruing from a discovery of mineral after the death of the shareholder. § 2198.

view that extra dividends, bonuses, etc., declared from profits go to the life tenant. § 2199.

under Massachusetts rule dividends accruing during the life of the life tenant, but not declared until after his death, pass to remainderman. § 2200.

ordinary cash dividends go to life tenant. § 2201.

illustrations. § 2202.

dividend payable out of old shares. § 2203.

cash dividends voted to pay invalid stock dividends. § 2204.

shares reduced in consequence of losses, and then reissued after recovery. § 2205.

what dividends pass to the specific legatee of shares. § 2206.

view that the question is to be determined by the form of corporate action. § 2207.

result of this view: cash dividends, however large, income; stock dividends, however made, capital. § 2208.

Dividends—(Continued).

another result; undivided earnings likewise capital. § 2209.
continued: stock dividends capital, although derived from net earnings. § 2210.
view of the supreme court of the United States. § 2211.
English expressions of the same view. § 2212.
profits turned into capital and afterwards divided. § 2213.
premiums accruing from the sale of new shares. § 2214.
profits arising from options to take new shares. § 2215.
further illustrations of the Massachusetts rule. § 2216.
further illustrations. § 2217.
further illustrations. § 2218.
increase in value of shares is capital. § 2219.
cash dividend declared out of capital goes to remainderman. § 2220.
dividend from expropriation of real estate of corporation. § 2221.
the Massachusetts doctrine criticised. § 2222.
rule under Georgia code. § 2223.

6. Remedies to compel payment of declared dividends.

stockholder cannot sue for a dividend until declared. § 2227.
but may when dividend has been declared. § 2228.
limitation of such actions. § 2229.
remedy in equity to recover dividend. § 2230.
parties to actions to enforce payment of dividends. § 2231.
demand. § 2232.
pending an action for the conversion of the shares. § 2233.
when stockholder of lessee corporation cannot sue for dividend. § 2234.

7. Miscellaneous.

by comptroller in liquidation of national banks. § 7309.
unlawful, liability of directors for declaring. §§ 4288–4295.

Documents.

See BOOKS AND PAPERS: RECORDS.

Domicile.

See CORPORATIONS, subd. 10; RESIDENCE.
residence of corporation considered. §§ 686–692.

Donation.

See DIRECTORS, subds. 5, 6.

Double taxation.

See TAXATION.
in respect of stock shares. §§ 2810–2819.

Dry dock company.

powers of — cannot engage in navigation. § 5953.

Ecclesiastical corporation.

See RELIGIOUS SOCIETY.

Education.

organization of companies for promotion of. § 176.

Effect.

See DISSOLUTION, subd. 7.

Elections.

See CORPORATIONS, subd. 10; DIRECTORS.

1. Assembling the meeting.

mandamus to compel the holding of a corporate election. § 700.

Elections—(Continued).

- time of holding corporate elections. § 701.
 - statutory provisions as to time of holding corporate meetings. § 702.
 - statutory provisions as to place of holding corporate meetings. § 703.
 - who may call the meeting. § 704.
 - statutory provisions as to who may call. § 705.
 - necessity of having meeting duly assembled. § 706.
 - corporate meetings invalid unless duly notified. § 707.
 - if the meeting is special all must be summoned. § 708.
 - and in the statutory mode. § 709.
 - requisites of the notice. § 710.
 - statutory provisions as to manner of giving notice, length of time, etc. § 711.
 - waiver of notice by appearance. § 712.
 - illustrations of the foregoing rule. § 713.
 - notice dispensed with by unanimous written consent. § 714.
 - when personal notice required. § 715.
 - must be given for the statutory time. § 716.
 - when notice must state objects of meeting. § 717.
 - meeting when confined to subjects expressed in notice. § 718.
 - illustrations. § 719.
 - adjournment to a subsequent day. § 720.
 - statutes providing for adjourned or special elections. § 721.
 - statutes under which elections fixed and regulated by by-laws. § 722.
2. *The quorum.*
- quorum where body is composed of an indefinite number. § 725.
 - where composed of definite number. § 726.
 - statutory provisions as to the quorum. § 727.
 - election by a majority of those who actually vote, though not a majority of the quorum. § 728.
 - delegating power of selection to a select body. § 729.
3. *Right to vote.*
- right to vote at such elections. § 730.
 - execution, surviving partners, trustees, assignees, etc. § 731.
 - right to vote in respect of shares pledged or mortgaged. § 732.
 - further of this subject. § 733.
 - right to vote in respect of shares held or owned by the corporation itself. § 734.
 - right of pledgor to proxy from pledgee. § 735.
 - no right to vote by proxy at common law. § 736.
 - validity of by-law which provides for voting by proxy. § 737.
 - statutes conferring the right to vote by proxy. § 738.
 - further of the right to vote by proxy. § 739.
 - right to vote how affected by by-laws. § 740.
 - injunction to restrain fraudulent or *ultra vires* voting. § 741.
 - statutory provisions as to who entitled to vote. § 742.
 - non-residents and aliens. § 743.
4. *Conduct of the election.*
- appointment of inspectors. § 745.
 - statutory provisions as to the appointment of inspectors. § 746.
 - instances of an election void because inspectors illegally appointed. § 747.

Elections—(Continued).

- their duties in conducting the election. § 748.
- cannot pass upon the validity of proxies. § 749.
- irregular ballots. § 750.
- the count. § 751.
- votes for ineligible candidates thrown away. § 752.
- cumulative voting. § 753.
- constitutional provisions as to cumulative voting. § 754.
- statutory provisions as to cumulative voting. § 755.
- judicial decisions on the subject of cumulative voting. § 756.
- certificate of election. § 757.
- statutory provisions as to conduct of elections. § 758.
- at adjourned meetings. § 3864.
- 5. *Right to the office, and contesting election.*
 - inadequacy of the remedy by *certiorari*. § 761.
 - inadequacy of the remedy by *mandamus*. § 762.
 - instances of the use of *mandamus*. § 763.
 - no remedy in equity except when the question arises collaterally. § 764.
 - statutory provisions to contest corporate elections. § 765.
 - information in the nature of *quo warranto*. § 766
 - a civil proceeding. § 767.
 - this remedy denied in the case of officers who are mere servants or employés and removable at pleasure. § 768.
 - any person interested may be relator. § 769.
 - information filed by the attorney-general or prosecuting attorney. § 770.
 - what the information must allege. § 771.
 - the plea. § 772.
 - misjoinder of parties. § 773.
 - leave to file discretionary with court. § 774.
 - when the relator bound to show title. § 775.
 - distinctions as to the burden of proof. § 776
 - the rule in New York. § 777.
 - remedy exists only against a party in possession. § 778.
 - matters of evidence. § 779.
 - remedy does not extend to mere irregularities, mistakes, etc. § 780.
 - rules of decision in cases where legal votes have been rejected or illegal votes received. § 781.
 - where two factions organize two meetings. § 782.
 - party receiving the next highest number of votes, where successful candidate disqualified. § 783.
 - validity of election where whole number not elected. § 784.
 - judgment where term of office has expired. § 785.
 - proceeding against an incumbent who is disqualified. § 786.
 - estoppel to raise objection. § 787.
 - title to corporate office not impeached collaterally. § 788.
 - presumptions in favor of regularity. § 789.
 - eligibility for the office of director. § 790.
 - classification of directors. § 791.
 - holding over. § 792.

Elections—(Continued).

statutory provisions that directors shall hold over. § 793.

resignation of a corporate office. § 794.

Eleemosynary corporation.

See CHARITIES; CORPORATION.

Eligibility.

for office of director. § 790.

Embezzlement.

See DIRECTORS; LIABILITY; INDICTMENT.

Eminent domain.

See CORPORATE POWERS; DELEGATION.

Delegated power of, generally.

scope of the subject. § 5587.

State does not part with right of eminent domain without express words. § 5588.

this power may be conferred upon private corporations. § 5589.

constitutional limitations upon the exercise of this power. § 5590.

whether the use is a public use a judicial question. § 5591.

necessity or expediency of taking, a question for the legislature. § 5592.

theories as to what uses are public uses. § 5593.

use may be a public use, though local in its extent. § 5594.

what uses are public uses: improvements which justify the exercise of this power — public highways. § 5595.

private roads. § 5596.

public parks. § 5597.

public buildings. § 5598.

public cemeteries. § 5599.

public railways. § 5600.

public canals. § 5601.

works for the improvement of public navigations. § 5602.

sluices for the passageway of fish. § 5603.

public booms. § 5604.

public landings. § 5605.

telegraphs and telephones. § 5606.

public grist-mills propelled by water. § 5607.

development of mines. § 5608.

iron-works. § 5609.

water-works for cities. § 5610.

works and servitudes for the drainage of lands. § 5611.

drains and sewers in cities. § 5612.

pipe lines. § 5613.

works for the pecuniary profit of the State itself. § 5614.

power extends to the condemnation of the property and franchises of other corporations. § 5615.

extends to the condemnation of exclusive privileges. § 5616.

extends to the condemnation of the property of corporations. § 5617.

extends to the condemnation of easements granted to corporations. § 5618.

strict construction of grants under which this power claimed. § 5619.

one corporation cannot condemn franchises and property of another for the same purpose. § 5620.

Eminent domain—(Continued).

- condition of rendering just compensation. § 5621.
- property of corporation cannot be taken without compensation. § 5622.
- power of legislature over mode of assessing damages where right of repeal has been reserved. § 5623.
- condemnation by United States of franchises granted by the States. § 5624.
- rules of damage where land is condemned for public use. § 5625.
- setting off benefits against damages. § 5626.
- title acquired under right of eminent domain. § 5627.
- acquire perpetual interest in city streets. § 5628.

Enabling acts.

See CHARTERS; ORGANIZATION; STATUTES.

Enactment.

See BY-LAWS, subd. 2.

Equity.

- See STOCKHOLDERS, subd. 44.
- remedies of stockholders in. §§ 4471-4511.
- jurisdiction in, as to winding up of corporation. §§ 4538-4548.
- power of courts of equity in dissolving and winding up corporations. § 6703.
- form of relief to stockholders. §§ 4552-4560.

Escheat.

See DISSOLUTION; FORFEITURES; LAND.

Estoppel.

- See CORPORATIONS, subd. 7.
- to deny corporate existence. §§ 518-533, 7647-7649.
- to forfeit stock shares. § 1775.
- to plead *ultra vires*. §§ 6015-6024.

Estoppel in pais—operation of against corporations.

- the doctrine of estoppel *in pais* stated. § 5246.
- estoppels *in pais* operate against corporations as against individuals. § 5247.
- estoppel validates contracts entered into by corporations without authority of stockholders. § 5248.
- validates the acts of corporations on the ground of acquiescence by the stockholders. § 5249.
- prevents a corporation from setting up want of power in its officers to make a contract. § 5250.
- prevents a corporation from repudiating acts of its officers within the apparent scope of their powers. § 5251.
- validates the acts of *de facto* officers. § 5252.
- works the release of stockholders whose rights have been repudiated by the corporation. § 5253.
- prevents corporation from denying its own existence. § 5254.
- prevents a *de facto* corporation from repudiating its contracts after dissolving and reorganizing. § 5255.
- prevents it from denying fraudulent alterations of its record. § 5256.
- prevents it from denying validity of provisions in its charter. § 5257.
- prevents it from repudiating unauthorized contracts after accepting benefits thereunder. § 5258.
- estops a corporation holding the shares of another corporation as pledgee. § 5259.

Estoppel—(Continued).

- prevents a railroad company from asserting its exclusive franchise against another company which has built its road. § 5260.
- prevents a canal company from diverting its water from a mill. § 5261.
- prevents municipal corporation from denying the validity of its bonds. § 5262.
- prevents a *quo warranto* proceeding against one whom the relator has induced to act as a corporate officer. § 5263.
- waiver of rights by corporation. § 5264.
- waiver of conditions in policies of insurance. § 5265.
- when corporation not estopped by acts of its officers in procuring new legislation. § 5266.
- acceptance of tolls prevents a turnpike company from denying its obligation to repair. § 5267.
- estoppels against corporate officers. § 5268.
- estoppels concurrent as between corporation and stockholders. § 5269.
- estoppels against individual stockholders. § 5270.
- when stockholders estopped from pleading *ultra vires*. § 5271.
- when transferees of stockholders so estopped. § 5272.
- when members estopped from denying existence of corporation. § 5273.
- third persons estopped by contracting with corporation. § 5274.
- one who contracts with corporation estopped to deny its existence. § 5275.
- person claiming under corporate deed estopped to deny corporate existence. § 5276.
- estoppels against creditors of corporations. § 5277.
- estoppel as against a creditor who is also a stockholder. § 5278.
- estoppel prevents a landowner whose land is taken by a corporation from having an injunction. § 5279.

Evidence.

See ACTIONS; CORPORATE EXISTENCE; PROOF.

1. *In actions by and against corporations — books and records.*
 - corporate books and records admissible against the corporation. § 7728.
 - admissible between the corporation and its members. § 7729.
 - admissible in a controversy between members. § 7730.
 - how far evidence against stockholders. § 7731.
 - exceptions and contrary holdings. § 7732.
 - books of account. § 7733.
 - corporate books and records admissible to prove their acts and proceedings. § 7734.
 - consequences of the rule that the corporate books are the best evidence. § 7735.
 - such records admissible to prove corporate existence. § 7736.
 - evidence that the books are the books of the corporation. § 7737.
 - secondary evidence of the contents of such books and records. § 7738.
 - such books and records *prima facie* evidence only. § 7739.
 - when not evidence as against strangers. § 7740.
 - corporate records evidence against receiver of corporation. § 7741.
2. *Other matters of evidence.*
 - presumptions respecting corporations. § 7746.
 - parol evidence of corporate acts. § 7747.
 - illustrations of the foregoing. § 7748.

Evidence—Exemplary damages INDEX.

Evidence—(Continued).

- effect of by-laws as evidence. § 7749.
- evidence of customs of private corporations. § 7750.
- of corporate existence. §§ 1846–1873.
- in action by corporation for assessments. § 1846, *et seq.*
- corporate books and records as. §§ 1918–1933.
- questions of in actions to charge stockholders. §§ 3650–3665.

Examination.

See INSPECTION.

Excess.

See SHARES, subd. 1.

Excise taxes.

See TAXATION.

upon foreign corporations in Massachusetts. § 8134.

Exclusive privileges.

See FRANCHISES.

Execution.

See ATTACHMENT; SALES.

against stock shares. See SHARES, subds. 19, 20.

against stockholder, generally. §§ 3591–3599.

1. *Against corporations—in general.*

general rule that corporate property subject to execution. § 7847.

otherwise as to property of corporations created for public objects. § 7848.

sequestration of earnings. § 7849.

liens of judgments upon railroad property. § 7850.

rolling stock vendible under execution. § 7851.

alienation through sales to enforce mechanics' liens. § 7852.

corporate franchises not subject to execution. § 7853.

nor is property necessary to enjoyment of corporate franchises. § 7854.

cases to which this exemption does not extend. § 7855.

decisions denying this exemption. § 7856.

statutes abolishing this exemption. § 7857.

levying upon a franchise of taking tolls and upon tolls to accrue under a franchise. § 7858.

effect of levy upon personal property subject to existing mortgages. § 7859.

levying upon the assets of a dissolved corporation, or corporation in liquidation. § 7860.

2. *Writ and proceedings thereunder.*

misnomer in the writ. § 7865.

sales under such executions. § 7866.

distribution of the proceeds of the sale. § 7867.

right of a stockholder to redeem. § 7868.

other questions arising under such executions. § 7869.

Executors and administrators.

See INDIVIDUAL LIABILITY.

individual liability of for corporate debts. § 3317–3335.

Executory contracts.

See CONTRACTS; ULTRA VIRES.

Exemplary damages.

See TORTS, subd. 6.

Exemption—Foreign corporat'ns INDEX.

Exemption.

See TAXATION.

of stock shares from taxation. §§ 2823-2840.

of corporate property from taxation. See FRANCHISES, subd. 8.

of foreign corporations from taxation. § 8131.

Expiration.

See CHARTERS; DISSOLUTION; FRANCHISES.

Express companies.

See TAXATION.

taxation of. § 8154.

Expulsion.

See MEMBERS, EXPULSION OF.

Factor.

See FORECLOSURE; LIENS.

lien of. § 2703.

False imprisonment.

See TORTS.

liability of corporation for. § 6313.

False representations.

See FRAUD; TORTS.

Federal jurisdiction.

of actions by and against corporations. See JURISDICTION, subds. 2-4.

conditions of in actions against non-resident corporations. § 8023.

Fee.

See CONVEYANCES; TITLE.

Fencing land.

organization of company for. § 152.

Ferry companies.

See ORGANIZATION; TAXATION.

incorporated in other States, taxation of. § 8126.

Fertilizers.

organization of fertilizer company. § 157.

Fiduciaries.

See DIRECTORS, subd. 6.

obligation of directors as. § 4009, *et seq.*

Financial powers.

See DISSOLUTION, subds. 2-4; CORPORATE POWERS, subd. 3.

Fire companies.

organization of. § 154.

Fire department relief.

organization of. § 155.

Fixtures.

See MORTGAGES; LAND.

Foreclosure.

of corporate mortgages. See MORTGAGES, subd. 4.

Foreign corporations.

See ACTIONS.

proof of existence of. § 7712.

bequests of personalty to. § 5829.

Foreign corporations—(Continued).

1. *Status and powers of in general.*

status of foreign corporations as settled by Federal decisions. § 7875.

not entitled to the privileges and immunities of citizens in the several States.
§ 7876.

whether entitled to the "equal protection of the laws" of the State within which it is permitted to do business. § 7877.

Federal protection of foreign corporations engaged in interstate commerce.
§ 7878.

what is interstate and foreign commerce within this prohibition. § 7879.

what is not interstate commerce within this prohibition. § 7880.

cannot migrate, but must dwell in place of its creation. § 7881.

may make and take contracts in other States and countries except where prohibited. § 7882.

presumptions arising in support of the validity of the contracts of foreign corporations. § 7883.

cannot exercise corporate franchises in a foreign jurisdiction except by comity.
§ 7884.

cases to which this comity does not extend. § 7885.

all their rights subject to the domestic law. § 7886.

States may impose conditions upon which they may do business. § 7887.

may be required to appoint a resident agent upon whom process may be served.
§ 7888.

may establish agencies and do business in the domestic State unless prohibited.
§ 7889.

foreign corporations made domestic corporations *quoad hoc*. § 7890.

when deemed to have been made such, and when not. § 7891.

instances where such adoption and domestication were held to have taken place.
§ 7892.

instances where such adoption and domestication held not to have taken place.
§ 7893.

statutes subjecting foreign corporations to the same liabilities and restrictions as domestic corporations. § 7894.

status of "tramp corporations." § 7895.

further of "tramp corporations." § 7896.

to what extent may act in other States. § 7897.

status of foreign insurance companies. § 7898.

status of corporations created by the Congress of the United States. § 7899.

foreign corporations when deemed "persons." § 7900.

when the word "corporation" used in statutes, applies to foreign corporations.
§ 7901.

mandamus to compel issuing of license to foreign corporation. § 7902.

foreign corporation doing business under the same name as a domestic corporation. § 7903.

courts will not interfere with internal management of foreign corporations.
§ 7904.

but will settle ordinary questions depending upon the construction of foreign charters. § 7905.

2. *Powers of foreign corporations relating to land.*

power to acquire and hold land. § 7913.

Foreign corporations—(Continued).

decisions considering the question as one of public policy. § 7914.

decision conceding the power. § 7915.

may acquire and hold real estate for office purposes, etc. § 7916.

whether this power exists in a foreign corporation organized for the purpose of dealing in real estate. § 7917.

doctrine that such power is presumed to exist until the State interferes. § 7918.

power to take and hold land by devise. § 7919.

power limited by charter of corporation. § 7920.

such charter construed according to the *lex rei sitæ*. § 7921.

power to take and foreclose mortgages. § 7922.

power to mortgage and incumber their lands. § 7923.

3. *State laws imposing conditions upon foreign corporations—in general.*

constitutional limitations upon the State legislatures. § 7928.

statutes providing that foreign corporations shall enjoy no greater rights than domestic corporations. § 7929.

retaliatory statutes. § 7930.

distinction between statutes of retaliation and statutes of reciprocity. § 7931.

restrictions upon exercising the right of eminent domain. § 7932.

statutes requiring foreign corporation to file charter, certificate of incorporation, articles of association, etc. § 7933.

statutes requiring agents of such corporations to file evidence of their authority. § 7934.

statutes requiring such corporations to keep known place of business and resident agent. § 7935.

what constitutes "doing business" in violation of such prohibition. § 7936.

citizens of the State procuring insurance from foreign companies. § 7937.

evidence of compliance with such statutes. § 7938.

proceedings against agents for penalties for doing business in violation of such statutes. § 7939.

restrictions upon foreign insurance companies. § 7940.

whether such statutes apply to foreign mutual benefit companies. § 7941.

statutes prohibiting the dealing in bank bills of corporations created in other States. § 7942.

State statutes not applicable to corporations vending patented articles. § 7943.

ousting foreign corporations by *quo warranto*. § 7944.

4. *Effect of violating these restraints upon contracts and rights of action thereon.*

foreign corporations cannot recover on contracts made in violation of such restrictions. § 7950.

doctrine that domestic citizen may treat the contract as void and recover what he has advanced thereon. § 7951.

doctrine that domestic citizen may defend against the contract so far as unexecuted on his part. § 7952.

illustration in case of premium notes of foreign insurance companies. § 7953.

exception in case of *bona fide* holders of such notes for value. § 7954.

illustration in the case of mortgages taken by foreign corporations. § 7955.

doctrine that the failure of the foreign corporation to comply with domestic statutes merely suspends its remedy on contracts until compliance. § 7956.

Foreign corporations—(Continued).

doctrine that failure to comply with such statutes does not render contracts void. § 7957.

doctrine where the statute gives a specific penalty. § 7958.

doctrine that neither party can set up his own violation of law. § 7959.

corporation estopped to set up its want of compliance with such statutes in avoidance of its own contracts. § 7960.

whether agent of foreign corporation can defend on this ground against an action by the corporation on his bond. § 7961.

non-compliance with such statutes prevents agent from recovering commissions. § 7962.

legislature may validate such contracts. § 7963.

foreign corporation can acquire and transmit valid titles without complying with local law. § 7964.

whether necessary for foreign corporation plaintiff to aver and prove compliance with such statutes. § 7965.

further of this subject. § 7966.

rule where the foreign corporation is sued. § 7967.

effect of non-compliance upon the interpretation of contracts. § 7968.

effect of withdrawing agency from the State. § 7969.

situs of the contracts of foreign corporations for purposes of jurisdiction. § 7970.

5. Actions by foreign corporations.

power of foreign corporations to sue. § 7977.

for what causes of action. § 7978.

rights of action how affected by failing to comply with statutes prescribing conditions upon which it may enter the State to do business. § 7979.

further of this subject. § 7980.

alleging compliance with statute permitting foreign corporations to do business within the State. § 7981.

pleading statutes invalidating contracts of foreign corporations not authorized to do business in the State. § 7982.

power to buy at execution sales. § 7983.

allegation of corporate existence in actions by and against foreign corporations. § 7984.

6. Actions against foreign corporations.

summary statement of the cases in which a foreign corporation may be sued. § 7988.

early doctrine that actions *in personam* did not lie against foreign corporations. § 7989.

how under the English law. § 7990.

doctrine that express legislative sanction is necessary. § 7991.

corporation can contract for service of process in a foreign country. § 7992.

progress of statutory changes domesticating foreign corporations for jurisdictional purposes. § 7993.

may be sued through their agents in any State into which they migrate. § 7994.

must do business within the State and be served by an authorized agent. § 7995.

jurisdiction as depending upon the amount and kind of business done by the officer or agent within the State. § 7996.

Foreign corporations—(Continued).

statutes creating or extending the right of action against foreign corporations. § 7997.

modern doctrine that corporations may establish domiciles in other States. § 7998.

modern rule as to residence of corporations for purposes of jurisdiction. § 7999.

modern rule that trading corporation may be sued wherever it has a place of trade. § 8000.

non-residents have no constitutional right of action against foreign corporations. § 8001.

further as to actions by non-residents against foreign corporations. § 8002.

foreign corporations not suable by non-residents on foreign contracts. § 8003.

contra, that non-residents may sue foreign corporations on foreign contracts. § 8004.

foreign corporations not suable for torts committed in foreign States. § 8005.

but suable for torts committed in domestic States. § 8006.

for what causes residents may sue foreign corporations. § 8007.

foreign corporations not suable *ex contractu* except upon domestic contracts. § 8008.

actions against foreign corporations. § 8009.

actions against foreign corporations which have migrated from the domestic State. § 8010.

jurisdiction of actions by stockholders to redress grievances in corporate management. § 8011.

actions against corporations created by the concurrent legislation of several States. § 8012.

7. *Service of process on foreign corporations.* See PROCESS, subd. 4.

8. *Proceedings against foreign corporations by attachment.* See ATTACHMENTS, subd. 2.

9. *Proceedings against foreign corporations by garnishment.* See GARNISHMENT, subd. 2.

10. *Taxation of foreign corporations.* See TAXATION, subd.

Foreign receivers.

See RECEIVERS.

receivers have no extra-territorial power. § 7334.

cannot sue in a foreign jurisdiction except by comity. § 7335.

this comity generally recognized except as against domestic citizens. § 7336.

this comity does not extend to the prejudice of the State's own citizens. § 7337.

foreign judicial assignments invalid as against domestic creditors. § 7338.

actions permitted when not in derogation of domestic rights. 7339.

for what purposes non-resident receivers permitted to sue. 7340.

may sue to repossess himself of property removed into the domestic jurisdiction. § 7341.

illustrations of this principle. § 7342.

real property situate in the foreign jurisdiction does not vest in receiver. § 7343.

cases refusing to extend this comity. § 7344.

foreign receivers preferred in contest with the debtor and his privies. § 7345.

foreign receiver preferred in contest with foreign creditor. § 7346.

distinction between voluntary assignments and assignments *in invitum* by operation of law. § 7347.

Foreign receivers—Franchises INDEX.

Foreign receivers—(Continued).

- where the receiver adopts and carries out the contract of the corporation. § 7348.
- not chargeable as garnishee or with trustee process. § 7349.
- attachment in foreign jurisdiction a contempt of court. § 7350
- appointing a receiver of property situated in a foreign jurisdiction. § 7351.
- auxiliary receivers appointed as a matter of comity. § 7352.
- receiver cannot transfer jurisdiction to foreign court. § 7353.

Foreign state.

See FOREIGN CORPORATION; JURISDICTION.

Forestalling.

See TRUSTS; TORTS.

Forfeitures.

See SHARES.

- of shares for nonpayment of assessments. § 1762, *et seq.*
- power of corporation to create. § 5843.
- relief against in equity. §§ 1806-1810.

Formation of corporations.

See ORGANIZATION.

Franchises.

See CHARTERS; DISSOLUTION; FORFEITURES.

1. *Nature of franchises in general.*

- what is a franchise. § 5335.
- whether vests in the corporation or in the individuals who compose it. § 5336.
- forfeiture of franchises. § 5337.
- distinction between franchises and mere personal privileges. § 5338.
- doctrine that equity will not forfeit franchises. § 5339.
- whether existence of franchises challenged collaterally. § 5340.
- whether a corporate franchise divisible. § 5341.
- whether a corporation organized under general laws can receive additional franchises through special laws. § 5342.

2. *Construction of grants of franchises.*

- grants of franchises strictly construed. § 5345.
- not construed as extending to foreign corporations. § 5346.
- provisos not construed so as to defeat the grant. § 5347.
- grants of franchises not construed as exclusive. § 5348.
- franchise of toll-bridge not impaired by railway bridge. § 5349.

3. *Vendibility of franchises.*

- whether a franchise alienable. § 5352.
- franchise to be a corporation not alienable. § 5353.
- consequences of this rule. § 5354.
- franchises of corporations having public duties to perform not alienable. § 5355.
- railway franchises not alienable without legislative authority. § 5356.
- so as to transfer a franchise to operate a line of telegraph. § 5357.
- no common-law power to lease property and franchises dedicated to public duties. § 5358.
- illustrations of this principle. § 5359.
- such contracts may be abandoned at any time before fully executed. § 5360.
- legislature may authorize alienation of franchises. § 5361.
- what words in statutes authorize the alienation of franchises. § 5362.

Franchises—(Continued).

- legislative power to sell includes power to mortgage. § 5363.
- corporate franchises not vendible under execution. § 5364.
- what franchises of a railway company pass by a judicial sale. § 5365.
- rule where purchasing company reorganized under existing laws. § 5366.
- vendibility of a portion of its franchises. § 5367.
- whether a franchise can be transferred to an individual. § 5368.
- power of a corporation to purchase an exclusive privilege. § 5369.
- sale of franchises does not work a dissolution of the corporation. § 5370.
- transfer of franchises by transferring all the shares. § 5371.
- how franchises annulled after unlawful assignment. § 5372.
- corporate property necessary to exercise of what franchises inalienable. § 5373.
- all other property alienable. § 5374.
- right of way, works, etc., of irrigating companies alienable. § 5375.
- 4. *Constitutional protection of franchises — charters regarded as contracts.*
 - what rights are protected as contracts by the Federal constitution. § 5380.
 - corporate charters protected as contracts. § 5381.
 - enumerated qualifications of the doctrine. § 5382.
 - charters of public corporations not so protected. § 5383.
 - charters of educational and other charitable corporations so protected. § 5384.
 - doctrine illustrated by the Dartmouth College case. § 5385.
 - other illustrations showing the extent of such protection. § 5386.
 - protection of religious corporations. § 5387.
 - consideration of the contract. § 5388.
 - obligation impaired by imposition of new conditions. § 5389.
 - conditions to be interpreted by the courts and not by the legislature. § 5390.
 - rights secured by charter not higher than those arising in contract between natural persons. § 5391.
 - legislature may provide for winding up insolvent corporations. § 5392.
 - rights not expressed but implied in charters protected as contracts. § 5393.
 - such as the right of a railroad company to aid subscribed by counties. § 5394.
 - validity of general law withdrawing from corporations the right to take by devise. § 5395.
 - validity of enabling acts. § 5396.
 - provision in bank charter that its circulating notes shall be legal tender. § 5397.
 - grants of exclusive privileges cannot be impaired without compensation. § 5398.
 - grant of franchises does not prevent grant of similar franchises to another corporation, unless exclusive. § 5399.
 - illustrations of this principle. § 5400.
 - construction of conflicting grants with reference to this principle. § 5401.
 - further illustrations. § 5402.
 - doctrine that franchises should be protected from unlawful competition, though not exclusive. § 5403.
 - turnpikes protected against "shunpikes." § 5404.
 - payment of damages in such cases. § 5405.
 - when possession enjoined until damages paid. § 5406.
 - right to condemn property for public use protected as a franchise. § 5407.
 - effect of reservation of the power to repeal or alter. § 5408.
 - how the power thus reserved may be exercised. § 5409.

Franchises—(Continued).

- judicial *dicta* on this subject. § 5410.
 - exercised in what particulars. § 5411.
 - effect of the reservation of an absolute right of repeal. § 5412.
 - power to alter or repeal not exercised so as to impair vested rights. § 5413.
 - effect of repeal of charters upon existing contracts. § 5414.
 - effect of assignment of corporate franchises upon legislative power to alter or repeal. § 5415.
 - State cannot force upon corporators an amendment of their charters. § 5416.
 - constitutional protection of the rights of shareholders. § 5417.
 - power to amend does not extend to creating a new corporation. § 5418.
 - reservation of right of repeal upon happening of future contingency; whether legislature or courts to judge of the contingency. § 5419.
 - comments on the view that the courts alone can determine that the contingency has happened. § 5420.
 - view that the decision of the legislature is subject to judicial revision. § 5421.
 - further of this subject. § 5422.
 - such reservations not construed as impairing the police power. § 5423.
 - effect of consolidation upon legislative power to alter or repeal. § 5424.
 - impairment of charters by judicial decisions. § 5425.
 - doctrine illustrated in the case of municipal bonds. § 5426.
 - charters may be impaired by any act to which the State gives the force of a law. § 5427.
 - constitutional protection of franchises granted by municipal corporations. § 5428.
 - protection of charter rights of navigation companies. § 5429.
 - repeal of law before right vested. § 5430.
 - contracts with third persons made on the faith of the grant of the franchise protected. § 5431.
 - impairment in favor of corporations of franchises granted to individuals. § 5432.
 - construction of charters with reference to exemptions from future legislation. § 5433.
 - retroactive laws. § 5434.
 - revocation of licenses granted to corporations. § 5435.
 - statutes prescribing penalties or more efficient remedies for existing duties. § 5436.
 - statutes which affect the remedy merely. § 5437.
 - constitutional protection extends to corporations organized under general laws. § 5438.
 - protected against changes in State constitutions. § 5439.
 - instances of legislation unconstitutional as impairing the contracts embodied in charters. § 5440.
 - instances of legislation affecting corporations not unconstitutional. § 5441.
 - constitutional protection of charters granted by Congress. § 5442.
5. *Under the fourteenth amendment.*
- protection under the fourteenth amendment to United States constitution prohibiting deprivation of property without due process of law. § 5448.
 - does not require special notice in taxation proceedings. § 5449.

Franchises—(Continued).

cases not within the prohibition. § 5450.
 cases within the prohibition. § 5451.
 statutes making railroad companies liable without proof of negligence. § 5452.
 making them liable for killing animals where track not fenced. § 5453.
 making corporations liable to one servant for injuries through the negligence of
 a fellow-servant. § 5454.

6. In other respects.

legislative power over corporations in the absence of constitutional restraints.
 § 5457.
 laying taxes for the benefit of private corporations. § 5458.
 constitutional protection of officers of corporations. § 5459.
 Federal protection of corporations engaged in interstate commerce. § 5460.
 State statutes giving penalties against telegraph companies not applicable to
 interstate messages. § 5461.
 further of this subject. § 5462.
 protection of foreign corporations engaged in interstate commerce. § 5463.
 constitutional protection against acts of Congress. § 5464.
 amendment of charters by special laws. § 5465.
 repeal or alteration by what majority of legislative vote. § 5466.

7. Taxation of franchises.

power of the States to tax corporate franchises. § 5556.
 what constitutional prohibitions not applicable to the taxation of franchises.
 § 5557.
 States cannot tax Federal franchises. § 5558.
 other constitutional limitations on the taxation of franchises. § 5559.
 what taxes have been held to be franchise taxes. § 5560.
 principles which are to be applied in laying franchise taxes. § 5561.
 State taxation of the business of corporations engaged in interstate commerce.
 § 5562.

8. Exemptions from taxation.

preliminary. § 5568.
 power of a State legislature to grant an exemption from taxation. § 5569.
 protection of such exemptions as contracts under the constitution of the United
 States. § 5570.
 grants of such exemptions strictly construed. § 5571.
 consequences which flow from this rule of construction: imposition of tax in
 charter does not exclude power to impose a more onerous tax. § 5572.
 general statute creating an exemption not construed as a contract. § 5573.
 exemption of particular property not extended to other property. § 5574.
 exemption from "taxes" not extended to assessments for street improvements.
 § 5575.
 immunity from taxation a personal privilege, and not a vendible franchise. § 5576.
 exemption of corporate stock is an exemption of corporate property. § 5577.

9. Miscellaneous.

not subject to execution. § 7853.
 voluntary surrender of. §§ 6678-6688.
 mortgages of by corporation. See MORTGAGES.
 forfeitures of. See DISSOLUTION, subds. 2-4.

Fraternities.

organization of fraternal society. § 165.

Frauds.

See **TORTS**.

Liability of corporations for—in general.

corporations liable for the frauds of their agents. § 6321.

provided the agents acted within the general scope of their authority. § 6322.

liable for the fraud where it adopts the contract. § 6323.

limitation of this principle. § 6324.

negligent ignorance of directors does not relieve corporation. § 6325.

view that a corporation is not liable for damages for deceit. § 6326.

unsoundness of this conclusion. § 6327.

liable for fraud and deceit of its agent in selling its goods or lands. § 6328.

whether liable for deceit of officers or agents when acting *ultra vires*. § 6329.

one person, officer in two corporations, committing fraud in one for the benefit of the other. § 6330.

liability of an incorporated carrier for fraudulent bills of lading. § 6331.

contrary view that the carrier is not liable where the goods are not received. § 6332.

the injustice and bad policy of these decisions. § 6333.

cases to which this principle does not extend. § 6334.

remedies against corporations committing frauds. § 6335.

effect of fraud on stock subscriptions. See **SUBSCRIPTIONS**, subds. 10-15.
in conduct of elections. § 3867.

of agents, liability of corporation for. § 4931.

Fraudulent conveyances.

See **INSOLVENT CORPORATIONS**.

by corporations, generally. §§ 6526-6537.

Fund.

distribution of by receiver. See **RECEIVERS**, subd. 12.

Funds.

See **GARNISHMENT**.

of foreign corporation, garnishment of. §§ 8069-8071.

Futures.

See **SHARES**, subd. 14.

Garnishment.

See **ATTACHMENTS; STOCKHOLDERS**, subd. 38.

of debt due shareholder for shares. §§ 3576-3587.

of moneys in hands of receiver. §§ 6931-6934.

1. Of corporations, generally.

corporations may be summoned as garnishee. § 7804.

whether corporate officers subject to garnishment. § 7805.

service of the garnishment upon what officer. § 7806.

proof *aliunde* of official character. § 7807.

when statute relating to service of ordinary process governs. § 7808.

officer to make disclosure not necessarily officer to receive service. § 7809.

authority of officer or agent to make disclosure. § 7810.

process directed to corporation and not to agent. § 7811.

garnishment of receivers of corporations. § 7812.

Garnishment—(Continued).

attachment of shares by garnishment against corporation. § 7813.
 garnishment of member of mutual insurance company. § 7814.
 garnishment of insurance companies before adjustment. § 7815.
 garnishment of such companies where the policy has been assigned. § 7816.
 garnishment of corporation formed by concurrent action of different States.
 § 7817.

answer of the garnishee. § 7818.

relief in equity against garnishee. § 7819.

other matters relating to the garnishment of corporations. § 7820.

2. *Proceedings against foreign corporation by garnishment.*

garnishment of funds held by foreign corporations for others. § 8069.

circumstances under which foreign corporations not subject to garnishment.
 § 8070.

garnishment of the funds of foreign corporations in the hands of resident custodians. § 8071.

attachment of a debt due from a citizen of another State to a foreign corporation of a third State. § 8072.

situs of a debt due by a foreign corporation for the purpose of garnishment. § 8073.

injunctions restraining domestic citizens from proceeding in a foreign State to subject exempt wages due from foreign corporation. § 8074.

garnishment of the wages due by foreign corporations to non-resident employés, exempt in State of residence. § 8075.

garnishee may plead exemption of principal debtor. § 8076.

theory that it is the duty of the garnishee to plead the exemption. § 8077.

duty of the garnishee to notify creditor. § 8078.

necessary that the garnishee should have notice. § 8079.

service of the garnishment. § 8080.

compelling disclosures by the officers of foreign corporations. § 8081.

Gas companies.

organization of. § 156.

Gift.

See DONATION; SHARES, subd. 4.

Government control.

See CONSTITUTIONAL RESTRAINTS; LEGISLATIVE POWERS.

Grants.

See FRANCHISES.

Gross receipts.

taxation of. § 8116.

Guaranteed shares.

See CAPITAL STOCK, subd. 14; SHARES, subd. 18.

Guaranty.

See CONTRACTS; DIRECTORS.

of debts by directors of corporation. § 3990.

of dividends, effect of, etc. §§ 2274–2276.

Gymnastic purposes.

organization of company for. § 159.

Heirs.

See TAXATION.

Heirs—(Continued).

corporate shares do not pass to. § 3317.

are assessable to extent of assets received from ancestor. § 3325.

Horticulture.

organization of company for promotion of. § 161.

Hotel company.

See ORGANIZATION.

Husband and wife.

See DIVIDENDS; DOMICILE.

Hydraulic power.

organization of company for promoting. § 162.

Hypothecation.

See PLEDGE.

Illegal charges.

See CHARGES.

Immortality.

See CORPORATE EXISTENCE.

of corporation. § 10.

Implied contracts.

See CONTRACTS, subd. 8.

Implied powers.

See CORPORATE POWERS, subd. 1.

Incidental powers.

See CORPORATE POWERS, subd. 1.

Income.

See DIVIDENDS.

Income bonds.

See CORPORATE BONDS.

Incorporation.

See ORGANIZATION.

purposes for which permitted. §§ 132-192.

construction of particular statutes. §§ 200-210.

steps necessary to be taken. §§ 215-249.

Increase.

of capital stock. See CAPITAL STOCK, subd. 10.

Indictment.

See TORTS.

Of corporations — in general.

corporations indictable under ancient law. § 6418.

for what offenses corporations not indictable. § 6419.

not indictable for treason, felony, breaches of the peace, etc. § 6420.

indictable for criminal libel. § 6421.

for keeping a disorderly house. § 6422.

for obstructing a public navigation. § 6423.

for obstructing a public highway. § 6424.

for committing a public nuisance. § 6425.

for sabbath-breaking. § 6426.

for inflicting an injury resulting in death. § 6427.

for a failure to perform their public duties. § 6428.

Indictment—(Continued).

- for failing to keep their works in repair. § 6429.
- further of such indictments. § 6430.
- for usury. § 6431.
- for omitting to stamp papers. § 6432.
- not indictable for acts authorized by charter or statute. § 6433.
- whether corporations indictable for offenses denounced against "persons." § 6434.
- offenses by interstate railway companies. § 6435.
- form and sufficiency of such indictments. § 6436.
- further of this subject. § 6437.
- proceedings before an examining magistrate. § 6438.
- mode of compelling appearance. § 6439.
- entering the plea of not guilty. § 6440.
- proof of the fact of incorporation under an indictment. § 6441.
- defenses to indictments. § 6442.
- the judgment or sentence. § 6443.
- indictments for offenses against corporations and their property. § 6444.

Individual liability of stockholders.

- See STOCKHOLDERS, subds. 2-17.
- conditions precedent to proceedings against stockholders. §§ 3340-3388.
- right of action in receiver, assignee, etc. §§ 3549-3571.
- divestiture of liability by transferring shares. § 3221, *et seq.*

Indorsements.

- See NEGOTIABLE INSTRUMENTS, subd. 5.

Infants.

- See TRANSFERS OF SHARES; VOTING.

Information.

- See QUO WARRANTO.

Infra vires acts.

- See ULTRA VIRES.

Inhabitaney.

- of corporations for purposes of jurisdiction. §§ 7484-7489.

Injunctions.

- See ACTIONS; EQUITY.

1. In actions by and against corporations.

- scope of the subject. § 7767.
- restraining *ultra vires* acts of corporations injurious to private right. § 7768.
- injunctions against breaches of contracts. § 7769.
- enjoining a corporation from breaking the contracts of its stockholders. § 7770.
- enjoining corporations from committing trespasses upon property. § 7771.
- enjoining the unlawful appropriation of private property for public purposes. § 7772.
- whether such an injunction ought to be denied on the ground of adequate remedy at law. § 7773.
- enjoining the *ultra vires* acts of corporations injurious to public right. § 7774.
- such jurisdiction supported upon the ground of trust. § 7775.
- injunctions to restrain invasions of corporate franchises. § 7776.
- when not necessary to establish the franchise in a trial at law. § 7777.

Injunctions—Insolvent corp'ns INDEX.

Injunctions—(Continued).

to enjoin State railroad commissioners from establishing rates and charges. § 7778.

to enjoin State railroad commissioners from enforcing unreasonable rates. § 7779.

whether a bill for an injunction against railway commissioners is a suit against the State. § 7780.

at a suit of private persons to compel corporations to perform their public duties. § 7781.

injunctions against strikes, boycotts, and other combinations among working-men. § 7782.

other decisions illustrating the use of injunctions in the case of corporations. § 7783.

cases where such injunctions not granted. § 7784.

2. *In aid of stockholders' remedies.* See ACTIONS.

summary statement of cases where injunctions granted. § 4517.

injunction restraining the directors from committing breaches of trust. § 4518.

injunction restraining illegal and *ultra vires* acts. § 4519.

single stockholder entitled to such an injunction. § 4520.

and without requesting the directors to sue themselves. § 4521.

enjoining the illegal voting of shares. § 4522.

enjoining one corporation from voting shares held in another. § 4523.

enjoining illegal forfeiture of shares. § 4524.

enjoining acts of persons usurping office of directors. § 4525.

equity will not annul the by-laws of mutual benefit societies. § 4526.

injunction to restrain a corporation from petitioning for an amendment of its charter. § 4527.

injunctions against unlawful and *ultra vires* consolidations. § 4528.

enjoining the transaction of business before due incorporation. § 4529.

injunction against reorganization. § 4530.

injunctions against judgments in winding-up proceedings. § 4531.

illustrative cases in which such injunctions have been granted. § 4532.

circumstances under which such injunctions denied. § 4533.

effect of laches on the part of the stockholder. § 4534.

Injuries.

See NEGLIGENCE; TORTS.

Insolvency.

See INSOLVENT CORPORATIONS.

Insolvent Corporations.

See RECEIVERS.

1. *Assignments for creditors.*

a corporation can make an assignment for the benefit of creditors. § 6466.

what corporations may make such assignments. § 6467.

under general statutes authorizing "debtors" to assign. § 6468.

such an assignment passes unpaid stock subscriptions. § 6469.

does not pass power to assess stockholders. § 6470.

passes what franchises. § 6471.

whether passes rights of action *ex delicto*. § 6472.

Insolvent corporations—(Continued).

whether the directors may make such an assignment without authorization of the stockholders. § 6473.
 formalities in making the assignment. § 6474.
 validity of conditions in such assignments. § 6475.
 further of this subject. § 6476.
 validity of an assignment giving assignee discretionary power to sell. § 6477.
 questioning the validity of the assignment. § 6478.
 on the ground that it was not made at a proper board meeting, etc. § 6479.
 further of this subject. § 6480.
 what resolution will authorize an assignment. § 6481.
 effect of such an assignment. § 6482.
 assignment after notice of motion for injunction. § 6483.
 who eligible as assignee. § 6484.
 what if one assignee refuses to qualify. § 6485.
 may maintain actions upon share subscriptions. § 6486.
 schemes of composition or "arrangement." § 6487.

2. Preferring creditors.

doctrine that an insolvent corporation cannot prefer particular creditors. § 6492.
 statutory affirmations of this doctrine. § 6493.
 doctrine that an insolvent corporation can prefer creditors. § 6494.
 reasons given in support of this doctrine. § 6495.
 the fallacy of these reasons. § 6496.
 doctrine that it can prefer its own stockholders. § 6497.
 doctrine that it can prefer its own directors. § 6498.
 reasoning of the judges so holding. § 6499.
 that it can prefer them although the debts are in excess of the statutory limit. § 6500.
 that such a preference gives no right of attachment. § 6501.
 that the president of a corporation can prefer himself as a creditor over the corporation. § 6502.
 doctrine that it cannot prefer its own directors and officers. § 6503.
 further of this doctrine. § 6504.
 illustrations. § 6505.
 whether directors can prefer their own relatives. § 6506.
 assignments to a single creditor, leaving other debts unpaid. § 6507.
 releasing its property to an attaching creditor. § 6508.
 mortgages and other assignments to secure present advances. § 6509.
 when assignee holds property as trustee. § 6510.
 payments in due course of business. § 6511.
 executing judgment notes. § 6512.
 effect upon creditors of failing to obtain preferences. § 6513.
 under the New York statute to prevent fraudulent bankruptcy by incorporated companies. § 6514.
 this statute avoids what payments and transfers. § 6515.
 what transfers it does not avoid. § 6516.
 how far it prohibits preferences obtained by means of actions against the corporation. § 6517.
 has no extra-territorial force. § 6518.

Insolvent corp'ns—Ins. cor'pns INDEX.

Insolvent corporations—(Continued).

under the New York Act of 1882, relating to transfers by banking corporations. § 6519.

remedies in equity against assignee. § 6520.

3. *Fraudulent conveyances by corporations.*

general doctrine as to fraudulent conveyances by corporation. § 6526.

fraudulent diversions of the property of the corporation. § 6527.

"Credit Mobilier" arrangements. § 6528.

evidence to show insolvency. § 6529.

conveyances to directors or officers of the corporation. § 6530.

ratification, acquiescence, estoppel. § 6531.

when such transactions not impeached by way of defense in actions at law. § 6532.

saving the rights of *bona fide* purchasers. § 6533.

assignment of all the property of the corporation in fraud of its creditors. § 6534.

transfers *pendente lite*. § 6535.

other conveyances rendered void by statute. § 6536.

consenting to judgments. § 6537.

4. *Creditors' suits—distribution of assets.*

jurisdiction of equity to distribute the assets of insolvent corporations. § 6555.
further of this subject. § 6556.

venue of actions brought for this purpose. § 6557.

whether such action by bill or petition. § 6558.

creditor bringing the bill must be a judgment creditor. § 6559.

so where he proceeds against stockholders. § 6560.

exceptions to the rule which requires a judgment at law. § 6561.

such judgment at law must be a domestic judgment. § 6562.

and his execution must have been returned *nulla bona*. § 6563.

bill by creditor having a lien upon the assets. § 6564.

bill by a general creditor to remove an invalid lien. § 6565.

creditors' bill where the trustee fails to execute the trust. § 6566.

parties plaintiff: whether bill filed on behalf of all creditors. § 6567.

parties defendant to such bills. § 6568.

cross-bill by assignee. § 6569.

kinds of relief administered. § 6570.

statutory proceedings for sequestration of earnings. § 6571.

5. *Selling out to new corporation.* See SALES.

6. *Appointment and qualification of receivers.* See RECEIVERS.

Inspection.

See BOOKS AND PAPERS; SHAREHOLDERS.

of books and papers by shareholders. § 4406-4435.

of turnpike roads. § 5519.

Inspectors.

See ELECTIONS.

of election, appointment of. § 745.

Insurance Corporations.

See CORPORATE POWERS; RECEIVERS.

powers ascribed and denied to. §§ 5849-5861.

enactment of by-laws by. § 992.

Insurance corporations—(Continued).

Receivers of insurance companies.

- appointment of receivers of such companies. § 7219.
- circumstances under which appointed. § 7220.
- appointment at the suit of judgment creditors. § 7221.
- appointment at the suit of policy holders. § 7222.
- impeaching the decree appointing the receiver. § 7223.
- receiver cannot reinsure risks. § 7224.
- cannot waive stipulations in policies. § 7225.
- payment of losses accruing during the receivership. § 7226.
- receiver's right of action on a guaranty where one life insurance company absorbs another and reinsures its risks. § 7227.
- administration of the securities deposited with the superintendent of insurance. § 7228.
- proceedings where receiver disallows a claim. § 7229.
- compromising claims. § 7230.
- premium notes in the hands of receiver. § 7231.
- further of premium notes. § 7232.
- assessing the premium notes. § 7233.
- necessity of assessment. § 7234.
- circumstances under which such assessments may be made. § 7235.
- effect of assessments by a former receiver. § 7236.
- extent and proportion of the assessment. § 7237.
- valuation of policies in winding up. § 7238.
- rule adopted by statute in England. § 7239.
- manner of making the assessment. § 7240.
- equalizing those who have paid premiums in cash. § 7241.
- particularity in making the assessment. § 7242.
- requisites of notice of the assessment. § 7243.
- notes payable absolutely where no assessment is necessary. § 7244.
- arrangements among the members limiting their liability. § 7245.
- actions to enforce assessments upon premium notes. § 7246.
- what the receiver must aver and prove. § 7247.
- recovery of interest on such premium notes. § 7248.
- receiver takes premium notes subject to equities. § 7249.
- illustrations of this principle. § 7250.
- right of set-off in actions on premium notes. § 7251.
- right of set-off under statutes of New York. § 7252.
- defenses to such actions. § 7253.
- priorities in distribution. § 7254.
- receiver may exercise an option possessed by the company. § 7255.
- distribution not made to creditors of creditors. § 7256.

Interest.

See **BONDS; COUPONS; FORECLOSURE.**

Internal improvements.

corporations for. § 200.

Interstate bridge companies.

taxation of. § 8128.

Interstate commerce.

See **TAXATION.**

Interstate commerce—Jurisdiction INDEX.

Interstate commerce—(Continued).

taxation of domestic corporations engaged in. § 8122.

Interstate railway companies.

offenses by. § 6435.

Joinder.

See CAUSES OF ACTION; PARTIES.

of causes of action against stockholder. § 3625.

Joint stock companies.

distinguished from corporations. § 14.

Judgment.

See ACTIONS.

against corporation, effect of. §§ 3392-3401.

revival of against corporation. § 3066.

Judgment creditors.

See CREDITORS; CREDITOR'S SUIT.

Judicial sale.

See EXECUTION.

franchise to be corporation not subject of. § 257.

Jurisdiction.

See ACTIONS; PARTIES.

1. *Of actions by and against corporations as depending upon residence and citizenship — of State courts.*

residence of corporations for the purpose of State jurisdiction. § 7421.

influence on State decisions of the change in Federal doctrine. § 7422.

corporation resides at its principal office. § 7423.

theory that it resides where it exercises its franchises. § 7424.

further of this theory. § 7425.

suable in any county in the State. § 7426.

venue the same as in the case of natural persons. § 7427.

in the county where the contract was broken or the injury occurred. § 7428.

the same subject continued. § 7429.

where the cause of action accrues. § 7430.

validity of statutes making corporations suable in any county. § 7431.

local actions. § 7432.

transitory actions. § 7433.

changing the venue. § 7434.

residence of a corporation the residence of its president. § 7435.

national banks are State corporations for jurisdictional purposes. § 7436.

jurisdiction and venue in respect of corporations chartered by the United States other than national banks. § 7437.

State jurisdiction in the case of interstate corporations. § 7438.

actions against branches of corporations. § 7439.

actions in the county in which the agent with whom the contract was made resides. § 7440.

2. *Federal jurisdiction as dependent upon diverse citizenship.*

early doctrine that a corporation was not a "citizen," under Federal Constitution and Judiciary Act. § 7447.

new doctrine that a corporation is a "citizen" of the State creating it, for the purposes of Federal jurisdiction. § 7448.

Jurisdiction—(Continued).

conclusively presumed to be a citizen of the State creating it. § 7449.
 effect of this rule on domestic corporations. § 7450.
 further of this rule. § 7451.
 rule where the corporation is created by the concurrent legislation of two States.
 § 7452.
 all the substantial parties must be of diverse citizenship. § 7453.
 application of this rule of jurisdiction to joint stock companies. § 7454.
 Federal jurisdiction in the case of corporation owned by a State. § 7455.
 manner of pleading Federal jurisdiction. § 7456.
 further of this subject. § 7457.
 manner of averring citizenship. § 7458.

3. *Removal of such actions from State to Federal courts.*

right of foreign corporations to remove on the ground of diverse citizenship.
 § 7462.
 submission to local jurisdiction does not preclude this right of removal. § 7463.
 further of this doctrine. § 7464.
 this right of removal extends to "tramp corporations." § 7465.
 invalidity of stipulation not to remove. § 7466.
 further of this subject. § 7467.
 right of removal on the ground of prejudice or local influence. § 7468.
 authority of the officer to make the affidavit. § 7469.
 substance of the affidavit. § 7470.
 conclusiveness of the affidavit. § 7471.
 right of removal in cases of a corporation created by the concurrent legislation
 of two or more States. § 7472.
 alien corporations entitled to remove. § 7473.
 controversy must be wholly between different parties. § 7474.
 removal of actions against corporations organized under a law of the United
 States. § 7475.
 further of this subject. § 7476.
 suits arising under the laws of the United States. § 7477.
 removal by alien corporations. § 7478.

4. *"Inhabitaney" of corporations for the purposes of Federal jurisdiction.*

"inhabitaney" for purposes of Federal jurisdiction. § 7484.
 old doctrine that a corporation can have no inhabitaney outside of the State
 creating it. § 7485.
 further of this question. § 7486.
 whether a corporation having an office in another State becomes an "inhabi-
 tant." § 7487.
 doctrine that inhabitaney and citizenship identical. § 7488.
 the recent Federal doctrine on this subject. § 7489.

5. *Jurisdiction as depending upon process and its service.* See PROCESS.

6. *Jurisdiction as dependent upon voluntary appearance.*

appearance cures defects in service of process and waives jurisdiction over the
 person. § 7552.
 in case of foreign corporations, waives exemption from being sued. § 7553.
 application of this principle to Federal jurisdiction. § 7554.
 waives exemption from being sued in the particular Federal district. § 7555.

Jurisdiction—(Continued).

- what appearance not deemed such a waiver. § 7556.
- admits that it is sued by the right name. § 7557.
- what is a voluntary appearance for the purposes of the action. § 7558.
- what is not an appearance. § 7559.
- what is an authorized appearance by a corporation. § 7560.
- waiving service and confessing judgment. § 7561.

Knowledge.

See NOTICE.

Laches.

- See EQUITY; LIMITATIONS, STATUTE OF.
- equitable doctrine of. § 7842.
- rights of bondholder lost by. § 276.
- on part of preferred shareholders. § 2296.

Land.

- See REAL PROPERTY.
- damages for injuries to. § 6370.
- powers of foreign corporations relating to. §§ 7913-7923.

Land improvement companies.

- powers of, generally. § 5960.

Law of place.

See CONTRACTS; CONSTRUCTION.

Lawful purposes.

- organization of corporation for. § 164.

Leases.

- by railroad corporations. See CORPORATE

Leave to sue.

See RECEIVERS, subd. 15.

Legislative control.

See CONSTITUTIONAL RESTRAINTS; LEGISLATIVE POWER.

Legislative power.

- See CHARTERS.
- corporations created by. § 35.
- to amend charters. § 67.
- to regulate tolls. See TOLLS.

Lex loci rei situ.

See CONTRACTS; SITUS.

Liability.

- of directors, generally. See DIRECTORS, subds. 9, 10.
- of directors, for failure to file reports. §§ 4221-4236.
- of directors, for making false reports. §§ 4240-4255.
- statutory, of directors and officers to creditors. See DIRECTORS, subd. 13.

Libel.

See TORTS.

License taxes.

- distinguished from licenses of occupations. § 8109.

Lien.

- See TRANSFERS OF SHARES.
- of corporation on its shares of stock. §§ 2317-2344.

Lien—(Continued).

of factors. § 2703.

of bankers, on cash dividends. § 2132.

Life tenant.

right of to dividends. See DIVIDENDS, subd. 5.

Limitations.

See CONSTITUTIONAL RESTRAINTS.

Limitations, statute of.

See SHAREHOLDERS.

1. Limitation of actions by or on behalf of creditors of corporation — general principles.

preliminary statement. § 3766.

statutes of limitation applicable to penalties. § 3767.

statutes exonerating stockholders unless action brought against corporation within a given time. § 3768.

in the case of notes which have been renewed. § 3769.

where the creditor sues to sequester unpaid balances. § 3770.

filing of general creditors' bill arrests the running of the statute as to creditors subsequently joining. § 3771.

prescription under the code of Louisiana. § 3772.

delay and laches. § 3773.

presumption of payment from lapse of time. § 3774.

why a judicial call does not rebut this presumption of payment. § 3775.

2. When such statutes begin to run.

generally from the date of the call under which the action is brought. § 3779.

where the statute gives a joint action against the corporation and the stockholders. § 3780.

from the date of the appointment of a receiver. § 3781.

in case of a motion for execution under the Missouri statute. § 3782.

3. Limitation of actions against corporations.

corporations may acquire title by adverse possession. § 7837.

limitation of actions to forfeit charters. § 7838.

limitation of actions by creditors against trustees of corporations. § 7839.

part payment to take the case out of the statute. § 7840.

limitation of actions against foreign corporations. § 7841.

equitable doctrine of laches. § 7842.

limitations of actions against shareholders. §§ 1986-1999.

Liquidation.

See WINDING UP.

voluntary liquidation of national banks. § 7204.

Lis pendens.

See BONA FIDE PURCHASERS.

not notice when. § 2604.

filing notice of to purchasers. § 3675.

as notice—stock shares pledged. § 2639.

Loans.

See SHARES, subd. 15.

of stock shares. §§ 2714-2716.

prohibited, liability of directors for. §§ 4285, 4286.

Lobbying.

See FORFEITURES.

Locus penitentiae—Mandamus INDEX.

Locus penitentiae.

where stock subscription is illegal. § 1183.

Lunatics.

See VOTING.

Majority.

See BONDHOLDERS; ELECTIONS; QUORUM.

Malicious acts.

See TORTS.

Malicious injuries.

by corporations, liability for. See TORTS, subd. 2.

Managers.

See DIRECTORS; OFFICERS.

Managing agent.

See AGENTS.

1. Appointment and powers of.

who regarded as a "managing agent." § 4846.

his appointment and tenure. § 4847.

powers ascribed to "managing director." § 4848.

general view of the scope of the powers of managing agents. § 4849.

his power to bind the corporation by acts done in the ordinary course of its business. § 4850.

his powers touching negotiable paper. § 4851.

cannot clothe sub-agents with power to make commercial paper. § 4852.

powers of the "superintendent." § 4853.

may employ workmen. § 4854.

whether employ surgeons, etc., for wounded employés. § 4855.

make assignments for creditors. § 4856.

powers touching litigation. § 4857.

powers of managers of particular kinds of corporations. § 4858.

is liable to the company. § 4859.

his powers when also president. § 4860.

his powers in respect of taxation. § 4861.

Mandamus.

See REMEDIES.

1. Against corporations.

mandamus against corporations to compel performance of public duties. § 7826.

when not issued to compel the performance of public duties. § 7827.

doctrine that the public duty must be enjoined by statute. § 7828.

does not lie to compel the performance of discretionary acts. § 7829.

who apply for the writ: plaintiff in the action. § 7830.

against corporation in corporate name. § 7831.

corporation may appeal where the writ runs against its officers. § 7832.

2. Miscellaneous.

to compel holding of corporate election. § 700.

to restore member of corporation. § 904.

to compel admission of member. § 905.

to reinstate members of corporation. §§ 4398, 4399.

to reinstate officer of corporation. § 829.

to compel inspection of books of foreign corporation. §§ 4430-4433.

Mandamus—(Continued).

against corporate officers at relation of member. § 4448.

to compel transfers of shares. § 2445.

practice in proceedings by to remove officer. §§ 830-840.

Manufacturing companies.

powers of generally. §§ 5961-5963.

Married women.

See MEMBERS; PARTIES; SUBSCRIPTIONS.

Masonic buildings.

organization of company for erection of. § 166.

Mechanics' liens.

See REMEDIES.

may be enforced by corporations. § 7759.

Meetings.

See CORPORATIONS, subd. 10.

corporate meetings, where held. §§ 686-697.

for election of board of directors. § 3861, *et seq.*

Members, expulsion of.

See MEMBERSHIP.

1. Power to expel, and grounds of expulsion.

preliminary observations: distinctions. § 846.

power of expulsion incident to corporation. § 847.

this power exercised by the corporation, not by the directors. § 848.

by-laws authorizing the expulsion of members. § 849.

illustrations of good and bad by-laws providing for the expulsion of members.
§ 850.

validity of by-laws providing for expulsion for the non-fulfillment of commercial contracts. § 851.

by-law prohibiting members from gathering in public places to buy and sell
"futures" outside of the exchange room. § 852.

by-laws when not enforceable by forfeiture of membership. § 853.

grounds of expulsion at common law; Bagg's case. § 854.

further of Bagg's case: how and by whom and in what manner disfranchised.
§ 855.

grounds of disfranchisement under rule of Lord Mansfield. § 856.

cases within these principles. § 857.

cases not within these principles. § 858.

expulsion for infamous crimes: whether a previous conviction necessary. § 859.

offenses against the member's duty as a corporator. § 860.

acts injurious to the society or to its reputation. § 861.

illustrations: "conduct injurious to the character and interests of the club."
§ 862.

frauds upon the society. § 863.

expulsion from merchants' exchange for dishonest conduct. § 864.

suspension for bankruptcy or insolvency. § 865.

contempt against corporate officer. § 866.

criticising the management. § 867.

offenses against other members. § 868.

refusal to submit to arbitration or to comply with award. § 869.

Members, expulsion of—(Continued).

illustration. § 870.

appealing to the judicial courts. §§ 871.

“negligence, misconduct in office, or any other reasonable causes.” § 872.

expulsion of members of incorporated medical societies. § 873.

members of trades union working for parties against whom a strike had been ordered. § 874.

enlisting in the volunteer army in time of war. § 875.

trial under an act of the legislature passed subsequently to the offense. § 876.

validity of by-laws providing for. § 4393.

2. Corporate proceedings to expel.

must proceed upon notice, inquiry and hearing. § 881.

what this principle includes. § 882.

right to notice exists, although the evidence against the accused may be very cogent. § 883.

instances showing the right to notice. § 884.

analogous principle that a public officer is not removable without notice. § 885.

denying the privilege of cross-examination. § 886.

right to an opportunity to be heard on an ecclesiastical appeal. § 887.

expulsion after an acquittal and without a second trial. § 888.

expulsion after first trial which is a nullity. § 889.

when second notice not necessary. § 890.

incidents of the notice and its service. § 891.

effect of change of residence in connection with by-law requiring members to notify their residence to the society. § 892.

of the corporate tribunal and its constitution. § 893.

illustrations: expulsion by a two-thirds vote. § 894.

jurisdiction of standing committee of brokers' board. § 895.

illustration. § 896.

of the trial and the evidence. § 897.

necessity of a sentence of expulsion. § 898.

right of appeal. § 899.

3. Judicial proceedings to reinstate.

mandamus to restore member. § 904.

mandamus to compel corporation to admit a member. § 905.

the return. § 906.

practice under the writ. § 907.

visitorial powers exercised by the courts. § 908.

remedy by injunction. § 909.

injunction in case of unincorporated societies. § 910.

injunction in case of religious societies. § 911.

member must first exhaust his remedy within the society. § 912.

injunction not granted to restrain proceedings before corporate judicatories. § 913.

principles on which courts proceed. § 914.

further of this subject. § 915.

contract to exercise judgment *bona fide*. § 916.

another statement of the principle: corporation not permitted to exercise trust corruptly. § 917.

Members, expulsion of—(Continued).

courts do not sit as courts of appeal from decisions of committee or club in such cases. § 918.

not sufficient that the decision contrary to reason. § 919.

regularity of suspension presumed until contrary appears. § 920.

effect of acquiescence. § 921.

jurisdiction of corporate committee not ousted by fact of judicial investigation. § 922.

doctrine that courts will not interfere except where property rights are involved. § 923.

courts will not enforce decisions of judicatories of unincorporated societies. § 924.

suspension of a lodge, when void and when voidable. § 925.

action for damages for the expulsion. § 926.

action for damages against religious corporation. § 927.

criminal information for disfranchisement of members. § 928.

articles of the peace by one partner against another. § 929.

action against judge for condemning without notice. § 930.

Membership.

See MEMBERS, EXPULSION OF.

1. Rights of.

preliminary statement. § 4392.

validity of by-laws providing for the expulsion of members. § 4393.

such by-laws cannot provide for expulsion without notice. § 4394.

by-laws of merchants' exchanges expelling for non-compliance with contracts. § 4395.

by-laws of social clubs expelling for disorderly conduct. § 4396.

suspension for non-payment of a fine. § 4397.

proceedings by *mandamus* to reinstate. § 4398.

mandamus to restore members in unincorporated societies. § 4399.

actions to restore to the rights of membership. § 4400.

enjoining the corporation from excluding or expelling a member. § 4401.

compelling recognition of plaintiff's rights as a shareholder. § 4402.

conduct showing membership. See ASSESSMENTS, subd. 5.

Merchants' exchange.

expulsion of members from. § 864.

Merger.

See CONSOLIDATION.

Migration.

See MEETINGS; RESIDENCE.

Mining corporations.

powers of, generally. §§ 5955-5957.

Ministerial officers.

of corporations, civil liability of. § 4733.

Minority rights.

See DISSOLUTION; SHARES; ELECTIONS.

Minors.

See ELECTIONS; VOTING.

Minutes.

See MEETINGS.

Misfeasance.

See TORTS.

Misnomer.

See CORPORATIONS; PLEADINGS.

of corporation, in pleading, devises and bequests, etc. §§ 284-300.

in writ of execution. § 7865.

Misrepresentations.

See FRAUD; TORTS.

Mistake.

See EQUITY.

Misuser.

See FORFEITURES.

Monopoly.

See TRUSTS.

Mortgages.

See CONVEYANCES; PLEDGES.

1. Power of corporation to mortgage property and franchises—in general.

implied power of corporations to mortgage. § 6131.

to what corporations this power ascribed. § 6132.

from what other powers the power to mortgage implied. § 6133.

further of this subject. § 6134.

statutory power to mortgage liberally construed. § 6135.

power extends to mortgaging all their property. § 6136.

railway companies no such implied power. § 6137.

such power frequently conferred by statute. § 6138.

corporations may mortgage to secure pre-existing debts. § 6139.

power to mortgage franchises. § 6140.

power to mortgage its after-acquired property. § 6141.

when railroad companies have this power. § 6142.

theory of the rule which accords this power to railway companies. § 6143.

a practical view of this subject. § 6144.

effect of a mortgage of after-acquired property. § 6145.

such a mortgage enforceable against a subsequent vendor's lien. § 6146.

whether such mortgages will cut under the liens of mechanics and materialmen. § 6147.

mortgage or pledge of future earnings. § 6148.

power to mortgage subscriptions to its stock. § 6149.

state of the English law on this question. § 6150.

mortgage of the "undertaking" in English law. § 6151.

unregistered debentures under the English Companies Act. § 6152.

mortgage to secure future advances. § 6153.

construction of statutes prohibiting such mortgages. § 6154.

company may execute subsequent mortgages until power exhausted. § 6155.

power to mortgage its real property situated in another State. § 6156.

mortgages in violation of such prohibition void. § 6157.

prohibition against selling includes a prohibition against mortgaging. § 6158.

how far the principle of estoppel works against corporations in respect of *ultra vires* mortgages. § 6159.

estoppel in respect of mortgage of property acquired *ultra vires*. § 6160.

Mortgages—(Continued).

- mortgages to secure debts in excess of charter limits. § 6161.
- how far legislature may validate void mortgage or conveyance. § 6162.
- mortgages under the New York Manufacturing Act. § 6163.
- fraudulent mortgages. § 6164.
- who may impeach void corporate mortgages. § 6165.
- power of foreign corporations in respect to. § 7922-7923.
- power of receiver to execute. §§ 7005.
- 2. *Power of directors and officers to execute such mortgages.*
 - qualification of the trustees in the mortgage. § 6171.
 - assent of stockholders of a given value. § 6172.
 - further as to the consent of the stockholders. § 6173.
 - further of the same subject. § 6174.
 - authorization by the directors. § 6175.
 - must take place at a meeting duly assembled. § 6176.
 - construction of resolutions of directors and other authorizing instruments. § 6177.
 - mortgages made by promoters prior to organization. § 6178.
 - power of agent to mortgage and pledge corporate property. § 6179.
- 3. *Incidents of mortgages and other liens created by corporations.*
 - advances made on condition that lender have control of the corporation. § 6182.
 - ratification of invalid mortgages. § 6183.
 - further of this subject. § 6184.
 - ratification in part. § 6185.
 - whether executed in conformity with the general law relating to chattel mortgages. § 6186.
 - trustee not chargeable as garnishee or under "trustee process" in behalf of general creditors. § 6187.
 - right of the mortgagees to net earnings. § 6188.
 - form of corporate mortgages. § 6189.
 - further of this subject. § 6190.
 - whether directors must execute mortgage themselves or can authorize agent to do it. § 6191.
 - use of the corporate property and franchise by a mortgagee in possession. § 6192.
 - construction of the words "grant, bargain, and sell." § 6193.
 - what passes under particular words in such mortgages. § 6194.
 - the same subject continued. § 6195.
 - what descriptive words cover branch roads thereafter built. § 6196.
 - what does not pass. § 6197.
 - the same subject continued. § 6198.
 - whether property acquired *ultra vires* will pass. § 6199.
 - rights of attaching creditors as against the mortgage. § 6200.
 - liability for fraudulent assignment of mortgages. § 6201.
 - equitable liens and mortgages. § 6202.
 - equity will give effect to an informal mortgage, as against subsequent incumbrancers, with notice. § 6203.
- 4. *Foreclosure of corporate mortgages.*
 - power and duty of the trustees to proceed to foreclose. § 6208.

Mortgages—(Continued).

- action to foreclose regularly brought by the trustee in the mortgage. § 6209.
- when the bondholders may sue to foreclose. § 6210.
- concurrent foreclosure suits in State and Federal courts. § 6211.
- right to foreclose for non-payment of interest. § 6212.
- how far the action of a majority of the bondholders will control. § 6213.
- parties to suits of foreclosure. § 6214.
- position of parties with reference to Federal jurisdiction. § 6215.
- intervening petitions. § 6216.
- creditors coming in under the decree and proving their claims before a master. § 6217.
- settling conflicting equities. § 6218.
- when court will order an appraisal prior to sale. § 6219.
- when property and franchises sold as an entirety and when divided. § 6220.
- superintending power of the court over the sale. § 6221.
- creditors may combine to purchase. § 6222.
- trustee may purchase for the bondholders. § 6223.
- power of the trustee to deal with the property so purchased. § 6224.
- trustees under corporate mortgage interested in purchase. § 6225.
- application to set aside sale must be timely. § 6226.
- trustees and their counsel not allowed compensation out of the fund. § 6227.
- proceeds of sale, to whom paid, and how credited on the bonds. § 6228.
- further as to the distribution of the proceeds. § 6229.
- continued. § 6230.
- rights of holders of bonds called in by the company, and reissued. § 6231.
- effect of an appeal from the decree of foreclosure. § 6232.
- setting aside the foreclosure sale. § 6233.
- rights of purchasers *pendente lite*. § 6234.
- what the purchaser at the foreclosure sale acquires. § 6235.
- what franchises pass to him. § 6236.
- takes free from the debts of the mortgagor. § 6237.
- what burdens he assumes. § 6238.
- succeeds to what liabilities. § 6239.
- succeeds to all public duties. § 6240.
- circumstances under which mortgagor remains liable for torts of mortgagee and purchaser. § 6241.
- title of strangers to the record not affected by such sale. § 6242.
- barring the equity of redemption. § 6243.
- course of procedure ordering foreclosure, but permitting redemption. § 6244.
- further of this course of procedure. § 6245.
- reorganizing the corporation. § 6246.
- effect of delay in coming into scheme of reorganization. § 6247.
- reorganizing by a majority of the bondholders. § 6248.
- other holdings touching such schemes of reorganization. § 6249.
- equities of stockholders who have purchased their shares in view of an approaching sale of the corporate property. § 6250.
- 5. *Priorities among creditors in such foreclosure suits.*
 - priorities among creditors. § 6256.
 - principles on which priorities adjusted. § 6257.

INDEX. Mortgages—National banking act

Mortgages—(Continued).

further of this subject. § 6258.

priorities of equitable mortgages. § 6259.

priorities of mortgages over floating debts. § 6260.

creating liens on the property which take precedence over prior mortgages.
§ 6261.

priorities of bonds under the same mortgage where the issue is limited. § 6262.
rights of execution purchaser of bonds which have never been delivered.
§ 6263.

trustees cannot charge the trust with subsequent debts. § 6264.

priority of bonds issued as collateral security. § 6265.

priority of second mortgage to which first mortgagees have consented. § 6266.

priorities of attorneys' fees. § 6267.

further of this subject. § 6268.

Municipal corporations.

See SHAREHOLDERS, subd. 3.

subscriptions by, to stock of private corporation. §§ 1115-1133.

Municipal ordinances.

distinguished from by-laws. § 938.

Mutual benefit societies.

See CORPORATIONS, subd. 1.

Mutual insurance company.

See CORPORATE POWERS, subd. 8.

Name.

See CORPORATION, subd. 4.

importance of the corporate name, etc. §§ 284-300.

actions to assert corporate rights or to redress corporate injuries brought in corporate name. § 7589.

corporation may sue in its own name on promise made to its officers for its benefit.
§ 7590.

distinction between cases where the agency is disclosed and where it is concealed. § 7591.

bank may sue on commercial paper made payable to its cashier. § 7592.

in such cases corporate officer may sue in his own name. § 7593.

doctrine that action may be brought either in the name of corporation or agent. § 7594.

promise made to trustees of unincorporated concern suable by trustees. § 7595.
when successors in office may sue. § 7596.

corporation party to contract in wrong name suable by it in right name.
§ 7597.

if payable to the officer by description, the corporation may sue. § 7598.

effect of change of name of corporation. § 7599.

member cannot sue for the corporation. § 7600.

corporation not affected by judgment in actions against its officers. § 7601.

suing or being sued in the name of an officer. § 7602.

action in whose name after dissolution. § 7603.

National banking act.

See DIRECTORS.

liability of directors under. § 4303.

National banks.

taxation of stock shares in. §§ 2854-2884.

Receivers of national banks.

power of courts to appoint receivers of national banks. § 7262.

cases in which courts will appoint receivers. § 7263.

appointment of receiver by comptroller of the currency under the Revised Statutes of the United States. § 7264.

circumstances under which comptroller may appoint receiver under act of 1876. § 7265.

action of comptroller in appointing receiver conclusive upon debtors. § 7266.
evidence of his appointment. § 7267.

effect of appointment on rights of action by and against bank. § 7268.

effect of judgments against national banks in the hands of receivers. § 7269.

right of action of receiver in Federal courts. § 7270.

statute forbidding transfers after insolvency. § 7271.

fraudulent preferences under this statute. § 7272.

further of this statute. § 7273.

statute prohibits attachments after insolvency. § 7274.

further of attachments against national banks. § 7275.

continued: attempted distinction in cases where bank not insolvent. § 7276.

this distinction repudiated. § 7277.

further of such attachments. § 7278.

actions by receiver to collect debts. § 7279.

in whose name action brought by receiver. § 7280.

power of receiver to compromise debts. § 7281.

whether receiver succeeds to larger rights of action than the corporation possesses. § 7282.

his right of action against the directors. § 7283.

his right of action against shareholders. § 7284.

necessity of assessment. § 7285.

determination of comptroller in assessing the shareholders conclusive. § 7286.

parties in equity. § 7287.

when the action should be at law and when in equity. § 7288.

pleading in such actions. § 7289.

accruing of interest against stockholders. § 7290.

mode of enforcing contribution and securing equality among the stockholders. § 7291.

creditor's bill to enforce individual liability of stockholders. § 7292.

receiver takes assets *cum onere*. § 7293.

must respect valid liens and pledges. § 7294.

must restore trust funds. § 7295.

must restore money subscribed on scheme to increase capital which has failed. § 7296.

must restore money deposited to be loaned to the president of the bank. § 7297.

what rights of set-off exist against receiver. § 7298.

the question how viewed on principle. § 7299.

the question how viewed by other courts. § 7300.

the same subject continued. § 7301.

continued. § 7302.

National banks—(Continued).

- waiver of right of set-off. § 7303.
- voluntary liquidation of national banks. § 7304.
- when stockholders may elect agent to wind up. § 7305.
- receiver authorized to purchase property in which bank has equities. § 7306.
- notice to present claims to receiver. § 7307.
- proof of claims by creditors. § 7308.
- dividends by comptroller in liquidation. § 7309.
- what claims entitled to distribution. § 7310.
- priorities among creditors in such distribution. § 7311.
- when United States not a preferred creditor. § 7312.
- fees and expenses of the winding up and receivership. § 7313.
- creditors entitled to interest. § 7314.
- redemption of circulating notes. § 7315.
- enjoining proceedings by comptroller and receiver. § 7316.
- actions against national banks after commencement of liquidation. § 7317.
- defenses available to the receiver against actions. § 7318.
- State courts no control over receiver. § 7319.
- jurisdiction of State courts of actions by and against such receivers. § 7320.
- no relief against the United States in actions against the comptroller or receiver.
§ 7321.
- what actions lie against the comptroller. § 7322.
- effect of receiver being substituted as defendant. § 7323.
- payment of State taxes. § 7324.
- actions against receiver for taxes. § 7325.
- sales by such receivers. § 7326.
- replevin of property in custody of receiver. § 7327.
- effect of appointment upon the statute of limitations. § 7328.

National corporations.

See CORPORATIONS, sub. 9.

Navigation.

organization of company relating to. § 168.

Negligence.

See TORTS.

1. Liability of corporation for—in performance of duties imposed by law.

- corporations liable for negligence. § 6339.
- general theory of civil liability for negligence. § 6340.
- cases not resting in contract—grounds of liability in. § 6341.
- legislative authorization no excuse for negligent injuries. § 6342.
- damages awarded upon the taking of private property for public use do not
satisfy subsequent negligent injuries. § 6343.
- nor does the purchase-money where the land is voluntarily conveyed. § 6344.
- illustrations of the foregoing doctrines. § 6345.
- other illustrations—damages denied. § 6346.
- application of the doctrine of *respondet superior*. § 6347.
- not liable for negligence of independent contractors. § 6348.
- cannot escape liability for negligent performance of public duties on this ground.
§ 6349.
- liable to servants for negligence of vice-principal. § 6350.

Negligence—(Continued).

contracts with employes releasing damages. § 6351.

liability for negligence under statutes. § 6352.

negligence in the performance of *ultra vires* acts. § 6353.

2. In performance of duties voluntarily assumed.

the governing principle stated. § 6357.

private corporations owning public works for the use of which they receive tolls.

§ 6358.

when liable on principle of nuisance or special damage. § 6359.

liability of turnpike and plank-road companies for non-repair. § 6360.

private corporations how liable for non-exercise of granted powers. § 6361.

liability for the non-performance of statutory obligations. § 6362.

corporations exercising public offices. § 6363.

corporations for the maintenance of public charities. § 6364.

payment of damages out of trust funds. § 6365.

out of corporate funds in the hands of receivers. § 6366.

liability of directors of corporation for. §§ 4100–4114.

Negotiability.

See BONA FIDE PURCHASERS.

of certificates of stock. § 2587, *et seq.*

Negotiable instruments.

See CONTRACTS, subd. 5.

coupons of corporate bonds. § 6107.

Negotiable paper.

powers of corporation relating to. See CORPORATE POWERS, subd. 4.

Net earnings.

See DIVIDENDS.

Net profits.

See DIVIDENDS.

New corporations.

See CONSOLIDATION; REORGANIZATION.

not liable for debts of old when. § 263.

Non-user.

See FORFEITURES; DISSOLUTION.

Notes and bills.

See NEGOTIABLE INSTRUMENTS.

Notice.

See AGENTS; DIRECTORS.

1. To corporations, generally.

general statement of doctrine. § 5189.

can have only constructive notice: what such notice is. § 5190.

general rule that notice to agent when acting officially is notice to the corporation. § 5191.

a classified statement of exceptions to the rule. § 5192.

facts which the agent has probably forgotten. § 5193.

facts communicated when agent not acting in the particular transaction. § 5194.

not necessary that agent should be so acting. § 5195.

notice must be to agent, whose duty it is to act on or communicate the knowledge to his principal. § 5196.

Notice—(Continued).

- knowledge must reach the agent while acting for his principal. § 5197.
- illustrations of this principle. § 5198.
- cases denying this principle. § 5199.
- knowledge acquired in a previous transaction, but present in the mind of the agent when acting in the particular transaction. § 5200.
- notice before the agency has begun or after it has terminated. § 5201.
- notice communicated to the agent before the agency begun. § 5202.
- whether corporation continues to be affected with knowledge of a fact communicated to a prior agent. § 5203.
- knowledge acquired by officers or agents in their own private affairs. § 5204.
- where the agent acts for himself and adversely to the corporation. § 5205.
- where the officer is acting for himself in a transaction with the corporation. § 5206.
- illustrations in the case of conveyances, etc., to the corporation by its officers. § 5207.
- illustrations in the case of notes discounted by banks for their officers. § 5208.
- facts which the officer is interested in concealing from the corporation. § 5209.
- constructive notice of private dealings between corporate officers and third persons affecting the corporation. § 5210.
- further of this subject. § 5211.
- notice to an officer who is also agent of the party giving the notice. § 5212.
- exception in the case of confidential communications. § 5213.
- where the person receiving the notice is a director in two corporations. § 5214.
- whether notice to one agent imputable to the corporation through another agent. § 5215.
- notice to an improper agent by him communicated to a proper agent. § 5216.
- rule where the officer agrees not to communicate the notice. § 5217.
- knowledge acquired through official relations imputable to agent in private capacity. § 5218.
- effect of private knowledge of corporate officer. § 5219.
- when notice to a single director is notice to a corporation. § 5220.
- notice to a single director not officially engaged. § 5221.
- when a single director is to be deemed "engaged in business" for the corporation for the purpose of receiving such notice. § 5222.
- existence of knowledge in a single director while sitting in the board. § 5223.
- facts which the director ought to know imputable to the corporation. § 5224.
- notice to the corporation in the case of frauds by single directors against third persons. § 5225.
- knowledge of agent defrauding a third person. § 5226.
- knowledge acquired by the agent while acting with a third party ostensibly for his principal, but really for himself. § 5227.
- notice to and knowledge of the president. § 5228.
- notice to the cashier of a bank. § 5229.
- knowledge of cashier who acts as member of discount committee. § 5230.
- notice to the treasurer. § 5231.
- notice to various special agents. § 5232.
- knowledge of a mere servant or clerk. § 5233.
- notice to a mere stockholder. § 5234.

Notice—(Continued).

- notice to a corporation of defects which it is bound to repair. § 5235.
- notice to a corporation taking negotiable paper. § 5236.
- circumstances putting a corporation upon inquiry. § 5237.
- whether corporation had notice, a question of fact. § 5238.
- evidence of notice to corporate officers. § 5239.
- other holdings relating to notice to corporations. § 5140.
- of sales of stock shares. §§ 1778–1779.

Novation.

See TRANSFERS OF SHARES.

Nuisance.

See INDICTMENT; TORTS.

Oath.

See ELECTIONS; VOTING.

Obligation.

See DIRECTORS.

of directors as fiduciaries. See DIRECTORS, subd. 6.

Office.

contesting right to. See ELECTIONS, subd. 5.

Officers.

See AMOTION; DIRECTORS; PRESIDENT.

of corporation, amotion of. §§ 799–841.

directors of corporations are. § 4253.

de facto, whether entitled to compensation. § 4708.

Options.

See SHARES, subd. 14.

Oral subscriptions.

See SUBSCRIPTIONS.

Organization.

See CHARTERS.

1. *Purposes for which incorporation permitted.*

statutes authorizing the formation of corporations. § 132.

agricultural fairs. § 133.

alumni. § 134.

avenues. § 135.

banks. § 136.

bar associations. § 137.

breeding domestic animals. § 138.

bridges. § 139.

building and loan associations. § 140.

building towns. § 141.

business purposes: mining, manufacturing, merchandising, etc. § 142.

camp meetings. § 143.

canals. § 144.

cemeteries. § 145.

chambers of commerce: merchants' exchanges: boards of trade. § 146.

colleges. § 147.

co-operative associations. § 148.

cruelty to animals. § 149.

Organization—(Continued).

- cruelty to children. § 150.
 - detective associations. § 151.
 - fencing land. § 152.
 - ferries. § 153.
 - fire companies. § 154.
 - fire department relief. § 155.
 - gaslighting. § 156.
 - guano: fertilizers. § 157.
 - guaranty: suretyship: indemnity: safe deposit. § 158.
 - gymnastic purposes. § 159.
 - health resorts: sanitariums: medicines, etc. § 160.
 - horticulture. § 161.
 - hydraulic power. § 162.
 - insurance. § 163.
 - lawful purposes. § 164.
 - lodges: fraternities: societies. § 165.
 - Masonic buildings. § 166.
 - mining: manufacturing, etc. § 167.
 - navigation. § 168.
 - patrons of husbandry. § 169.
 - pipe lines. § 170.
 - police relief. § 171.
 - political clubs. § 172.
 - public libraries. § 173.
 - railroads. § 174.
 - rafting: booming logs. § 175.
 - religion: education: benevolence. § 176.
 - savings banks. § 177.
 - slack-water navigation. § 178.
 - soldiers' monuments. § 179.
 - sporting. § 180.
 - stage coaches. § 181.
 - street railroads. § 182.
 - telegraphs: telephones. § 183.
 - tobacco warehouses. § 184.
 - toll roads: plank, gravel, macadamized, turnpike roads, etc. § 185.
 - training nurses. § 186.
 - tramways, elevated. § 187.
 - trust companies. § 188.
 - union depots. § 189.
 - water works. § 190.
 - Indiana: enumeration of purposes for which corporations may be formed. § 191.
 - Texas: enumeration of purposes for which corporations may be formed. § 192.
2. *Decisions construing particular statutes.*
- corporations for internal improvements. § 200.
 - "lawful sporting purposes." § 201.
 - erection of buildings. § 202.
 - industrial pursuits. § 203.

Organization—(Continued).

“for any other purpose intended for mutual profit,” etc. § 204.

“other lawful business.” § 205.

“beneficial or protective purposes.” § 206.

“manufacturing purposes.” § 207.

“works of public utility.” § 208.

“pecuniary profit.” § 209.

“loan, mortgage, security, guaranty, indemnity company.” § 210.

3. Steps necessary to perfect organization.

corporations may be organized under general laws. § 215.

theory of the nature of a charter where the incorporation is under a general law.
§ 216.

when life of corporation commences. § 217.

distinctions between actions against the supposed corporation and actions against
the supposed corporator. § 218.

necessity of articles or certificate of incorporation. § 219.

corporate existence proved by *user* under an instrument of incorporation. § 220.

defective certificate not *prima facie* evidence of incorporation. § 221.

distinction between *user* under special charter, and compliance with conditions
under general law. § 222.

originals evidence where statute prescribes copy. § 223.

literal compliance with statute not necessary: substantial compliance sufficient.
§ 224.

substantial compliance necessary. § 225.

distinctions between conditions precedent and conditions directory. § 226.
illustrations. § 227.

defects in the articles or certificate which do not vitiate. § 228.

claiming more than the law allows. § 229.

provision as to expulsion of members. § 230.

specifying the objects of the association. § 231.

illustrations. § 232.

stating the place where the business of the corporation is to be carried on.
§ 233.

stating the manner of carrying on the business. § 234.

provision as to manner of payment of stock. § 235.

fatal defects not supplied by parol evidence. § 236.

acknowledgment of articles. § 237.

amendment of articles or certificate. § 238.

filing, publishing, and recording articles. § 239.

filing copy with secretary of state, etc. § 240.

illustrations. § 241.

recording in the wrong book. § 242.

fraudulent and surreptitious recording. § 243.

noncompliance with provisions directing publication of articles. § 244.

provision as to assent and approbation of a judge. § 245.

subscription of the whole amount of the capital stock. § 246.

payment of a certain amount of the capital stock. § 247.

certificate of treasury board, comptroller of currency, etc., conclusive. § 248.

letters patent of incorporation conclusive evidence of corporate existence. § 249.

Organization—(Continued).**4. Reorganization.**

effect of renewal of charter. § 255.

distinction between the revival of an old corporation and the creation of a new one. § 256.

franchise to be a corporation not the subject of a judicial sale. § 257.

statutory provisions under which the reorganized company succeeds to the franchises of the old. § 258.

further statutory provisions. § 259.

these schemes of reorganization favored. § 260.

effect of reorganization after mortgage foreclosure. § 261.

special privileges of antecedent companies pass to new. § 262.

new corporations, when not liable for debts of old. § 263.

illustrations. § 264.

assets of old corporation liable for its debts in hands of new. § 265.

illustrations. § 266.

when new corporations liable for debts of old. § 267.

organization of new company does not necessarily destroy old. § 268.

stockholders bound to take notice of plan of reorganization, and to signify their assent within the prescribed time. § 269.

members of stockholders' committee can not purchase at sale. § 270.

but creditors may combine to purchase and reorganize. § 271.

when minority of shareholders not bound by reorganization by majority. § 272.

when minority of bondholders bound by reorganization by majority. § 273.

reorganization under British and Canadian arrangement acts. § 274.

compromise arrangement must be substantially complied with. § 275.

bondholder may lose his rights by *laches*. § 276.

rights of holder of income bonds. § 277.

effect of transforming a partnership into a corporation. § 278.

abortive corporations reincorporated under a general law. § 279.

Ouster.

See QUO WARRANTO.

Ownership.

of real property by corporation. See CORPORATE POWERS, subd. 5.

Parol contracts.

See CONTRACTS, subd. 7.

Parties.

See ACTIONS; STOCKHOLDERS, subd. 31.

1. To actions by stockholders — plaintiff.

when a single stockholder may sue. § 4564.

when not necessary to join all the stockholders by name. § 4565.

but plaintiff must join the other stockholders or sue for them. § 4566.

suit must be *bona fide* for those in like interest with plaintiff. § 4567.

further of this subject. § 4568.

whether stockholder must have been such at the time of the grievances complained of. § 4569.

distinction between the Federal and State rule on this subject. § 4570.

relation of the State rule to the rule against champerty and maintenance. § 4571.

when the stockholders must sue on behalf of the creditors. § 4572.

Parties—(Continued).

doctrine that a person not a stockholder cannot be joined with a stockholder. § 4573.

2. Parties defendant.

general considerations. § 4577.

when the corporation must be made a party defendant. § 4578.

in contests between stockholders and third persons. § 4579.

exception where the corporation is dissolved or in liquidation. § 4580.

when the directors must be made parties defendant. § 4581.

whether the directors must be joined or may be sued separately. § 4582.

whether the shareholders must be made parties defendant. § 4583.

necessary parties refusing to join as plaintiffs may be joined as defendants. § 4584.

when third parties must be joined as defendants. § 4585.

third persons must be joined if their interests will be affected by the decree. § 4586.

when third parties need not be joined. § 4587.

corporation must be brought in by process or publication. § 4588.

when stockholders allowed to defend for the corporation. § 4589.

when stockholders not allowed to appear and defend. § 4590.

when decree executed against those who were not parties. § 4591.

3. To actions by and against corporations.

corporation when a necessary plaintiff. § 7566.

corporations as joint plaintiffs. § 7567.

when corporation a defendant in actions at law. § 7568.

joinder of several corporations as defendants. § 7569.

when corporation is a necessary party defendant in equity. § 7570.

is a necessary party when holder of legal title. § 7571.

corporation when not a necessary party defendant. § 7572.

directors parties to actions affecting the trust reposed in them. § 7573.

president when a necessary party and when not. § 7574.

directors, trustees, officers, agents, etc., when not necessary or proper parties. § 7575.

when receivers entitled to be made parties. § 7576.

when stockholders may be parties defendant. § 7577.

further of this subject. § 7578.

stockholders for the corporation. § 7579.

statutory exceptions permitting stockholders to be summoned. § 7580.

other views as to the joinder of stockholders as defendants. § 7581.

stockholders when not necessary parties defendant. § 7582.

what objections may be raised by one having no right to plead. § 7583.

4. Miscellaneous.

to actions to enforce payment of dividends. § 2231.

to proceedings by creditors against stockholders. §§ 3481-3515.

corporation as party to suit in equity. § 4156.

Part payment.

See LIMITATIONS, STATUTE OF.

Partnership.

distinguished from corporation. § 13.

Partnerships.

See REORGANIZATION; LIABILITY; PROMOTERS.

Patrons of husbandry.

organization of. § 169.

Payment.

See DIVIDENDS; SHARES, subd. 1.

of shares of stock. See SHARES.

Personal property.

power of corporation to take, hold, and transfer. See CORPORATE POWERS, subd. 6.

shares regarded as. § 1066.

Persons.

See CORPORATIONS.

in what sense corporations are. § 11.

corporations are persons within attachment laws. § 7790.

foreign corporations are deemed persons when. § 7900.

Pipe lines.

organization of pipe line company. § 170.

Pleadings.

See ACTIONS; PROCEDURE.

1. In actions by stockholders.

manner of alleging fraud. § 4595.

manner of alleging negligence and mismanagement. § 4596.

allegations of injury or damage. § 4597.

offering to restore what the corporation has received. § 4598.

allegations of bills to set aside sales of corporate property by the directors. § 4599.

amending bill by corporation so as to make it a bill by the members. § 4600.

rule that legal capacity to sue must be raised by demurrer or answer. § 4601.

multifariousness. § 4602.

2. In actions by and against corporations.

variance in respect of corporate name. § 7608.

what variance immaterial. § 7609.

misnomer and identity in case of corporations having similar names. § 7610.

variance created by using names of the trustees. § 7611.

misnomer in actions by or against joint-stock companies and unincorporated associations. § 7612.

misnomer must be pleaded in abatement. § 7613.

misnomer amendable. § 7614.

effect of amendment where corporation is sued in wrong name. § 7615.

declaring on obligations issued by corporations. § 7616.

not necessary to aver that corporation had power to make the contract sued on. § 7617.

qualifications of the foregoing. § 7618.

pleading of the defense of *ultra vires*. § 7619.

not necessary to aver election, qualification, appointment, etc., of officer or agent. § 7620.

charter, when a private act, to be pleaded and proved. § 7621.

declarations upon statutes other than charters. § 7622.

Pleadings—(Continued).

- statements before justices of the peace. § 7623.
- pleading in actions on by-laws. § 7624.
- declarations against corporations for improper or abusive exercise of statutory powers. § 7625.
- corporations plead and answer, how. § 7626.
- non-joinder of corporation plaintiff pleadable in abatement. § 7627.
- corporation may plead to the jurisdiction by attorney. § 7628.
- stage of proceedings at which it may so plead. § 7629.
- plea of the dissolution of the corporation. § 7630.
- plea of *non est factum* by a corporation. § 7631.
- verification of pleadings by corporations. § 7632.
- allegation of citizenship of corporations for purposes of Federal jurisdiction. § 7633.

3. Miscellaneous.

- In *quo warranto* proceedings. See **QUO WARRANTO**.
- in action by corporation for assessments. §§ 1823-1835.
- questions of in actions to charge stockholders. §§ 3625-3645.
- questions of in creditors' suit. §§ 3526-3533.
- estoppel to plead *ultra vires*. §§ 6015-6024.

Pleas.

- See **PLEADINGS**.
- of dissolution of corporation. § 7630.
- of *non est factum* by a corporation. § 7632.

Pledgee.

- See **PLEDGES**.
- of shares, remedies of. § 2656.

Pledges.

- See **MORTGAGES; SHARES**.

1. Of shares, nature and incidents of the contract.

- nature of a pledge: delivery essential. § 2615.
- distinction between a pledge and a mortgage of shares. § 2616.
- mortgage of shares with possession retained by mortgagor. § 2617.
- illustrations of pledges of shares. § 2618.
- title how vested after a pledge. § 2619.
- sense in which an equitable title passes to the pledgee. § 2620.
- notice to the corporation not necessary to a valid pledge. § 2621.
- pledge of corporate stock must be in writing. § 2622.
- absolute transfer may be shown by parol to be a pledge. § 2623.
- incidental rights of the pledgee. § 2624.
- taking such a pledge from a married woman. § 2625.
- effect of pledge upon lien of corporation. § 2626.
- construction of particular agreements of pledge. § 2627.
- illustration of an instrument held to be neither a pledge nor a mortgage. § 2628.
- status of the pledgee where the debt has been paid. 2629.

2. Validity as against third parties.

- assignment in pledge without delivery not good against creditors without notice. § 2633.
- rights of attaching creditors of pledgor. § 2634.

Pledges—(Continued).

illustration of an attempted pledge by a writing not good against a judgment creditor. § 2635.

power of a pledgee to pass title to innocent purchaser. § 2636.

purchasers with notice take subject to rights of pledgor. § 2637.

what imports notice: addition of the word "trustee." § 2638.

lis pendens. § 2639.

3. *Returning the identical certificate.*

a right to shares is not a right to certificates of a particular number. § 2642.

pledgee or trustee not bound to hold the identical certificates. § 2643.

further of this subject. § 2644.

illustration: pledgee returning similar shares, though not the identical certificate. § 2645.

analogous holdings as to the identity of shares. § 2646.

distinction between shares of stock pledged to secure a debt and fungibles in the Scotch law. § 2647.

rule not applicable to the case of shares of different values or kinds. § 2648.

pledgee liable if he does not keep on hand the same kind and number of shares. § 2649.

custom to re-hypothecate or otherwise use the pledge. § 2650.

doctrine that pledgee bound to return identical certificate. § 2651.

grounds of these conflicting theories. § 2652.

pledgee no right to sell before maturity. § 2653.

4. *Enforcing the contract.*

ordinary remedies of pledgee. § 2656.

his right of action. § 2657.

effect of the statute of limitations. § 2658.

right of pledgee to sell stocks or bonds. § 2659.

whether the pledgee bound to sell. § 2660.

pledgee bound to use diligence in realizing upon the security. § 2661.

must not sell more than necessary to pay debt. § 2662.

whether a mortgagee is bound to see to enforcing contract of sale. § 2663.

when the pledgee must collect and not sell. § 2664.

interpretation of express powers of sale. § 2665.

express authority as to sale excludes implied authority. § 2666.

effect of authority to sell at board of brokers. § 2667.

notice and mode of sale. § 2668.

doctrine that where the pledgee purchases the pledge at his own sale there can be no conversion. § 2669.

power to sell without notice not a power to sell without demand. § 2670.

custom of selling at private sale without notice void. § 2671.

this right to notice may be waived by contract. § 2672.

notice to redeem not necessary where time of payment fixed. § 2673.

circumstances dispensing with special notice. § 2674.

pledgor cannot require sale to take place at any particular time. § 2675.

rights of the parties in the case of a sale of the pledge pending an appeal and before reversal. § 2676.

pledgee cannot purchase at his own sale. § 2677.

equitable relief in such case to pledgor. § 2678.

Pledges—(Continued).

pledgee can purchase at a judicial sale. § 2679.
 sale of the securities under a decree of court. § 2680.
 obligation of corporation to transfer to purchaser. § 2681.

5. Action by pledgor for conversion.

tender of amount by pledgor not necessary to action. § 2684.
 but pledgee may recoup such indebtedness. § 2685.
 pledgee may show that the transfers were fictitious. § 2686.
 pleading precedent of a good count in trover for a share certificate. § 2687.
 another precedent. § 2688.
 measure of damages in such cases. § 2689.

Police power.

Exercise of over corporations.

general statement. § 5470.
 nature and extent of the police power. § 5471.
 in respect of the police power corporations stand on the same footing as individuals. § 5472.
 the police power extends to the reasonable regulation of corporations. § 5473.
 is involved in the visitatorial power of the State over corporations. § 5474.
 extends to the judicial dissolution of corporations for insolvency, abuse of franchises, violations of law, etc. § 5475.
 and to compelling the performance of their public duties. § 5476.
 imposing penalties for violating charter provisions. § 5477.
 police regulations must be reasonable and necessary. § 5478.
 illustrations of unreasonable police regulations of corporations. § 5479.
 exercised within wide limits of legislative discretion. § 5480.
 this power not in conflict with the exclusive power of Congress to regulate interstate commerce. § 5481.
 restricting or prohibiting the manufacture and sale of intoxicating liquors. § 5482.
 punishing the sale of adulterated foods and drinks. § 5483.
 regulation of water supply in cities. § 5484.
 prescribing fire limits in cities. § 5485.
 control of cemeteries. § 5486.
 excluding cattle infected with contagious diseases. § 5487.
 suppression of gambling, lotteries, etc. § 5488.
 abrogation of lottery franchises. § 5489.
 employment of women and children, and limiting hours of labor in factories. § 5490.
 regulation of contracts between employer and employé. § 5491.
 decisions overthrowing such statutes. § 5492.
 further of these decisions. § 5493.
 continued. § 5494.
 decisions affirming such statutes. § 5495.
 whether the legislature can exercise this power under a reserved power of altering and amending charters. § 5496.
 laborers' lien laws. § 5497.
 regulations of corporations using agencies protected by United States patents. § 5498.

Police power—(Continued).

- requiring electric wires to be put underground. § 5499.
- State regulation of railways by commissions. § 5500.
- compelling railroad companies to maintain stations at particular places. § 5501.
- compelling company to maintain flag stations and stop trains thereat. § 5502.
- compelling railway passenger trains to stop a given time at every station. § 5503.
- compelling railway companies to fence their tracks. § 5504.
- compelling railway companies to establish or change highway crossings. § 5505.
- making railway companies liable for fires. § 5506.
- imposing precautions upon railway companies in the running of their trains. § 5507.
- controlling railway construction with a view to the public safety. § 5508.
- compelling the examination of railway employes for color blindness. § 5509.
- compelling railroad companies to light their tracks. § 5510.
- prohibiting the heating of railway passenger cars with stoves. § 5511.
- regulation of passage tickets of common carriers. § 5512.
- imposing penalties for delay in delivering freight. § 5513.
- prescribing the *quantum* of damages for railway injuries. § 5514.
- compelling railroad companies to submit claims to arbitration. § 5515.
- State and municipal regulation of street railways. § 5516.
- municipal ordinances requiring quarterly reports of street railways. § 5517.
- compelling change of motive power in street railroads. § 5518.
- inspection of turnpike roads. § 5519.
- compelling water-power company to erect a fishway. § 5520.
- regulating the use of wharves. § 5521.
- prohibiting the business of banking. § 5522.
- compelling insurance companies to report their condition, liabilities, etc. § 5523.
- regulating the business of life insurance. § 5524.

Police relief.

- organization of society for. § 171.

Political clubs.

- organization of. § 172.

Pools.

- See TRUSTS.

Power of attorney.

- See AGENTS; REGISTRATION, subd. 4; TRANSFERS OF SHARES, subd. 15.

Powers.

- See CORPORATE POWERS.
- of directors. See DIRECTORS, subd. 5.

Possession.

- See TITLE.
- of receiver, nature of. See RECEIVERS, subd. 6.

Practice.

- See PLEADINGS; PROCEDURE.

1. *Matters of in actions by stockholders.*

- matters of practice. § 4605.
- entries in corporate books not admissible against directors. § 4606.

Practice—(Continued).

what knowledge imputable to directors. § 4607.

ratification by a corporation not implied from an entry of fraudulent transactions on its books. § 4608.

1. *Matters of in actions by and against corporations.*

arbitration by corporations. § 7754.

disqualification of a judge who is a member of a corporation litigant. § 7755.

disqualification of jurors by reason of membership in corporations. § 7756.

disqualification of a juror by reason of being related to a shareholder. § 7757.

enforcement of mechanics' liens against the property of corporations. § 7758.

corporations may enforce mechanics' liens. § 7759.

who may appeal from judgments against corporations. § 7760.

questions which may be considered on such appeals. § 7761.

status as suitors of corporations owned by the State. § 7762.

Preference.

of creditors, by insolvent corporation. §§ 6492-6507.

Preferred shares.

See SHARES.

Prescription.

See CORPORATION; CREATION.

President.**1. *His powers.***

nature, election, and tenure of the office. § 4611.

proof of his official character. § 4612.

when his acts bind the corporation, and when not. § 4613.

corporation not bound by his acts in manifest violation of his duty. § 4614.

nor where he is acting for a third person. § 4615.

nor where he is acting for himself personally. § 4616.

two opposing theories with reference to his implied powers. § 4617.

view which ascribes to him the powers of general agent for ordinary business. § 4618.

view which makes his powers special and limited. § 4619.

this view applied to the presidents of banking corporations. § 4620.

what he can do under the rule which ascribes to him the powers of an ordinary business agent. § 4621.

what he cannot do. § 4622.

grounds on which persons dealing with corporations protected. § 4623.

his authority provable by parol. § 4624.

his personal liability for breach of warranty of agency. § 4625.

larger powers inferable from usage, custom, or habit of acting. § 4626.

his powers when also general manager. § 4627.

effect of by-laws or other private instruments restraining his powers. § 4628.

his power touching the prosecution and defense of suits. § 4629.

cannot confess a judgment against the corporation. § 4630.

his power to revive debts barred by limitation. § 4631.

his power to alien corporate property. § 4632.

may acquire such power by express authorization or by usage. § 4633.

cannot assign its property for the benefit of its creditors. § 4634.

but directors can confer this power. § 4635.

President —(Continued).

- cannot consent to the appointment of a receiver. § 4636.
- cannot release claims, stay executions, etc. § 4637.
- may indorse its negotiable paper for the purpose of transfer. § 4638.
- illustrative holdings. § 4639.
- power to certify checks. § 4640.
- whether he has power to make a promissory note. § 4641.
- cannot pay claims against the corporation. § 4642.
- whether purchase materials required by the company in its operations. § 4643.
- whether power to borrow money. § 4644.
- power to buy includes power to buy on credit. § 4645.
- no power to revoke act of directors. § 4646.
- cannot buy, sell, or lease land. § 4647.
- when receive contracts of subscription to stock. § 4648.
- when take an assignment of shares of another stockholder to secure his own debt. § 4649.
- how execute contracts so as to bind the corporation, and not bind himself. § 4650.
- power to use the corporate seal. § 4651.
- when power to pay commissions. § 4652.
- discharging the duties of other officers. § 4653.
- taking title to himself in trust for the corporation. § 4654.
- his powers under particular instruments. § 4655.
- how far corporation bound by his declarations and admissions. § 4656.
- notice to him as affecting the corporation. § 4657.
- ratification of his acts. § 4658.
- things which a bank president can do. § 4659.
- things which a bank president cannot do. § 4660.
- authority of president in a given case, how proved or disproved. § 4661.
- illustrations of the manner of proving his authority. § 4662.
- evidence derived from previous ratifications of similar acts. § 4663.

2. His liabilities.

- his liability for torts. § 4569.
- his liability for frauds. § 4670.
- his liability for mismanagement, negligence, etc. § 4671.
- his obligations as a fiduciary. § 4672.
- what acts are consistent with such obligations. § 4673.
- what acts are inconsistent with such obligations. § 4674.
- conversion of corporate property. § 4675.
- personal liability on his *ultra vires* contract. § 4676.
- criminal liability of the president of a national bank. § 4677.
- when liable on the theory of breach of warranty of authority. § 4678.

3. His compensation.

- no compensation for services as president, unless, etc. § 4682.
- president's compensation, how fixed. § 4683.
- president's compensation for services rendered outside the duties of his office. § 4684.

Presumptions.

See EVIDENCE.

Prescriptions—(Continued).

- in favor of regularity of passage of laws. § 635.
- none in favor of exemption from taxation. § 2823.
- respecting corporations. § 7746.

Priorities.

See CREDITORS.

1. *Priorities among creditors of corporation.*

- legal priorities preserved in equity. § 3833.
- judgments satisfied in the order of their date. § 3834.
- whether a judgment creditor obtains a priority by the filing of his bill. § 3835.
- distinction as to priorities between creditors' bill and winding-up proceedings. § 3836.
- State entitled to be preferred as a creditor. § 3837.
- priority of creditor first suing stockholder. § 3838.
- doctrine on this subject in Maine. § 3839.
- contrary view that the creditor first suing gets no priority. § 3840.
- whether a stockholder can give a preference to particular creditors. § 3841.
- what if creditor holds property of the corporation delivered in pledge. § 3842.
- priority of a mortgage of uncalled amounts due upon stock subscriptions. § 3843.
- among creditors on mortgage foreclosures. §§ 6256-6268.

Procedure.

See PLEADINGS; PRACTICE.

- on execution or attachment of stock shares. See SHARES, subd. 20.
- to enforce liability of directors for debts. §§ 4308-4348.
- to enforce stockholders' liability. §§ 3413-3476.
- in creditors' suit. §§ 3526-3533.
- questions of in actions to charge stockholders. §§ 3669-3676.
- to enforce statutory liability of directors. §§ 4330-4348.

Proceedings.

See PRACTICE.

- to appoint receiver. §§ 6873-6889.
- against foreign corporations by attachment. §§ 8059-8065.
- under writ of execution. §§ 7865-7869.
- against foreign corporation by garnishment. §§ 8069-8081.

Process.

See SERVICE.

1. *What process used in actions against corporations.*

- writ of summons. § 7495.
- subpoena in equity. § 7496.
- capias*: warrant of arrest. § 7497.
- distingas* and sequestration. § 7498.

2. *Service of process on corporations generally — upon whom made.*

- State law governs in actions in Federal courts. § 7502.
- statute must be followed in order to give jurisdiction. § 7503.
- legislature may change modes of service. § 7504.
- rule where there is no governing statute. § 7505.
- agency of person on whom process served must appear of record. § 7506.
- whether the return conclusive as to the fact of agency. § 7507.
- service upon directors. § 7508.

Process—(Continued).

service upon officer after term expires, or after office resigned or abandoned.
§ 7509.

further of this subject. § 7510.

service upon the president. § 7511.

service on managing agent. § 7512.

who not managing agents to receive such service. § 7513.

service on general agent. § 7514.

service upon secretary, or secretary and treasurer. § 7515.

service upon any agent or employé. § 7516.

service on station agents of railway companies. § 7517.

service upon person having property in charge. § 7518.

service on any agent in actions growing out of the business of his agency.
§ 7519.

service upon a railway section foreman. § 7520.

service upon stockholders. § 7521.

service upon the cashier of a bank. § 7522.

service upon receivers. § 7523.

service upon clerk, book-keeper, etc. § 7524.

service upon traveling agent. § 7525.

what agent can accept service. § 7526.

authority to accept service, how shown. § 7527.

service upon an officer who is plaintiff in the suit. § 7528.

service upon corporate officer temporarily within the jurisdiction. § 7529.

substituted service on another officer where proper officer not found. § 7530.

3. Service—place and manner of service and return.

service where made. § 7538.

further of this subject. § 7539.

statutory mode of service must be followed. § 7540.

following the analogy of statutes. § 7541.

manner of service, delivering copy, etc. § 7542.

service by officer who is a member of the corporation. § 7543.

service by publication. § 7544.

form and sufficiency of the return. § 7545.

objection to service and return, how made. § 7546.

service of notice of appeal. § 7547.

4. Service of process on foreign corporations.

what statutes relating to service of process include foreign corporations. § 8019.

service upon corporations created by the concurrent action of two or more States.
§ 8020.

statutory modes of acquiring jurisdiction exclusive. § 8021.

State statutes providing this mode of service applicable in the Federal courts.
§ 8022.

conditions of Federal jurisdiction in actions against nonresident corporations.
§ 8023.

validity of statutes providing for service of process upon any officer or agent
§ 8024.

where foreign corporation has appointed an agent to receive service under the
local statute. § 8025.

Process—(Continued).

- proof of appointment of such an agent. § 8026.
- where it has appointed a State officer as such agent. § 8027.
- judgments against foreign corporations founded on process served upon agents appointed under statutes to receive service of process, good everywhere. § 8028.
- service on agent with whom the contract was made. § 8029.
- service upon officer or agent casually within the State. § 8030.
- doctrine not applicable to agents appointed to do business for the corporation within the State. § 8031.
- not necessary that agent should reside continuously within the State. § 8032.
- agent must be representing corporation as matter of fact. § 8033.
- service upon sub-corporations organized by the foreign corporation to carry on its business in the domestic State. § 8034.
- service upon a director. § 8035.
- service upon the "principal officer." § 8036.
- service upon "managing agent." § 8037.
- service upon any agent by whom the corporation does its business in the domestic State. § 8038.
- service upon any person doing business for the corporation. § 8039.
- agency expired but business not wound up. § 8040.
- service upon stockholders. § 8041.
- alternative service. § 8042.
- service upon vice-president. § 8043.
- service upon mere clerk. § 8044.
- service upon receivers. § 8045.
- where a railroad company has leased its road to another company. § 8046.
- service upon the agent who is himself plaintiff in the action. § 8047.
- evidence of service of process. § 8048.
- construction of particular statutes relating to service of process on foreign corporations. § 8049.
- notice by publication in lieu of personal service. § 8050.

Production of corporate books.

See EVIDENCE; PROCESS.

Profits.

See DIVIDENDS.

Prohibitions.

See CONSTITUTIONAL RESTRAINTS.

against granting charters of incorporation. See CONSTITUTIONAL RESTRAINTS, subd. 5.

Promoters.

See CONTRACTS; ORGANIZATION.

1. *Liability of, on their contracts.*

meaning of the term "promoter." § 415.

personal liability of promoters on contracts made for a projected company. § 416.

but promoters personally liable although contract made in name of corporation. § 417.

rule applies in all cases to managers. § 418.

Promoters—(Continued).

- illustrations. § 419.
- theory that rule not applicable where there is a corporation *de facto*. § 420.
- English view that promoters not necessarily liable as partners. § 421.
- this view further explained and illustrated. § 422.
- character in which liable a question of fact. § 432.
- liable when signing as "agent." § 424.
- illustration of the English rule. § 425.
- promoters not, as such, contributories. § 426.
- further of the English rule. § 427.
- the English doctrine summed up by Sir Nathaniel Lindley. § 428.
- no action at law by one promoter against the others. § 429.
- Unless under exceptional circumstances. § 430.
- liability of committeeman subsequently joining. § 431.
- members of provisional committee not liable for contracts of managing committee. § 432.
- judgment and satisfaction against one may be pleaded in abatement by another. § 433.
- evidence to charge committeemen. § 434.
- illustrations. § 435.
- evidence to charge the associates in an abortive corporation. § 436.
- liability of associates for expenses of agents appointed to procure charter. § 437.
- 2. *Liability to the shareholders.*
 - liability to subscribers for their deposits where the undertaking proves abortive. § 440.
 - grounds of recovery at law in such cases. § 441.
 - illustration. § 442.
 - grounds of recovery in equity. § 443.
 - remedy in equity lost by *laches*. § 444.
 - equity repels actions brought for barratrous purposes. § 445.
 - in returning deposits, breach of trust to prefer particular shareholders. § 446.
 - release by contract of right to recover deposits. § 447.
 - construction of such a contract—agreement to execute future agreement. § 448.
 - what committeemen are liable. § 449.
 - action at law against promoters for deceit. § 450.
 - measure of damages in such actions. § 451.
 - remedy in equity, of sharetaker against promoters for fraud. § 452.
 - measure of recovery in equity. § 453.
- 3. *Liability to the company.*
 - promoters bound to disclose what they are to get for their services. § 456.
 - cannot make secret profits out of the corporation. § 457.
 - purchasing and then selling to corporation at a higher price. § 458.
 - illustrations. § 459.
 - no liability when the transaction is fully disclosed. § 460.
 - company may affirm promoters' contract and enforce it for its own benefit. § 461.
 - not necessary to rescind the whole transaction. § 462.
 - deduction for promoting company. § 463.

Promoters—Quasi corporations INDEX.

Promoters—(Continued).

- compromise of suit against vendors. § 464.
- measure of recovery in equity. § 465.
- liability at law for secret profits. § 466.
- illustrations. § 467.
- immaterial that directors of the corporation knew of the fraud. § 468.
- liability for fraudulent representations. § 469.
- illustration. § 470.
- defense that the corporation raised the money on an illegal issue of its stock. § 471.
- grounds of recovery against aiders and abettors. § 472.
- whether liability of managing comitteeman in equity for fraud is joint or several. § 473.
- who may bring the action in equity. § 474.
- great latitude allowed in admission of evidence. § 475.
- when the fiduciary relation between the promoter and the company commences. § 476.

4. *Non-liability of the company for contracts of promoters.*

- contracts of promoters not binding on future company. § 480.
- illustrations. § 481.
- engagement with promoters is a proposal to corporation. § 482.
- illustration. § 483.
- not liable for services rendered in promoting it. § 484.
- illustration. § 485.
- limitations of rule of corporate liability. § 486.
- services rendered at the request of all the corporators. § 487.
- rule not applicable where third persons join the corporation. § 488.
- distinction between cases where the remedy is in equity and at law. § 489.
- illustrative cases where the corporation was held liable on the theory of estoppel. § 490.

Proof.

- of corporate existence. See CORPORATE EXISTENCE, subd. 3.

Prospectus.

- See FRAUD; SUBSCRIPTIONS.

Proxy.

- See ELECTIONS; VOTING.
- right to vote by. § 3876.

Publication.

- See CALLS; NOTICE.

Public libraries.

- organization of library association. § 173.

Public policy.

- See TRUSTS; ULTRA VIRES.

Public school corporations.

- what are. § 25.

Public use.

- See EMINENT DOMAIN.

Quasi corporations.

- what are. § 20.

Quasi-public corporations.

See CORPORATIONS; ORGANIZATION, subd. 1.

Quorum.

See ELECTIONS, subd. 2; DIRECTORS, subd. 3.

generally considered. §§ 725-729.

of directors, and number that can act. §§ 3904-3938.

Quo warranto.

See REMEDIES.

origin and early use of the writ of *quo warranto*. § 6767.

rise of the information in the nature of *quo warranto*. 6768.

terms of the fourth section of the Statute of Anne. § 6769.

theory of the information against corporations. § 6770.

scope of the remedy. § 6771.

must be prosecuted by the State. § 6772.

such actions brought by the Attorney-General. § 6773.

when without a private relator. § 6774.

further of this subject. § 6775.

relator must be interested. § 6776.

right of State's attorney to control proceedings. § 6777.

when the recital of a private relator is surplusage. § 6778.

when Attorney-General ordered to file information. § 6779.

whether the Attorney-General must have express statutory authorization to sue.
§ 6780.

whether Attorney-General or district attorney. § 6781.

against whom brought. § 6782.

when necessary to obtain leave to file information. § 6783.

circumstances under which leave denied. § 6784.

issuing a rule to show cause why an information should not be filed. § 6785.

affidavits for and against the rule. § 6786.

dismissing the information upon cause shown against its being filed. § 6787.

rule on the respondent to plead. § 6788.

process and its service. § 6789.

further of this subject. § 6790.

whether the proceeding is civil or criminal. § 6791.

whether the information should be framed as a civil or criminal pleading. § 6792.

setting forth the ground of forfeiture. § 6793.

contradictory averments in the same paragraph fatal. § 6794.

other allegations which must be made. § 6795.

when the information admits the existence of the corporation. § 6796.

what the information must state where the proceeding is to annul franchises
never granted. § 6797.

course of pleading in such cases. § 6798.

when defendant must justify or disclaim. § 6799.

nature of the plea of justification. § 6800.

attorney-general demurs or replies. § 6801.

when court will give judgment on the plea. § 6802.

substance of the replication. § 6803.

what the information must state where the proceeding is to forfeit the fran-
chises already granted. § 6804.

Quo warranto—(Continued).

- burden of proof. § 6805.
- nature of the judgment when rendered for the State, § 6806.
- ousting the corporation of particular franchises. § 6807.
- ousting usurpers from corporate offices. § 6808.
- ousting individuals of particular franchises. § 6809.
- in case of a pretended corporation not legally organized. § 6810.
- discretion in granting or refusing judgment of ouster. § 6811.
- further of this subject. § 6812.
- theory that corporation continues to exist until execution of the judgment. § 6813.
- jurisdiction to review elections. §§ 3879-3881.

Railroad corporations.

See NEGLIGENCE; TORTS.

1. *Powers of, in general.* See CORPORATE POWERS, subd. 9.
2. *Receivers of railroads.*
 - appointing receivers of railroad companies which fail to operate their roads. § 7202.
 - building or completing a railroad. § 7203.
 - performing contracts of corporation. § 7204.
 - court will carry out the construction placed by different railroad companies upon their own contracts. § 7205.
 - payment of rental under "car-trust" leases. § 7206.
 - applications or misapplications of this principle. § 7207.
 - character of such contracts determined by the local law. § 7208.
 - vendor or lessor desiring to preserve a lien must comply with local law. § 7209.
 - lien of such leases good as against subsequent mortgagees. § 7210.
 - status of rents where the lessor has resumed possession. § 7211.
 - whether authorize receiver to make new car-trust leases. § 7212.
 - purchasing rolling stock. § 7213.
 - how keep accounts in cases of the receivership of a railway having separate divisions. § 7214.
 - powers of receiver appointed by the State. § 7215.
3. *Miscellaneous.*
 - mortgages by. §§ 6137-6144.
 - preferred claims in railway receivership. §§ 7114-7124.
 - enactment of by-laws. § 998.
 - foreign taxation of. § 8127.

Ratification.

1. *By corporation — generally.*
 - preliminary. § 5285.
 - the general principles stated. § 5286.
 - the ratifying agency or body must have had power to do or authorize the act ratified. § 5287.
 - acts *ultra vires* the corporation not validated by ratification. § 5288.
 - ratification creates an estoppel. § 5289.
 - successive ratifications evidence of general authority to make similar contracts. § 5290.
 - ratification validates defective execution of corporate powers. § 5291.

Ratification—(Continued).

- illustrations of the foregoing. § 5292.
- sense in which this rule is to be understood. § 5293.
- extends to the validation of contracts not made in writing as required by statute. § 5294.
- whether an instrument defectively executed must be ratified by an instrument of equal dignity. § 5295.
- theory that a ratification cannot cure the failure to affix the corporate seal. § 5296.
- state of the English law as to ratification by corporations of informally executed contracts. § 5297.
- ratification by acquiescence after knowledge. § 5298.
- ratification by failing to disavow promptly after knowledge. § 5299.
- ratification by failing to dissent within a reasonable time. § 5300.
- what is a reasonable time generally a question of fact. § 5301.
- middle doctrine that silence after knowledge is merely presumptive evidence of ratification. § 5302.
- receiving and retaining the benefit of the unauthorized act after knowledge. § 5303.
- illustrations of this principle. § 5304.
- effect of a ratification upon intervening rights. § 5305.
- general rule that ratification can only take place with full knowledge. § 5306.
- for this purpose knowledge of directors is knowledge of corporation. § 5307.
- knowledge of directors how far conclusively presumed. § 5308.
- this presumption denied in respect of officers of the corporation. § 5309.
- knowledge of a single director or trustee. § 5310.
- distinction between unauthorized act of agent and of intermeddling stranger. § 5311.
- ratification presumed on slight evidence where act beneficial. § 5312.
- what acts will be a ratification where the transaction is formally reported. § 5313.
- ratification by the full body of stockholders. § 5314.
- what acts may be so ratified. § 5315.
- further instances. § 5316.
- ratification of contracts between corporation and its directors. § 5317.
- ratification by directors of contract made by president. § 5318.
- voidable contract ratified by settlement of accounts thereunder. § 5319.
- ratification by part payment. § 5320.
- ratification of contracts made by promoters prior to organization of corporation. § 5321.
- ratification of contracts made in corporate name before fully organized. § 5322.
- ratification of contracts made with a predecessor corporation. § 5323.
- adoption of contractor by precedent partnerships. § 5324.
- not necessary to plead ratification. § 5325.
- ratification of act of treasurer in affixing seals to notes. § 5326.
- evidence of ratification. § 5327.
- facts not amounting to a ratification. § 5328.
- when ratification not necessary. § 5329.

Ratification—(Continued).

2. Miscellaneous.

by corporation, of acts of agents. §§ 4938-4947.
of invalid mortgages. § 6183.

Real property.

See **LAND**.

powers of corporation as to ownership and transfer of. See **CORPORATE POWERS**, subd. 5.

Receivers.

See **DISSOLUTION; FOREIGN RECEIVERS; INSOLVENT CORPORATIONS**.

1. Appointment of.

appointment of receivers largely discretionary. § 6823.
court may impose equitable conditions as a condition precedent to the appointment. § 6824.

an example of an order imposing such conditions. § 6825.

circumstances under which receivers appointed. § 6826.

circumstances under which not appointed. § 6827.

where a business corporation is dissolved. § 6828.

where the statute makes the directors trustees to wind up. § 6829.

no such appointment unless on application of a party in interest. § 6830.

attitude of stranger to litigation who procures himself to be appointed receiver. § 6831.

appointment where a church corporation is dissolved. § 6832.

in suits in equity to foreclose mortgages. § 6833.

how far a court of equity will assume the management of a business by receivership. § 6834.

where the corporation has made a voluntary assignment for its creditors. § 6835

where the corporation is being wound up by its directors. § 6836.

appointment to sequester earnings of a corporation having public duties to perform. § 6837.

in proceedings to enforce judgments. § 6838.

creditor must be either a judgment or a lien creditor. § 6839.

further of this rule. § 6840.

at the suit of sureties or guarantors. § 6841.

at the suit of a minority stockholder. § 6842.

on the application of the corporation itself. § 6843.

on the application of the defendant. § 6844.

at the suit of directors. § 6845.

at the suit of the State. § 6846.

where the corporation enters a combination called a "trust." § 6847.

not appointed where there are no assets to administer. § 6848.

appointment of receivers of companies in England. § 6849.

2. Jurisdiction to appoint.

jurisdiction to make the appointment. § 6854.

jurisdiction to appoint as between Federal and State courts. § 6855.

federal jurisdiction not ousted by dissolution of corporation in State court. § 6856.

such jurisdiction as dependent upon venue. § 6857.

appointment of receivers by the legislature. § 6858.

Receivers—(Continued).

further of this subject. § 6859.

power to appoint receivers of foreign corporations. § 6860.

further of this subject. § 6861.

how under statutes of New York. § 6862.

effect of the pendency of a proceeding by the State to dissolve the corporation.
§ 6863.

appointment presumed valid when collaterally attacked, etc. § 6864.

3. Who appointed.

who should and who should not be appointed. § 6868.

whether one corporation may be appointed receiver of another corporation.
§ 6869.

number of receivers to be appointed. § 6870.

4. Proceedings to appoint.

at what stage of the proceeding appointed. § 6873.

parties to the application. § 6874.

bondholders not necessary parties. § 6875.

conduct of the litigation by the trustees concludes the bondholders. § 6876.

unsecured creditors not necessary parties. § 6877.

appointment on complaint of minority stockholders. § 6878.

appointment by the court of its own motion. § 6879.

notice of the application. § 6880.

further of this subject. § 6881.

manner of stating the grounds of the application in the bill or petition. § 6882.

further of this subject. § 6883.

relation of the proof to the pleadings in such applications. § 6884.

showing cause against the application and making the appointment. § 6885.

scope and terms of the order of appointment. § 6886.

appeal and *supersedes* of orders appointing receivers. § 6887.

taking and saving exceptions with a view to such appeal. § 6888.

qualifying: taking the oath of office. § 6889.

5. Effect of appointment.

effect of the appointment upon pending actions. § 6893.

does not suspend the right of action against corporation. § 6894.

effect of receivership without dissolution upon existing rights of action. § 6895.

receiver can be made a party, but only on his own motion. § 6896.

injunctions against the prosecution of actions against the corporation. § 6897.

appointment suspends the power of other courts to interfere with the subject of
the receivership. § 6898.

exception in the case of receivers of national banks. § 6899.

suspends rights of action by the corporation. § 6900.

prevents new rights of action from accruing. § 6901.

suspends rights of action by creditors against stockholders. § 6902.

does not displace liens or other vested rights. § 6903.

how affects the running of interest. § 6904.

effect of appointment on the rights of purchaser *pendente lite*. § 6905.

where the corporation is a member of a partnership. § 6906.

when failure to apply for receiver extinguishes the debt of the corporation.
§ 6907.

Receivers—(Continued).

jurisdiction over property of non-resident stockholders through receiver. § 6908.
distribution under receiver *pendente lite* conclusive in a subsequent proceeding to dissolve. § 6909.

commencement of winding-up proceedings suspends similar rights of action. § 6910.

power of a court to modify contracts entered into prior to insolvency. § 6911.
decisions under particular State statutes. § 6912.

6. *Title and possession of receiver.*

receiver not a purchaser for value. § 6917.

how far title vested out of corporation and vested in receiver. § 6918.

whether takes title by relation from the date of appointment. § 6919.

how in case of statutory receiver. § 6920.

no right to take out of possession of a stranger to the action. § 6921.

no right to possession of goods previously levied upon in a court of law. § 6922.
further as to the nature and extent of his title. § 6923.

what property passes to him in particular cases. § 6924.

title and custody of a receiver *pendente lite*. § 6925.

judgment creditors may subject earnings until mortgagee or receiver takes possession. § 6926.

court will protect the possession of its receiver. § 6927.

how far protect his right to possession. § 6928.

court will protect its receiver though erroneously appointed. § 6929.

statutes punishing the refusal to deliver property and records to receiver. § 6930.

levying attachments and executions on property in possession of receiver. § 6931.

whether prior earnings of the corporation subject to levy. § 6932.

moneys earned by the receiver not subject to garnishment as against the corporation. § 6933.

liable to garnishment after order of distribution made. § 6934.

proceedings to recover property seized by the receiver. § 6935.

7. *Whom the receiver represents.*

whom the receiver represents. § 6939.

the receiver the agent of the court. § 6940.

and court has plenary control over him. § 6941.

hence the court will perform his contracts. § 6942.

and those of his predecessor in office. § 6943.

validity of receiver's acts not questioned collaterally. § 6944.

represents all parties in interest. § 6945.

represents all the creditors. § 6946.

may bring actions to charge directors for breaches of trust. § 6947.

theory that he stands in the shoes of the corporation. § 6948.

in what sense the representative of the corporation. § 6949.

may impeach fraudulent conveyances made by the corporation. § 6950.

further of this subject. § 6951.

and other illegal diversion of its funds. § 6952.

may sue to recover assets fraudulently diverted by the officers of the corporation. § 6953.

corporation not bound to redeem obligations of a receiver. § 6954.

estoppel against receivers. § 6955.

Receivers—(Continued).

8. *Collecting the assets.*

- what assets pass to the receiver. § 6959.
- may have a *mandamus* to compel State officer to pay over funds. § 6960.
- what rights of action pass to him. § 6961.
- enforcing liability of stockholders. § 6962.
- the same subject continued. § 6963.
- theory that debtors to the corporation have full right of set-off. § 6964.
- whether debtor entitled to set-off. § 6965.
- further of this subject. § 6966.
- no right of set-off in respect of claims purchased after suspension. § 6967.
- doctrine illustrated by the case of bank bills. § 6968.
- aiding the receiver by writ of assistance. § 6969.
- delivery of property to receiver enforced by process of contempt. § 6970.
- remedy of receiver in case of property levied on by sheriff prior to his appointment. § 6971.
- loss of money deposited in bank. § 6972.
- power of receiver to compromise debts. § 6973.

9. *Actions by receiver.*

- whether the receiver can sue without express authority. § 6977.
- what constitutes such authority. § 6978.
- whether he must sue in his own name or in the name of the corporation. § 6979.
- the Federal doctrine on this subject. § 6980.
- receiver must plead and prove his official character. § 6981.
- parties to actions by and against receivers. § 6982.
- not necessary that corporation should join. § 6983.
- actions by receivers in courts of the United States. § 6984.
- jurisdiction of Federal courts as depending upon citizenship. § 6985.
- reviving in favor of receiver actions commenced by corporation. § 6986.
- revivor of actions commenced by the receiver and pending at his death or removal. § 6987.
- effect of discharge of receiver on actions pending against him. § 6988.
- compulsory reference under the New York statute. § 6989.
- right of action in, against stockholder. § 3549, *et seq.*

10. *Incidental powers and duties in administering the trust.*

- following the statute. § 6993.
- Federal court receiver must proceed according to the law of the State. § 6994.
- diligence required of the receiver. § 6995.
- redeeming from a mortgage. § 6996.
- affirming or disaffirming sales made after insolvency. § 6997.
- his obligation to pay rent. § 6998.
- remedies of landlord — distress — intervening petition — priority in distribution. § 6999.
- receiver's duty to pay taxes. § 7000.
- railroad property not salable in part for taxes. § 7001.
- whether a franchise tax collectible after appointment of a receiver. § 7002.
- judgment against receiver for taxes. § 7003.
- power to lease. § 7004.
- power to mortgage. § 7005.

Receivers—(Continued).

authority of a receiver to invest. § 7006.
 his power to make contracts. § 7007.
 cannot control corporate elections. § 7008.
 granting right of way to another railroad. § 7009.
 sales by receivers. § 7010.
 further of such sales. § 7011.
 control of the court over such sales. § 7012.
 purchaser takes subject to what liens. § 7013.
 receiver purchasing at his own sale. § 7014.
 subsequent judgment creditor cannot redeem. § 7015.
 compensation of receiver. § 7016.
 when chargeable with interest. § 7017.

11. *Proving claims against the fund.*

duty and power of the receiver in respect of the allowance of claims. § 7022.
 compromising claims against the corporation. § 7023.
 adjudication of claims against the estate. § 7024.
 claimants against the fund should intervene *pro interesse suo*. § 7025.
 practice of making examination *pro interesse suo*. § 7026.
 compelling third parties to be examined *pro interesse suo*. § 7027.
 claimants of property intervening by petition. § 7028.
 evidence before the master. § 7029.
 conclusive effect of decree limiting time for proving claims. § 7030.
 proving claim does not bar separate action. § 7031.

12. *Distribution of the fund in the hands of the receiver.*

receiver cannot distribute without order of court. § 7035.
 discretion as to ordering receiver to pay money. § 7036.
 appeal lies from order to pay out of fund in court. § 7037.
 remedy to compel distribution. § 7038.
 duty of statutory receiver to settle priority of incumbrances. § 7039.
 costs of the proceeding preferred. § 7040.
 priorities in the distribution. § 7041.
 creditors preferred before stockholders. § 7042.
 stockholders subscribing to a guarantee fund. § 7043.
 special liens to be preserved in making distribution. § 7044.
 marshaling the assets so as to require the exhaustion of special security. § 7045.
 priorities among lien creditors. § 7046.
 how under Massachusetts insolvent laws. § 7047.
 expenditures of the receiver in operating the property preferred. § 7048.
 prior liens or mortgages preferred. § 7049.
 claims for damages for torts not preferred. § 7050.
 other demands not preferred. § 7051.
 taking and renewing the note not a waiver of priority. § 7052.
 simple contract debts contracted in constructing the works of a corporation
 other than a railroad company not preferred. § 7053.
 principle which denies a lien for beneficial services rendered to corporation.
 § 7054.
 whether lien for attorney's fees. § 7055.
 governing principle as to the allowance of such fees. § 7056.

Receivers—(Continued).

- expenditures by stockholders in behalf of the corporation. § 7057.
- debts contracted prior to or at the time of mortgages. § 7058.
- judgments. § 7059.
- judgments recovered after assignment or filing bill for receiver. § 7060.
- wages of employés, operatives, and laborers. § 7061.
- who within such statutes and who not. § 7062.
- debts barred by limitation. § 7063.
- demands of foreign receivers, assignees, etc. § 7064.
- ordinary bank deposits. § 7065.
- deposits in savings banks. § 7066.
- deposits made by savings banks. § 7067.
- billholders of banks. § 7068.
- salaries of officers. § 7069.
- debts due the United States. § 7070.
- sureties on appeal bonds. § 7071.
- ultra vires* debts. § 7072.
- sham stock subscriptions with an agreement for rescission. § 7073.
- rights accruing subsequently to the dissolution. § 7074.
- general deposit of court funds. § 7075.
- distribution of assets deposited in another State. § 7076.
- validity of retroactive statutes touching distribution of assets. § 7077.
- order of distribution under New York statute. § 7078.
- 13. *Restoration of trust funds by the receiver.*
 - receivers must restore trust funds in full. § 7084.
 - no matter how much altered by the corporation. § 7085.
 - following the proceeds of trust funds. § 7086.
 - reason of the confusion on this subject. § 7087.
 - proceeds of paper deposited for collection not a trust fund. § 7088.
 - illustrations. § 7089.
 - otherwise if proceeds collected by receivers. § 7090.
 - unless credited as cash by the bank before its suspension. § 7091.
 - necessary to trace the paper or its proceeds into the hands of its receiver. § 7092.
 - contrary view that such collections a trust fund. § 7093.
 - illustrations of this view. § 7094.
 - money deposited immediately before suspension. § 7095.
 - money otherwise obtained by fraud. § 7096.
 - distinction where the customer has no deposit account with the bank. § 7097.
 - general deposits with banking company pass to its receiver as assets. § 7098.
 - what deposits are special and hence a trust fund. § 7099.
 - money delivered to a bank to pay a note which it has transferred. § 7100.
 - damages for the conversion of a special deposit. § 7101.
 - doctrine that special deposits converted and mingled with assets of corporation do not give a preference. § 7102.
 - doctrine that, in order to create a preference, the property converted must be traced into the trust estate. § 7103.
 - the same subject continued. § 7104.
 - illustrations of this doctrine. § 7105.

Receivers—(Continued).

- evidence to trace and identify the fund. § 7106.
- illustrative cases. § 7107.
- trustees presumed to pay out his own funds, and not those of his *cestui que trust*. § 7108.
- conclusion: the true doctrine suggested. § 7109.
- 14. *Preferred claims in railway receiverships.*
 - priority of claims for labor and materials necessary for keeping the road a going concern. § 7114.
 - age and nature of the claims which can be thus preferred. § 7115.
 - illustrative decisions. § 7116.
 - no distinction between unassigned and assigned claims. § 7117.
 - whether a diversion of funds necessary to support this rule of priority. § 7118.
 - such claims may be charged on the *corpus* of the property if the income is insufficient. § 7119.
 - not necessary that the payment of such claims should be made a condition precedent to the granting of a receivership. § 7120.
 - unsecured debts contracted for the original construction of railroads not preferred. § 7121.
 - claims for materials and labor furnished in building a railroad. § 7122.
 - claims for unliquidated damages not entitled to preference over prior mortgages. § 7123.
 - payment of damages to employes injured in the line of their duty. § 7124.
- 15. *Actions against receivers.*
 - leave to bring actions against the receiver. § 7128.
 - appealing from orders granting such leave. § 7129.
 - circumstances under which such leave granted or denied. § 7130.
 - effect of the act of Congress dispensing with the necessity of leave to sue receiver. § 7131.
 - further of this statute. § 7132.
 - the same subject continued. § 7133.
 - removal to Federal court of actions brought against receiver in State court. § 7134.
 - revivor against receiver of actions commenced against corporation. § 7135.
 - when receiver not properly joined with the corporation. § 7136.
 - suing the receiver instead of intervening. § 7137.
 - reviving against receiver actions commenced against corporation and restraining receiver from pleading statute of limitation. § 7138.
 - when receiver and corporation cannot be made parties. § 7139.
 - indemnity for expenses of litigation against the receiver. § 7140.
 - receiver entitled to any defenses which the corporation could make. § 7141.
 - liens of judgments recovered against the receiver after discharge. § 7142.
 - proceedings to condemn land in the hands of receivers. § 7143.
 - condemning lands in the hands of receivers. § 7144.
- 16. *Liability and remedies for torts of receiver* See TORTS.
 - corporation not liable for torts or crimes of receiver. § 7148.
 - exceptions to this rule. § 7149.
 - a case illustrating two of these exceptions. § 7150.
 - the true theory suggested. § 7151.

Receivers—(Continued).

- exception in case of penalties for non-compliance with statutory police regulations. § 7152.
- exception where the receiver has been appointed on the petition of the corporation itself. § 7153.
- statutory exception in Indiana. § 7154.
- general rule that receiver not liable personally. § 7155.
- personally liable for *ultra vires* torts. § 7156.
- trustees in possession personally liable. § 7157.
- receiver not liable on contracts made officially. § 7158.
- liable for damages resulting in death. § 7159.
- liable in his official capacity for damages for torts. § 7160.
- application of the statute of limitations to actions against receiver for damages. § 7161.
- when proceeds by action and when by intervening petition or motion. § 7162.
- when discharge of receiver bars action against him. § 7163.
- reviving action against railroad company after discharge of receiver. § 7164.
- 17. *Receiver's certificates.*
 - issuing receivers' certificates and making them a prior lien. § 7168.
 - circumstances which justify the exercise of the power. § 7169.
 - circumstances under which such certificates have been ordered. § 7170.
 - to make repairs and prevent dilapidation. § 7171.
 - to purchase rolling stock. § 7172.
 - cases denying power to issue such certificates. § 7173.
 - statutes creating this power. § 7174.
 - issuing such certificates at usurious rates: selling them at less than par. § 7175.
 - power to authorize sale of such certificates at a discount. § 7176.
 - circumstances under which it has been held improper to issue such certificates. § 7177.
 - issuing them to prevent a valuable land grant to the railroad company from lapsing. § 7178.
 - form of such receiver's certificate of debenture. § 7179.
 - conclusiveness of the order issuing such certificates upon the purchaser at a foreclosure sale. § 7180.
 - bondholders must make their objections before the certificates have passed into the hands of *bona fide* purchasers. § 7181.
 - such orders can only be made on hearing and notice. § 7182.
 - such certificates not negotiable instruments. § 7183.
 - non-liability of indorser of such certificates. § 7184.
 - other consequences of this doctrine. § 7185.
 - personal liability of the receiver to *bona fide* purchasers of fraudulent certificates. § 7186.
 - such certificates do not displace the liens of those who are not parties. § 7187.
- 18. *Removing and discharging receiver.*
 - vacating order appointing receiver, by writ of prohibition. § 7192.
 - revocation of the appointment and dismissal from the office. § 7193.
 - removing the receiver. § 7194.
 - appeal from order of removal. § 7195.

Receivers—(Continued).

validity of conditions in order discharging receiver. § 7196.

effect of order limiting time for presenting claims when receiver discharged.
§ 7197.

compensation of the receiver. § 7198.

counsel fees. § 7199.

19. *Receivers of railroads.* See RAILROAD CORPORATIONS.

20. *Receivers of insurance companies.* See INSURANCE CORPORATIONS.

21. *Foreign receivers.* See title FOREIGN RECEIVERS.

Records.

See EVIDENCE, subd. 1.

Redemption.

of circulating notes of national banks. § 7315.

from sale under execution. § 7868.

of capital stock. See CAPITAL STOCK, subd. 11.

Registration.

See TRANSFERS OF SHARES, subd. 4.

of transfers of shares. §§ 2365-2384.

Regulation.

distinguished from by-law. § 937.

Reinstatement.

See MANDAMUS; MEMBERS, EXPULSION OF, subd. 3.

Relation.

of stockholders to corporation. § 1136.

between broker and customer. § 2692.

Release.

of shareholders. See CAPITAL STOCK, subd. 3; DEFENSES, subd. 4.

Relief.

form of, in proceedings against stockholders. §§ 3536-3545.

Religious corporations.

enactment of by-laws. § 999.

Remainderman.

right of to dividends. See DIVIDENDS, subd. 5.

Remedies.

See ACTIONS; PROCEEDINGS; SUBSCRIPTIONS, subd. 12.

of defrauded shareholders. §§ 1424-1434.

of preferred shareholders. §§ 2289-2296.

to compel payment of dividends. § 2227, *et seq.*

to enforce share subscriptions. § 1762, *et seq.*

against persons guilty of fraud in stock subscriptions. §§ 1460-1487.

of corporation, on commercial paper. § 7386.

for torts of receivers. See RECEIVERS, subd. 16.

remedy by writ of *quo warranto*. See QUO WARRANTO.

of corporate bondholders. §§ 6121-6128.

of stockholders in equity. §§ 4471-4511.

of stockholders, generally considered. §§ 4441-4466.

to enforce statutory liability of directors. §§ 4308-4344.

of corporation against unfaithful directors. §§ 4118-4128.

to enforce stockholders' liability. §§ 3413-3476.

Removal.

See AMOTION.

of receivers. §§ 7192-7199.

Removal of actions.

See JURISDICTION, subd. 3.

of actions by alien corporations. § 7478.

Renewal.

of charter, effect of. § 255.

Rescission.

See CONTRACTS; SUBSCRIPTIONS, subd. 13.

Residence.

See DOMICILE.

of corporations for purposes of jurisdiction. See JURISDICTION, subds. 1, 4.

of corporations for purposes of jurisdiction — modern rule. §§ 7998-7999.

Resignation.

of corporate office. § 794.

of office of director. § 3886.

of national bank directors. § 4305.

Resolution.

distinguished from by-law. § 936.

Respondeat superior.

application of rule of to corporations. § 6276.

Responsibility.

of officers and agents to corporations. § 4992.

Restraints.

See CONSTITUTIONAL RESTRAINTS.

Restrictions.

See CONSTITUTIONAL RESTRAINTS.

Review.

of proceedings for amotion. § 825.

of sentence of amotion. § 841.

Revival.

of old corporation distinguished from creation of new one. § 256.

Safe deposit company.

organization. § 158.

Salaries.

See COMPENSATION.

Sales.

See SHARES, subd. 17.

of stock shares. §§ 2719-2733.

by receivers. § 7010.

under execution. § 7866.

of forfeited stock shares. §§ 1778-1779.

of shares for future delivery. § 2714.

Of property of corporation to new corporation.

power of a corporation to sell all its property. § 6541.

and receive pay in the stock of a new corporation. § 6542.

but not to the prejudice of its creditors. § 6543.

nor to the prejudice of stockholders. § 6544.

Sales—(Continued).

- cannot give away all of its property to a new corporation. § 6545.
- circumstances under which such proceedings *ultra vires*. § 6546.
- creditors of the old corporation have an equitable lien on the assets thus transferred. § 6547.
- effect of thus selling out. § 6548.
- ratification of such selling out by the stockholders. § 6549.
- when such transactions fraudulent and when not. § 6550.
- receiver's sales: circumstances under which purchasing company at void receiver's sale entitled to subrogation of rights to old company. § 6551.

Sanitariums.

- organization of sanitarium company. § 160.

Savings banks.

- See BANKS.
- powers of, generally. § 5948.

Scire facias.

- See FORFEITURES; QUO WARRANTO.

Scrip dividends.

- See DIVIDENDS, subd. 3.

Seal.

- See CONTRACTS, subd. 3.

Sealed instruments.

- See CONTRACTS.

Secretary.

- See OFFICERS.

1. In general.

- his *status*. § 4692.
- tenure of his office. § 4693.
- is the proper custodian of the corporate seal. § 4694.
- the keeper of its records. § 4695.
- the organ of the corporation for communication with the public. § 4696.
- no inherent power to bind the corporation. § 4697.
- his power to indorse. § 4698.
- his power to accept. § 4699.
- his powers where he is also general manager. § 4700.
- his duties as transfer agent. § 4701.
- his liability for refusing an inspection of corporate books and records. § 4702.
- his powers when called an actuary. § 4703.
- compensation of secretary, treasurer, general agent. § 4704.
- the same subject continued. § 4705.
- continued. § 4706.
- continued. § 4707.
- whether *de facto* officer entitled to compensation. § 4708.
- no compensation for acts prohibited by law. § 4709.
- ratification by directors of payment of salary. § 4710.

Securities of United States.

- State taxation of property invested in. § 8093.

Sequestration.

- See PROCESS.

Servants.

See AGENTS; NEGLIGENCE.

Service.

See PROCESS.

of process on corporations. See CORPORATIONS.

of process, on foreign corporation. See PROCESS, subd. 4.

Set-off.**1. In actions against stockholders in general.**

right exists where the corporation is a going concern. § 3785.

ceases when the corporation becomes insolvent. § 3786.

reasons which deny the right after insolvency. § 3787.

right exists where there are no other creditors. § 3788.

right exists where the debt of the corporation is a trust fund. § 3789.

where the statute gives a direct proceeding at law. § 3790.

special contract for a right of set-off. § 3791.

distinction between cases where the set-off is executed and where it is unexecuted. § 3792.

if the shareholder is a bankrupt. § 3793.

whether payment of corporate debts pleadable by way of set-off. § 3794.

whether stockholder may compound with creditors. § 3795.

release by a creditor of a particular shareholder. § 3796.

shareholder cannot buy claims at a discount and plead them as offset. § 3797.

but may prove as a creditor claims which he has purchased at a discount. § 3798.

and for stronger reasons a stranger may do so. § 3799.

company may set off calls against its own debt. § 3800.

setting off unpaid dividends against debts of the corporation. § 3801.

where the indebtedness to the stockholder has collateral security. § 3802.

shareholders can only assign debt of company subject to right of set-off. § 3803.

policy-holders cannot set off loss against liability on premium note. § 3804.

2. Under particular statutes.

under section 10 of New York Manufacturing Law. § 3809.

under the New York Business Companies Act of 1875. § 3810.

in a proceeding by motion under Missouri statute for execution against the stockholder. § 3811.

under Maine statute. § 3812.

under Georgia statute. § 3815.

Shareholders.

See STOCKHOLDERS; CAPITAL STOCK; SUBSCRIPTIONS.

1. Natural persons.

persons capable of contracting. § 1090.

by what law the subject governed. § 1091.

alien friends. § 1092.

ambassadors of foreign countries. § 1093.

alien enemies. § 1094.

infants. § 1095.

married women. § 1096.

where the married woman has an equitable separate estate. § 1097.

Shareholders—(Continued).

husband's liability for calls in respect of wife's shares. § 1098.

2. Private corporations.

one corporation cannot become a stockholder in another. § 1102.

reason of the rule. § 1103.

illustrations: railroad companies. § 1104.

further illustrations: banking companies. § 1105.

other illustrations. § 1106.

cannot subscribe for its own stock. § 1107.

limited view that one corporation can invest in the shares of another. § 1108.

illustrations. § 1109.

consequences which flow from this view. § 1110.

undoing such transaction: estoppel — *laches*. § 1111.

3. Municipal corporations.

validity of municipal subscriptions to private corporations. § 1115.

illustrations of the principle: aid to railroad companies valid — to manufacturing companies not. § 1116.

rule in the absence of direct constitutional restraints. § 1117.

validity of statutes authorizing municipal subscriptions to corporations. § 1118.

power to grant such aid by way of subscription settled. § 1119.

whether power exists to make donations to such companies. § 1120.

right to municipal aid not created by general words. § 1121.

right to municipal aid passes to new company on consolidation. § 1122.

statute repealed before right vested. § 1123.

an illustration of this principle. § 1124.

another illustration of the same principle. § 1125.

invalidity of State statutes attempting to take away the remedy on such subscriptions. § 1126.

validity of statutes transferring benefit of subscription from the county to the taxpayers. § 1127.

instances of such statutes impairing the obligation of contracts. § 1128.

invalidity of statute compelling town to subscribe to a railway. § 1129.

injunction to prevent issue of bonds where terms of subscription not complied with. § 1130.

release of subscription by abandonment of the work. § 1131.

petitions "representing a majority of the taxpayers," etc. § 1132.

subscriptions by a sovereign State. § 1133.

4. Limitations of actions against shareholders — in general.

statutes of limitations apply both at law and in equity. § 1986.

effect of doctrine that capital stock is a trust fund. § 1987.

whether shareholder's liability is in the nature of a specialty debt. § 1988.

continued: how in case of statutory liability. § 1989.

what are statutory liabilities. § 1990.

what statute applicable in actions by creditors against stockholders. § 1991.

illustration: California statute of three years. § 1992.

application of statutes of limitation to different forms of action. § 1993.

power of Legislature to shorten statutes of limitation. § 1994.

what is the commencement of an action. § 1995.

doctrine of stale demand. § 1996.

Shareholders—(Continued).

- when defenses not raised by demurrer. § 1997.
- when declaration required to negative statute. § 1998.
- State adjudications, how far binding on Federal courts. § 1999.
- 5. *When the statute begins to run.*
 - general doctrine. § 2002.
 - does not begin to run until a call has been duly made. § 2003.
 - where the statute allows a period of grace after the call. § 2004.
 - where the call is made by order of court, or otherwise, for purposes of liquidation. § 2005.
 - whether call by corporation puts the statute to running as against creditors. § 2006.
 - general power to receive is not a call. § 2007.
 - rule in Pennsylvania. § 2008.
 - does not run against creditors until a *de facto* dissolution. § 2009.
 - where the liability is that of a partner. § 2010.
 - where the theory is that of subrogation. § 2011.
 - rule in Iowa: statute begins to run simultaneously against corporation and stockholder. § 2012.
 - when his liability is secondary. § 2013.
 - prescription under code of Louisiana. § 2014.
 - where the liability is in the nature of a guaranty of payment. § 2015.
 - in case of liability in case of mismanagement or delinquency. § 2016.
 - in favor of one who has transferred his share. § 2017.
 - in case of renewals. § 2018.
 - in case of bank bills and bank debts. § 2019.
 - effect of the lien of the corporation on the debtor's shares. § 2020.
 - fraudulent concealments of the cause of action. § 2021.
 - in favor of corporation, where it has forfeited the shares of a member. § 2022.
 - in favor of executors and administrators. § 2023.
 - from date of judgment against corporation. § 2024.
 - in special cases. § 2025.
- 6. *Questions under special statutes.*
 - limitation as to time when suit shall be brought against corporation. § 2028.
 - continued. § 2029.
 - continued. § 2030.
 - statute of Maine as to past members. § 2031.
 - statute of Maine of six months. § 2032.
 - statute of New York touching demands of purely equitable cognizance § 2033.
 - the Ohio statute of March 18, 1839. § 2034.
- 7. *Rights of preferred shareholders.*
 - See CAPITAL STOCK, subd. 15.
- 8. *Remedies of preferred shareholders.*
 - See CAPITAL STOCK, subd. 16.
- 9. *Liability of shareholders to creditors.*
 - See STOCKHOLDERS.
- 10. *Divestiture of liability by transferring shares.*
 - See TRANSFERS OF SHARES; STOCKHOLDERS, subd. 15.

Shareholders—(Continued).

11. *Right of to inspect books and papers.*

See BOOKS AND PAPERS.

12. *Remedies of in equity.*

See STOCKHOLDERS, subd. 44.

13. *Release of shareholders.*

See CAPITAL STOCK, subd. 3.

Shares.

See CAPITAL STOCK; TRANSFER OF SHARES.

1. *Payment of—in general.*

must be paid for at their full value. § 1562.

no power in directors to fix price of stock or issue it for less than face value.
§ 1563.

no such power in the corporation itself. § 1564.

such contracts not aided in equity. § 1565.

effect of this rule on the liability of shareholders to creditors. § 1566.

statements of what the law was and is aside from recent Federal and State
holdings. § 1567.the leading case, *Upton v. Tribilcock*, considered. § 1568.

distinction between the English and American cases. § 1569.

continued: American doctrine that directors are trustees for creditors. § 1570.

source of the American doctrine that the capital stock of a corporation is a trust
fund, etc. § 1571.

this doctrine not found in modern English books. § 1572.

further distinction between the English and American cases. § 1573.

further distinction between the doctrine of the English and American cases:
power of English companies to make their own regulations touching their
capital and stock. § 1574.

a corporation cannot convert this trust fund into an ordinary debt. § 1575.

nor divide it among its members, leaving their debts unpaid. § 1576.

nor release its members from paying for their shares. § 1577.

nor agree that unpaid shares shall be deemed fully paid up. § 1578.

agreements that shares shall be deemed "fully paid up." § 1579.

such agreements frauds on other shareholders. § 1580.

not necessary that other shareholders should prove that they were actually mis-
led. § 1581.

what agreements avoided by the rule. § 1582.

effect of recital in certificate that the stock is "full paid." § 1583.

substituting the paid-up shares of another member. § 1584.

stock paid up and money loaned back to stockholder. § 1585.

stock issued to bondholders as a bonus. § 1586.

contrary view that receiver of shares issued as a gratuity not liable to creditors.
§ 1587.bonds issued to shareholders as a bonus, or to indemnify them against assess-
ments. § 1588.

bonds of corporation issued to stockholders as a bonus. § 1589.

when such an arrangement valid as between the company and the stockholders.
§ 1590.

may be valid as between the members personally. § 1591.

Shares—(Continued).

in England the company is estopped by its contract from demanding payment,
but may have damages for the fraud. § 1592.
authority to sell bonds no authority for selling stock at less than par. § 1593.
may issue its stock at par in payment of its debts. § 1594.
issuing shares at less than par to pay past indebtedness. § 1595.
further of this subject. § 1596.
issuing shares as collateral security for present advances. § 1597.
issuing new shares to old stockholders not to be paid in full. § 1598.
making payment by reducing the capital stock. § 1599.
where the capital stock is increased. § 1600.

2. *Payment in property.*

payment in property allowed where statute does not require payment in cash.
§ 1604.
payment in property generally allowed. § 1605.
payment must be in money or money's worth. § 1606.
further of the money or money's worth rule. § 1607.
English statements of the same rule. § 1608.
rule where the charter allows payment in property. § 1609.
what if such statute is repealed after subscription and before incorporation.
§ 1610.
agreements to pay in property collateral to the contract of subscription. § 1611.
English decisions on this subject. § 1612.
other English cases illustrating the rule. § 1613.
continued. § 1614.
continued. § 1615.
true value rule. § 1616.
standards by which to determine the true value under this theory. § 1617.
rule that the overvaluation must be fraudulent. § 1618.
error as to value no evidence of fraud. § 1619.
illustrations. § 1620.
otherwise as to an overvaluation with knowledge. § 1621.
illustrations. § 1622.
transfer of worthless patented or unpatented inventions. § 1623.
view that the contract must be impeached for fraud in a direct proceeding.
§ 1624.
when assignee in bankruptcy of corporation cannot disaffirm. § 1625.
whether fraudulent overvaluation should be pleaded. § 1626.
manner of pleading it. § 1627.
consideration shown by parol. § 1628.
trial by jury on the question of fraud. § 1629.
effect of knowledge on the part of creditors. § 1630.
part cash and part property. § 1631.
payment not compellable except according to the contract. § 1632.
when subscription payable in property is demandable in money. § 1633.
rescission of such contract. § 1634.
further of the rescission of such contract. § 1635.
no right of action in creditors against directors for fraudulent overvaluation.
§ 1636.

Shares—(Continued).

corporation a purchaser for value. § 1637.

these principles applicable to the reorganization of corporations. § 1638.

3. *In what kind of property.*

doctrine of preceding article restated. § 1642.

corporation cannot accept payment in specific property which it is not authorized to hold. § 1643.

what kind of property is "money's worth" to the corporation. § 1644.

incorporating a partnership and transferring its property in exchange for shares. § 1645.

payment in services at less than par value of the shares. § 1646.

illustrations. § 1647.

payment in newspaper puffing and advertising. § 1648.

continued: no objection that editorials were published gratuitously. § 1649.

in case of insurance companies, payment by commissions on business. § 1650.

payment by serving as director and giving the corporation one's business. § 1651.

issuing shares to officers in payment of salary. § 1652.

miscellaneous considerations as to payment in services. § 1653.

payment in securities other than money. § 1654.

payment of collateral security. § 1655.

payment in certified checks. § 1656.

validity of payment by giving promissory note. § 1657.

effect of such payment or settlement. § 1658.

such notes when negotiable. § 1659.

valid in the hands of indorsees. § 1660.

indorsee entitled to subrogation. § 1661.

4. *Doctrine that corporation can give away its unissued shares.*

cases denying or limiting the foregoing principle. § 1665.

new doctrine that a corporation can, as against creditors, give away its unissued shares. § 1666.

continued: doctrine that a corporation can issue its shares in payment of labor and materials. § 1667.

comments on the decision so holding. § 1668.

continued: refusing to follow the construction put by the State courts upon their own statutes of incorporation. § 1669.

as shown in the Missouri case of *Schickle v. Watts*. § 1670.

and by other decisions in that State. § 1671.

Missouri decisions further considered. § 1672.

as shown by a decision of the Supreme Court of Iowa. § 1673.

statutory exceptions to the foregoing doctrine. § 1674.

view that rule not applicable to subsequent creditors with notice. § 1675.

nor to any person who gives credit with knowledge of the manner in which payment has been made or secured. § 1676.

5. *Rights of bona fide purchasers of unpaid shares.*

status of *bona fide* purchasers of so-called "paid-up shares." § 1680.

protected although the certificates do not recite "paid-up." § 1681.

unsoundness of this view. § 1682.

illustrations of the rule. § 1683.

illustrations continued. § 1684.

Shares—(Continued).

- otherwise a subsequent purchaser with notice. § 1685.
- when record of deed not noticed. § 1686.
- surrender of unpaid shares and reissue to *bona fide* subscriber. § 1687.
- 6. *Miscellaneous holdings.*
 - statutes and constitutional provisions on the subject. § 1691.
 - right to vote before shares paid for. § 1692.
 - time of payment. § 1693.
 - place of payment. § 1694.
 - index to cases turning on peculiar circumstances. § 1695.
 - issuing unsubscribed stock at par where it is worth more. § 1696.
 - construction of particular charter. § 1697.
- 7. *Forfeiture of; power to forfeit and how exercised.*
 - requisites of a valid forfeiture: a lawful authority and a declared intention to forfeit carried into effect. § 1762.
 - power to forfeit must be conferred by statute. § 1763.
 - an expressed and *bona fide* intention to forfeit. § 1764.
 - the intention must be carried into effect formally. § 1765.
 - power must be exercised in mode prescribed by statute: by-law, when necessary. § 1766.
 - illustration of this principle. § 1767.
 - when by-law forfeiting shares invalid. § 1768.
 - the assessments must be legal. § 1769.
 - corporation must comply with conditions on its part. § 1770.
 - forfeiture enforceable although project subsequently abandoned. § 1771.
 - but dissenting shareholder may recover back his installments. § 1772.
 - waiver of right of forfeiture by failing to sell for each delinquency. § 1773.
 - previous misappropriation of corporate funds. § 1774.
 - estoppel to forfeit shares of a member. § 1775.
 - waiver of forfeiture for non-payment of premium. § 1776.
 - notice of the intention to forfeit. § 1777.
 - mode of sale. § 1778.
 - what notice of sale must be given. § 1779.
 - instance of defective compliance with the statute as to notice of sale. § 1780.
- 8. *Effect of such forfeitures.*
 - view that the remedy by forfeiture of shares is cumulative merely. § 1784.
 - when exclusive. § 1785.
 - effect of forfeiture pending action for assessments. § 1786.
 - corporation may sue for balance due after forfeiture and sale. § 1787.
 - statutory right of action for residue. § 1788.
 - illustration: case of a double assessment. § 1789.
 - shareholder entitled to residue. § 1790.
 - status of the shares after forfeiture. § 1791.
 - what forfeiture releases shareholder's liability. § 1792.
 - and releases his liability to creditors. § 1793.
 - this subject further explained. § 1794.
 - further explanation of the principle. § 1795.
 - statutory exceptions to this rule. § 1796.
 - not so as to *ultra vires* forfeitures. § 1797.

Shares—(Continued).

effect of acquiescence and laches. § 1798.

continued: the English doctrine stated. § 1799.

distinction between the American and English cases. § 1800.

illustrations of *ultra vires* forfeitures. § 1801.

collusive forfeitures. § 1802.

presumption that stock was regularly forfeited. § 1803.

9. *Relief against such forfeitures.*

when equity will relieve against forfeiture. § 1806.

no relief where stockholder has acquiesced until change of circumstances. § 1807.

no relief unless stockholder offers to pay up. § 1808.

no relief against forfeiture by managers after assignment for creditors. § 1809.

injunction granted against forfeiture where shares are paid in full. § 1810.

10. *Powers of corporation in relation to its own shares.*

its principles governing the distribution of stock. § 2040.

legal requisites of a valid issue of stock. § 2041.

special stock in Massachusetts. § 2042.

right of the holder of the certificate, under an invalid issue of stock, to rescind. § 2043.

loss of certificate of stock—issue of new one. § 2044.

suit by the company to determine conflicting equities of holders of duplicate certificates. § 2045.

liability of the corporation for overissues. § 2046.

motive of a valid issue of stock not examinable. § 2047.

no power to issue its stock at less than par. § 2048.

purchaser of such stock may rescind. § 2049.

right of prior stockholders to reduce it to amount already paid. § 2050.

power of a corporation to pledge its unissued shares. § 2051.

corporation may be estopped from denying its power to pledge its unissued shares. § 2052.

view that a charter power to mortgage capital stock refers to actual, and not potential stock. § 2053.

corporation cannot purchase its own shares. § 2054.

notwithstanding such purchases, stockholders remain liable to creditors. § 2055.

rescission of such contracts. § 2056.

liability of directors in such cases. § 2057.

applications of the rule. § 2058.

shareholders liable to receiver of corporation. § 2059.

a corporation may be vested with such power by its charter. § 2060.

charter under which company may purchase its own stock. § 2061.

view that corporation may buy and sell its own shares. § 2062.

creditors alone can impeach a sale of stock to the company. § 2063.

view that the corporation may be the beneficial owner of its own shares. § 2064.

power of national banks in this respect. § 2065.

ultra vires no defense to note given for such stock. § 2066.

cannot purchase of one stockholder to the exclusion of others. § 2067.

exceptions to the foregoing rule. § 2068.

power to reissue such purchased shares—merger—revival. § 2069.

one corporation cannot subscribe for shares in another. § 2070.

Shares—(Continued).

- but may sometimes acquire shares in another. § 2071.
- contract of the corporation to pay in its own stock—what amounts to a default—
§ 2072.
- 11. *Transfers of shares.* See TRANSFERS OF SHARES.
 - right of alienation. §§ 2300–2313.
 - lien of corporation on its shares. §§ 2317–2344.
 - nature of share certificates. §§ 2348–2363.
 - formalities; registration. §§ 2365–2384.
 - unregistered transfers. §§ 2387–2405.
 - priorities as between attaching creditors and unrecorded transferees. §§ 2409.
2421.
 - compelling transfers in equity. §§ 2425–2441.
 - mandamus to compel transfers. § 2445.
 - action at law for refusal to register. §§ 2447–2468.
 - measure of damages for refusing to transfer. §§ 2471–2483.
 - fiduciary relation between company and stockholder. §§ 2486–2490.
 - its liability for wrongful transfers. §§ 2493–2513.
 - its duties and responsibilities where certificates are lost or stolen. §§ 2516–2525.
 - transfers of shares held in trust. §§ 2527–2551.
 - liability for transferring on forged powers of attorney. §§ 2555–2583.
- 11. *Bona fide purchasers of shares.* See BONA FIDE PURCHASERS.
 - in general. §§ 2587–2601.
 - who are such purchasers. §§ 2603–2610.
- 13. *Pledges and mortgages of shares.* See PLEDGES.
 - nature and incidents of the contract. §§ 2615–2629.
 - validity as against third parties. §§ 2633–2639.
 - returning the identical certificate. §§ 2642–2653.
 - enforcing the contract. § 2656 *et seq.*
 - action by pledgor for conversion. §§ 2684–2689.
- 14. *Dealings in shares with and through brokers.*
 - view that the relation between broker and customer is that of pledgee and
pledgor. § 2692.
 - when broker purchasing for customer may resell for his own account.
§ 2693.
 - whether sale without notice is conversion. § 2694.
 - right of broker to sell for failure to keep good margin. § 2695.
 - right of broker to reimbursement for advances notwithstanding sale without
notice. § 2696.
 - a different rule where the shares have been paid for. § 2697.
 - broker identified by a third party. § 2698.
 - limits within which the parties may make their own contracts. § 2699.
 - usage of brokers. § 2700.
 - usages of stock exchange control only so far as reasonable. § 2701
 - rights of broker as against his principal in respect of stock purchased for the
latter but not received. § 2702.
 - factor's lien: purchases for agent of unnamed principal. § 2703.
- 15. *"Options," "futures," "straddles."*
 - sales for future delivery: when tender good after expiration of time. § 2706.

Shares—(Continued).

option deals: doctrine that no purchase need actually be made by the broker. § 2707.

construction of an option expiring at the end of the year. § 2708.

liability of broker to principal for wrongfully closing out a "straddle." § 2709.

construction of statutes enacted to prevent stock-jobbing. § 2710.

dealing prohibited by statute: when purchase not *in pari delicto*. § 2711.

16. *Loans.*

loan of shares declared to be a *mutuum*. § 2714.

illustration: transaction held to be in the nature of a *mutuum*. § 2715.

doctrine that the lender loses his right of action by waiting until the stock which he loaned has become extinguished. § 2716.

17. *Sales of.*

whether shares of stock within the statute of frauds. § 2719.

motives of purchase immaterial. § 2720.

purchases by officers of stockholders. § 2721.

whether agreement to purchase construed to be at par or market value. § 2722.

conditional sales of shares. § 2723.

measure of damages for failure to deliver shares. § 2724.

interpretation: contract held to be executed and to pass title. § 2725.

measure of damages for deceit inducing purchase of shares. § 2726.

market price of stock on a given day. § 2727.

specific performance of contract for purchase of shares. § 2728.

when equity will grant relief to the vendor. § 2729.

circumstances under which specific performance not decreed. § 2730.

interpretation of contract of sale reserving "all profits and dividends." § 2731.

sale or executory agreement. § 2732.

various decisions touching sales of shares. § 2733.

18. *Warranties.*

express warranty in the sale of shares. § 2737.

no implied warranty that directors will accept purchaser. § 2738.

no implied warranty that the corporation is a corporation *de jure*. § 2739.

no implied warranty against fraudulent overissue. § 2740.

a contrary view. § 2741.

cases to which the foregoing principle does not apply. § 2742.

19. *Other dealings.*

law of the place. § 2746.

reduction by husband of wife's shares into his possession. § 2747.

what acts indicate a purpose on the part of husband not to reduce wife's shares into his possession. § 2748.

assignment by married woman in pledge to secure debt of husband. § 2749.

apportionment as between legatees. § 2750.

shares held by a partnership: effect of succession in the firm. § 2751.

sale by heir no estoppel against him as administrator. § 2752.

liability for intermediate assessments in case of a sale with an option of re-purchase. § 2753.

when stockholders estopped from impeaching validity of shares. § 2754.

effect of by-law giving to other stockholders a right of pre-emption. § 2755.

particular contracts relating to corporations construed. § 2756.

Shares—(Continued).

20. *Execution and attachment against shares; in general.*
 - shares of corporate stock subject to execution and attachment. § 2765.
 - when shares in foreign corporations leviable. § 2766.
 - attachment of shares not an encumbrance of the property of the corporation. § 2767.
 - rights of the purchaser at the execution sale. § 2768.
 - attachment by the corporation itself. § 2769.
 - circumstances charging the corporation with notice. § 2770.
 - whether equitable title of unregistered transferee subject to attachment. § 2771.
 - shares of stock fraudulently transferred liable to attachment, although transfer registered. § 2772.
 - or to seizure and sale under execution. § 2773.
 - same result under view that statute is declaratory of common law. § 2774.
 - whether purchaser entitled to maintain bill in equity before acquiring possession. § 2775.
 - view that attachment seizes only the legal title as shown by the corporate books. § 2776.
 - view that equity of redemption in shares is attachable. § 2777.
 - levy upon stock held in the name of a nominal owner. § 2778.
 - Pennsylvania statute requiring affidavit and recognizance. § 2779.
 - rights of corporation as against attaching creditors. § 2780.
 - continued: decisions on particular states of fact. § 2781.
 - rights of subsequent *bona fide* purchaser, where corporation issues a new certificate to the purchaser at a void judicial sale of the shares. § 2782.
21. *Execution and attachment—procedure.*
 - situs* of corporate stock for the purpose of seizure by attachment or execution. § 2786.
 - effect of statute making foreign corporations domestic corporations. § 2787.
 - statute authorizing execution against corporate stock must be substantially complied with. § 2788.
 - duties and responsibilities of levying officers. § 2789.
 - manner of making levy. § 2790.
 - duty of secretary of corporation to give information. § 2791.
 - notice of officer of corporation. § 2792.
 - but sheriff's return and conveyance must identify the number of shares. § 2793.
 - remedy of execution purchaser to compel transfer. § 2794.
 - duty and responsibility of the corporation in respect of such sales. § 2795.
 - equitable action to subject railway shares held by the county. § 2796.
 - action for permitting transfers in contravention of a charging order. § 2797.
 - when transfer to purchaser not compelled. § 2798.
22. *Taxation of shares.* See TAXATION.
 - general considerations. §§ 2803–2807.
 - double taxation in respect of shares. §§ 2810–2819.
 - exemptions from taxation. §§ 2823–2840.
 - situs* of shares for purpose of taxation. §§ 2846–2851.
 - questions relating to assessment and collection. §§ 2913–2919.
23. *Miscellaneous.*

Shares—(Continued).

assessments and calls. See CAPITAL STOCK, subd. 4.
surrender of shares. §§ 1511–1528.

Situs.

See TAXATION.
of stock shares for purposes of taxation. §§ 2846–2851.
of shares for taxation. §§ 246–2851.
of interstate property for taxation. § 8095.
of ships at sea. § 8096.
of rolling stock of interstate railway companies. § 8097.

Slack-water navigation.

company, organization of. § 178.

Slander.

See TORTS.

Sleeping-car companies.

taxation of. § 8125.

Soldiers' monuments.

organization of company for erection of. § 179.

Special charters.

See CHARTERS.

Special deposits.

power of banks to receive. § 5951.

Special statutes.

See CONSTITUTIONAL RESTRAINTS, subd. 3.

Specific performance.

enforcement of against corporation. § 7407.

Speculative contracts.

See FUTURES.

Sporting.

organization of sporting company. § 180.

Spurious stock.

See SHARES.

Stage coaches.

organization of stage coach company. § 181.

Statute of frauds.

See TRANSFERS OF SHARES.

Statutes.

See CHARTERS; ORGANIZATION.
of incorporation, construction. §§ 200–210.
providing for consolidation of corporations. §§ 305–316.
imposing personal liability on stockholders. §§ 3013–3027.
constitutional restraints as to title of. §§ 607–627.
punishing refusal to inspect books and papers. §§ 4410–4416.
imposing conditions upon foreign corporations. §§ 7928–7944.
creating or extending right of action against foreign corporation. § 7997.
relating to service of process. §§ 8019.

Statutory liability.

Of directors and officers to creditors. See DIRECTORS, subd. 13.

Stock.

See CAPITAL STOCK.

Stockholders.

See **SHARES; SHAREHOLDERS; SUBSCRIPTIONS.**

1. *Liability of stockholders to creditors—extent of at common law.*
 - non-liability of members at common law. § 2925.
 - liability of members of unincorporated joint-stock company. § 2926.
 - members of corporation cannot enlarge liability by a by-law, resolution, etc. § 2927.
 - but may enlarge their liability by contract. § 2928.
 - liable to make good to creditor the amount due on their shares. § 2929.
 - this rule under various constitutions and statutes. § 2930.
 - exception as to the necessity of a call. § 2931.
 - liability exhausted by payment. § 2932.
 - not liable to creditors when not liable to corporation. § 2933.
 - exception in favor of *bona fide* purchasers in good faith. § 2934.
 - exception where shares have been transferred in pledge by the corporation to the shareholder. § 2935.
 - illustration: creditor of corporation holding its stock as collateral security and voting it. § 2936.
 - liability of pledgee of a shareholder. § 2937.
 - in case of agreement by one corporation to assume debts of another. § 2938.
 - where the corporation engages in other business than that authorized by its charter or articles. § 2939.
 - where the formation of the corporation is prohibited by law or public policy. § 2940.
 - where the business for which the corporation is formed is illegal. § 2941.
 - members of religious corporations may be personally liable. § 2942.
 - shareholders personally liable for frauds committed in dealing with corporate assets. § 2943.
 - not personally liable for securing to themselves a fraudulent preference. § 2944.
 - not personally liable for *ultra vires* debts. § 2945.
 - liability of sole stockholder. § 2946.
2. *Liability in equity on ground that capital is a trust fund.*
 - capital stock a trust fund for creditors. § 2951.
 - including unpaid subscriptions. § 2952.
 - recent qualifications of this doctrine. § 2953.
 - stockholders withdrawing the capital of the corporation bound to make it good. § 2954.
 - rule not varied by a public registration. § 2955.
 - this trust fund, how pursued by creditors. § 2956.
 - grounds on which courts of equity proceed. § 2957.
 - cases in which equitable relief is invoked. § 2958.
 - grounds of equitable relief where stock is not paid in. § 2959.
 - equity will compel directors to make assessments. § 2960.
 - or make the assessments by its own methods. § 2961.
 - bona fide* dividends of profits. § 2962.
 - grounds of equitable relief where stock is improperly divided. § 2963.
 - creditors entitled to share ratably. § 2964.
3. *Liability before organization and capital paid in.*
 - preliminary. § 2968.

Stockholders—(Continued).

- until legal organization, co-adventurers liable as partners. § 2969.
- what evidence necessary to charge a person as such a partner. § 2970.
- theories on which members have been held liable. § 2971.
- will be entitled to contribution among themselves. § 2972.
- when partners liable by estoppel after incorporation. § 2973.
- liability of members of joint-stock company afterwards incorporated. § 2974.
- distinction between prerequisite steps and directory provisions. § 2975.
- failing to file such articles as comply with the statute. § 2976.
- failing to publish statutory notices of incorporation. § 2977.
- recording a certificate does not cure defective articles. § 2978.
- failing to keep corporate books. § 2979.
- failure to comply with a statute requiring the posting of by-laws. § 2980.
- increasing capital stock without filing new certificate, etc. § 2981.
- individual liability of stockholders who have not paid their subscriptions. § 2982.
- statutory liability until capital paid and certificate thereof filed. § 2983.
- this liability, how measured: illustrations of it. § 2984.
- further of this liability. § 2985.
- retroactive effect of such statutes. § 2986.
- their extra-territorial effect. § 2987.
- what if there is no such statute. § 2988.
- liability of corporators before stock is distributed. § 2989.
- corporation and stockholders estopped to set up irregularity of corporate organization. § 2990.
- conclusiveness of the certificate of incorporation. § 2991.
- whether creditor estopped by contracting with corporation as such. § 2992.
- prima facie* evidence and burden of proof. § 2993.
- 4. *Constitutional provisions creating and abolishing individual liability.*
 - constitutional guaranties securing creditors of corporations. § 2998.
 - constitutional provisions restricting the liability to unpaid subscriptions. § 2999.
 - constitutional provisions creating a superadded or double liability. § 3000.
 - provision for a proportional individual liability. § 3001.
 - constitutional guaranty securing creditors of banking companies. § 3002.
 - whether these constitutional provisions are self-enforcing. § 3003.
 - further of this subject. § 3004.
 - effect of a constitutional provision creating a double liability. § 3005.
 - Missouri Constitution of 1865, and statute thereunder. § 3006.
 - effect of Missouri constitutional amendment abolishing this double liability. § 3007.
 - creditor may waive constitutional or statutory right to proceed against stockholders. § 3008.
 - incorporating ostensibly for another business in order to evade the rule of individual liability. § 3009.
- 5. *Construction of statutes imposing personal liability on stockholders.*
 - statutes creating individual liability construed strictly. § 3013.
 - doctrine of strict construction denied. § 3014.
 - cases supporting a remedial construction. § 3015.
 - rule of faithful or sensible construction. § 3016.

Stockholders—(Continued).

- such statutes, if penal, strictly construed. § 3017.
- what statutes of individual liability penal, and what not. § 3018.
- statute supplanting one more onerous. § 3019.
- statutory remedy to be followed. § 3020.
- not construed as retroactive. § 3021.
- liability governed by statute in force when debt created. § 3022.
- statutory descriptions of the persons chargeable as stockholders. § 3023.
- words importing a superadded individual liability to the amount of stock held. § 3024.
- whether release of corporation under insolvent law releases shareholders. 3025.
- individual liability survives in personal representative. § 3026.
- decisions under particular statutes. § 3027.
- 6. *Constitutional questions arising under such statutes.*
 - general doctrine: legislative alteration of the charter void. § 3031.
 - statutes imposing individual liability unconstitutional as to existing charters. § 3032.
 - statutes imposing liability for future debts. § 3033.
 - exception where the right of repeal is reserved. § 3034.
 - statutes affecting the remedy merely not invalid. § 3035.
 - what statutes taking away remedies against stockholders have been held valid. § 3036.
 - statutes giving a new or additional remedy to creditors. § 3037.
 - waiver by stockholder of constitutional immunity. § 3038.
 - invalidity of statutes substituting liability of corporation for liability of members. § 3039.
 - statutes repealing individual liability laws, if retroactive, void. § 3040.
 - otherwise in case of stockholders subsequently joining. § 3041.
 - summary remedies not unconstitutional. § 3042.
- 7. *Extraterritorial force of such statutes.*
 - liability of resident stockholders in foreign corporation determined by law of domicile of corporation. § 3046.
 - where the liability is in respect of unpaid shares. § 3047.
 - suit by foreign receiver to enforce this liability. § 3048.
 - stockholder bound by decree in insolvent proceeding without notice. § 3049.
 - individual liability enforced *ex comitate*, unless penal. § 3050.
 - illustrations. § 3051.
 - what statutes of individual liability are penal, and not enforceable in another State. § 3052.
 - liability of members of migrating corporation. § 3053.
 - where the governing statute of the foreign corporation imposes the individual liability and prescribes the remedy. § 3054.
 - where the foreign statute requires a suit in equity. § 3055.
 - this doctrine, how applied in Massachusetts. § 3056.
 - and in West Virginia. § 3057.
 - applied in Massachusetts so as to deny actions at law given by the law of the domicile of the corporation. § 3058.
 - comments on the Massachusetts doctrine. § 3059.
 - contrary holdings on the same subject. § 3060.

Stockholders—(Continued).

ancillary suit in Massachusetts for discovery. § 3061.
resident members of resident corporations liable on foreign contracts. § 3062.
interpretation of the foreign statute in the foreign forum followed. § 3063.
remedy according to the law of the forum. § 3064.
whether foreign stockholders entitled to contribution from resident stockholders.
§ 3065.
reviving a judgment against corporation to reach property of non-resident members within the State. § 3066.

8. *Statute creating a joint and several liability as partners.*

classification of the statutory liability of stockholders. § 3071.
nature of the liability of partners. § 3072.
stockholders so liable until organization perfected and capital paid in. § 3073.
other cases where they are liable as partners. § 3074.
"double liability," when regarded as that of partners. § 3075.
liability as partners attaches to members who are such when debt contracted.
§ 3076.
liability as partners that of principal debtors, not that of guarantors or sureties.
§ 3077.
direct action against the members as partners. § 3078.
limitation runs from contracting of debt. § 3079.
liability several as well as joint: assets of deceased stockholders liable. § 3080.
unlimited several liability without right of contribution. § 3081.
liability of stockholder not merged by judgment against corporation. § 3082.

9. *Statutes creating a several liability.*

nature and divisions. § 3086.
limited several or double liability according to stock held. § 3087.
further of this superadded "double liability." § 3088.
individual liability for amounts withdrawn or not paid in. § 3089.
liability for failure to file certificates, post notices, etc. § 3090.
liability for frauds under the Iowa statute. § 3091.
liability in the proportion which the members' shares bear to the corporate indebtedness. § 3092.
further of these statutes. § 3093.
whether solvent shareholders liable to make good defaults of insolvent ones.
§ 3094.
liable "to the amount of his stock," etc. § 3095.
liability to amount of nominal capital. § 3096.
liability "for all losses," etc. § 3097.
not a liability to the corporation. § 3098.
must be imposed by statute. § 3099.
stockholders liable upon their own interpretation of their charter. § 3100.
effect of statutory revision. § 3101.
individual liability does not depend upon stock being paid for. § 3102.
individual liability of married women as stockholders. § 3103.
individual liability of stockholders in national banks. § 3104.

10. *For what debts these statutes make stockholders liable.*
meaning of the word "debt" in such statutes. § 3110.
view that judgment for damages for tort not a "debt." § 3111.

Stockholders—(Continued).

- the opposing view. § 3112.
- unliquidated damages. § 3113.
- other demands deemed to arise *ex contractu*. § 3114.
- ultra vires* debts. § 3115.
- debts barred by limitation. § 3116.
- liability not revived or extended by renewals. § 3117.
- debts created by indorsement. § 3118.
- debts contracted after suspension. § 3119.
- debts accruing from money loaned and misappropriated. § 3120.
- deposits in savings banks where no certificates are issued. § 3121.
- rent accruing on existing leases after insolvency. § 3122.
- mortgage debts under a statute. § 3123.
- debt paid by surety. § 3124.
- debts due to other stockholders. § 3125.
- debts due to officers of the corporation. § 3126.
- when a debt is deemed to have been contracted. § 3127.
- 11. *Liability for interest, fees, and costs.*
 - stockholder liable for interest, though not in excess of his statutory liability. § 3132.
 - liability for interest from date of suit, although in excess of statutory liability. § 3133.
 - view that interest is not recoverable of the stockholder. § 3134.
 - counsel fees. § 3135.
 - from what date interest runs against stockholder. § 3136.
 - stockholder liable for costs of proceeding against him. § 3137.
 - liability to costs where proceeding is in equity. § 3138.
- 12. *Statutes making stockholders liable for debts due for labor, provisions, etc.*
 - such statutes fairly construed, not extended. § 3141.
 - illustrations. § 3142.
 - such statutes extend to assignees of the debt. § 3143.
 - such statutes include those who work by the piece. § 3144.
 - do not extend to the services of professional men. § 3145.
 - engineers of works, master mechanics, conductors, etc. § 3146.
 - manager, superintendent, foreman. § 3147.
 - secretary of the corporation. § 3148.
 - book-keeper. § 3149.
 - traveling salesman, commercial traveler. § 3150.
 - assistant editor and reporter. § 3151.
 - contractors. § 3152.
 - another stockholder. § 3153.
 - another corporation. § 3154.
 - statutory right not waived by receiving dividend, etc. § 3155.
 - whether waived by accepting a promissory note. § 3156.
 - whether waived by the taking of "store orders." § 3157.
 - application of payments by the laborer. § 3158.
 - to what stockholders liability attaches: present and past stockholders. § 3159.
 - release by the plaintiff of some of the stockholders. § 3160.
 - defenses available to the stockholder. § 3161.

Stockholders—(Continued).

remedy at law or in equity. § 3162.
 the complaint in such actions. § 3163.
 parties defendant. § 3164.

13. *To what class of shareholders liability attaches.*

rule in regard to partners. § 3169.
 general rule in regard to stockholders. § 3170.
 past members not liable unless by statute. § 3171.
 statutory liability of past members in America. § 3172.
 exceptional rule of liability as partners attaching to those who were stockholders when debt contracted. § 3173.
 results of these divergent views. § 3174.
 stockholders becoming such subsequent to repeal not subject to double liability. § 3175.

liability for debts contracted before membership. § 3176.
 exception where the liability is that of partners. § 3177.
 exception where the liability is in the nature of a penalty for a wrongful act. § 3178.

as for contracting debts before stock paid in. § 3179.
 statutes under which liability attaches to those who are members at the time the liability is sought to be enforced. § 3180.
 statutes fixing liability upon those who were stockholders when payment refused. § 3181.

at the time of the commencement of the action against the corporation. § 3182.
 at the time when suit brought to charge stockholders. § 3183.
 at the time of suing out *scire facias* for execution against the stockholder. § 3184.
 at the time when execution against corporation returned *nulla bona*. § 3185.
 assignee of shares not liable for fraudulent dividends received by his assignor. § 3186.

effect of renewals. § 3187.

14. *Status and liability of legal and equitable owners of shares.*

general rule. § 3192.
 legal owner liable. § 3193.
 trustees when liable personally. § 3194.
 statutes making the trust estate liable and exonerating the trustee. § 3195.
 trustees holding shares for the company. § 3196.
 trustee concealing his trust. § 3197.
 shares transferred to a person in trust without his knowledge or consent. § 3198.

effect of trustee resigning his trust. § 3199.
 taking shares in name of fictitious trustee. § 3200.
 or in the name of any fictitious person. § 3201.
 or in the name of persons *non sui juris*. § 3202.
cestui que trust not liable. § 3203.
 except in cases of fraud. § 3204.
 whether the nominee also put on the list. § 3205.
 assignees of insolvent estates. § 3206.
 whether assigned estate liable. § 3207.
 bankruptcy of shareholder. § 3208.

Stockholders—(Continued).

- if company is wound up before bankruptcy. § 3209.
- whether discharge releases the bankrupt shareholder. § 3210.
- husband when liable for wife. § 3211.
- purchaser at execution sale of shares previously transferred. § 3212.
- whether pledgor or pledgee liable as a shareholder. § 3213.
- effect of company pledging its unissued shares. § 3214.
- further decisions on this question. § 3215.
- pledgee taking transfer in the name of an irresponsible party. § 3216.
- 15. *Divestiture of liability by transferring shares—in general.*
 - bona fide* transfer terminates liability of transferor. § 3221.
 - transferee succeeds to rights and liabilities of transferor. § 3222.
 - exception in favor of *bona fide* purchasers of shares which purport to be paid up. § 3223.
 - contrary rule under exceptional charters and statutes. § 3224.
 - exceptional rule in Pennsylvania. § 3225.
 - exceptional rule in Ohio. § 3226.
 - under Virginia code both transferor and transferee liable. § 3227.
 - exception in case of liability for laborers' wages. § 3228.
- 16. *Right of stockholder to divest his liability.* See TRANSFER OF SHARES.
 - right to transfer shares. § 3231.
 - no implied power to restrain alienation of shares. § 3232.
 - by-laws restraining transfers of shares void. § 3233.
 - valid only so far as necessary to protect rights of corporation. § 3234.
 - distinction between by-law and charter provision restraining such alienation. § 3235.
 - how as to national banks. § 3236.
 - restraining transfers. § 3237.
 - by-laws prohibiting transfers while transferor indebted to corporation. § 3238.
 - interpretations of such regulations. § 3239.
 - not retroactive. § 3240.
 - when purchaser of shares chargeable with notice of such a by-law. § 3241.
 - when transfers require approval of directors. § 3242.
 - usage that stock not transferable where holder indebted to company. § 3243.
 - effect of certificate transferable on its face. § 3244.
 - power to impose such restraint in the certificate. § 3245.
 - statutory lien of a corporation upon its shares. § 3246.
 - lien created by articles of incorporation. § 3247.
 - effect and extent of such lien. § 3248.
 - effect of such a lien upon indorsers and sureties. § 3249.
 - waiver of this lien by the corporation. § 3250.
- 17. *Fraudulent transfers to escape liability.*
 - general rule: fraudulent transfers to escape liability void. § 3255.
 - the English distinction between real and sham transfers. § 3256.
 - effect of procuring consent of the directors by fraud. § 3257.
 - transfers after insolvency or winding-up proceedings. § 3258.
 - American doctrine: transfers to insolvent or incapable persons to escape liability, void although out-and-out. § 3259.
 - stress laid by American judges on the question of intent. § 3260.

Stockholders—(Continued).

- fraudulent intent, how proved. § 3261.
- ultra vires* transfers. § 3262.
- transfers made with the consent of the directors but beyond their power. § 3263.
- reorganization for the purpose of defrauding creditors. § 3264.
- rule where real purchaser takes the transfer in the name of an irresponsible person to avoid liability. § 3265.
- transfers for the benefit of creditors of shareholders. § 3266.
- 18. *Transfers to persons incapable of contracting.*
 - divisions of the subject. § 3270.
 - transfers to infants. § 3271.
 - effect of transfer through an infant to an adult. § 3272.
 - what if company wound up during minority. § 3273.
 - ratification after majority. § 3274.
 - married women. § 3275.
 - transfers of shares to the company itself void. § 3276.
 - exceptions to this rule. § 3277.
 - want of knowledge on part of transferor. § 3278.
 - transfer to a non-existent or fictitious person. § 3279.
- 19. *Exoneration of the transferor.*
 - general rule that who is a shareholder determined by the corporate books. § 3283.
 - general rule that transferor is liable while his name remains on the books. § 3284.
 - view that transferor is relieved unless guilty of negligence. § 3285.
 - illustrations of this view. § 3286.
 - this view denied in Ohio. § 3287.
 - rule where the transferor is a director. 3288.
 - corporation may waive formality in the transfer. § 3289.
 - where the transfer is to the corporation itself. § 3290.
 - prohibited transfers. § 3291.
 - where the transferor owns and transfers all the shares. § 3292.
 - statutory provisions respecting notice of transfer. § 3293.
 - statutory provisions avoiding transfers made within a given time prior to the failure of the corporation. § 3294.
 - period at which transfer inoperative to divest liability. § 3295.
 - where the liability is for rent accruing after transfer under a lease made before transfer. § 3296.
 - when transferor cannot impeach validity of transfer. § 3297.
- 20. *Liability of the transferee.*
 - transferee may be liable notwithstanding informality of transfer. § 3301.
 - transfers to the transferee without his consent. § 3302.
 - what will not be evidence of such consent. § 3303.
 - error in distinguishing the numbers of the shares not material. § 3304.
 - not necessary that the new certificate should have issued to the transferee. § 3305.
 - transferee liable without reference to the motive of the transfer. § 3306.
 - retransfer in pursuance of a previous agreement. § 3307.

Stockholders—(Continued).

- vendor in unregistered transfer may recover over against vendee. § 3308.
 liability to pay assessments as between vendor and purchaser. § 3309.
 transfer how proved to make transferee liable. § 3310.
 point of time at which liability attaches to transferee. § 3311.
 shares transferable free from liability when it has been exhausted. § 3312.
 purchasers at execution sale. § 3313.
21. *Liability of executors, administrators, heirs, and legatees.*
 corporate shares pass not to the heir, but to the executor or administrator. § 3317.
 the estate liable; not the executor or administrator. § 3318.
 doctrine in Massachusetts that estate not liable. § 3319.
 the general American doctrine. § 3320.
 distinction between a statutory penalty and a liability arising out of contract.
 § 3321.
 charter extended and debts contracted after the death of stockholder. § 3322.
 whether executor or legatee a contributory. § 3323.
 right of executor to contribution against residuary legatee. § 3324.
 heirs assessable to the extent of assets received from ancestor. § 3325.
 mode of enforcing contribution from estate of deceased shareholder. § 3326.
 by a proceeding in equity. § 3327.
 suing executor without proceeding in probate court. § 3328.
 time within which demand against estate of deceased stockholder presented.
 § 3329.
 when executor personally liable. § 3330.
 executor personally liable for breach of trust. § 3331.
 liability of the estates of deceased non-resident stockholders. § 3332.
 creditors not to be delayed until settlement of the estates of deceased shareholders. § 3333.
 executors *de son tort*. § 3334.
 English doctrine on this subject considered. § 3335.
22. *Conditions precedent to proceedings against stockholders — dissolution of corporation.*
 generally considered. § 3340.
 dissolution of the corporation does not extinguish its debts. § 3341.
 consequence of this principle. § 3342.
 effect of dissolution upon the liability of stockholders. § 3343.
 statutes making the liability of stockholders depend on a dissolution of the corporation. § 3344.
 what constitutes a dissolution of the corporation such as lets in remedies against the stockholders. § 3345.
 failing to elect officers, and sold out under execution. § 3346.
 becoming utterly bankrupt. § 3347.
 how fact of dissolution pleaded. § 3348.
23. *Necessity of the creditor exhausting his remedy at law.*
 general rule that creditors must exhaust remedy against corporation before proceeding against stockholder. § 3351.
 under some theories, even where the liability is said to be primary. § 3352.
 as under the New York Manufacturing Act. § 3353.
 when judgment at law against corporation necessary to let in equitable relief against the stockholders. § 3354.

Stockholders—(Continued).

- facts not sufficient to dispense with a judgment at law. § 3355.
- sufficient to exhaust ordinary legal remedies. § 3356.
- measure of diligence is judgment, *feri facias* and *nulla bona*. § 3357.
- not necessary to exhaust remedy against corporation where liability of stockholder is primary. § 3358.
- further of this subject. § 3359.
- theory that the liability may be that of a partner and yet secondary. § 3360.
- theory that the liability is secondary and collateral. § 3361.
- exceptional rules under which not necessary to recover judgment against corporation. § 3362.
- whether the return of *nulla bona* is conclusive against the shareholder. § 3363.
- 24. *What will excuse this necessity.*
 - dissolution of the corporation. § 3367.
 - appointment of a receiver. § 3368.
 - de facto* dissolution not sufficient where the claim sounds in damages. § 3369.
 - failure to comply with statutory requirements so as to become incorporate. § 3370.
 - either corporation must be insolvent generally, or creditor must have exhausted his remedies against it. § 3371.
- 25. *Other conditions precedent.*
 - proving claim before receiver. § 3374.
 - dispenses with necessity for judgment, even where the statute requires a judgment. § 3375.
 - exhausting deposits made with the State. § 3376.
 - exhausting equitable assets before statutory liability. § 3377.
 - exhausting remedy against other judgment debtors of corporation. § 3378.
 - not necessary to exhaust individual liability before subjecting what is due on share subscriptions. § 3379.
 - making demand upon the corporation or its officers. § 3380.
 - what necessary to a good demand. § 3381.
 - notifying stockholder of proceeding against corporation. § 3382.
 - giving notice to stockholder of the default of the corporation. § 3383.
 - commencing action against the corporation within a given time. § 3384.
 - call by directors not necessary to right of action by creditor. § 3385.
 - assessing the shareholders after insolvency. § 3386.
 - validity of this assessment. § 3387.
 - tender of a certificate not necessary. § 3388.
- 26. *Effect of judgment against the corporation.*
 - judgment against corporation conclusive. § 3392.
 - theory and extent of this doctrine. § 3393.
 - application of the rule. § 3394.
 - theory of this rule: privity of stockholder with the corporation. § 3395.
 - conflicting decisions in New York. § 3396.
 - New York rule different in respect of liability for unpaid shares: judgment *prima facie* evidence against stockholder. § 3397.
 - where the action is against trustees to enforce a personal liability for failing to file reports. § 3398.
 - doctrine that a judgment against the corporation is *prima facie* evidence of the debt in a proceeding against the stockholder. § 3399.

Stockholders—(Continued).

- subject to be impeached for collusion or fraud. § 3400.
- conclusiveness of judgments by default. § 3401.
- going behind the judgment where the stockholder is liable only for a particular class of debts. § 3402.
- judgment against corporation after dissolution, not evidence to charge stockholder. § 3403.
- decree assessing shareholders in winding-up proceedings conclusive without personal service. § 3404.
- whether suit against stockholder is upon judgment or original demand. § 3405.
- right of stockholder to appeal or prosecute error from judgment against corporation. § 3406.
- recitals in judgment against corporation not evidence against stockholder. § 3407.
- conclusiveness of judgment in supplementary proceeding against stockholder. § 3408.
- 27. *Remedies and procedure—theories and statutes under which remedy is at law.*
 - remedy at law where stockholder in default in payment of calls. § 3413.
 - doctrine that where statute creates a right and prescribes no remedy at law. § 3414.
 - remedy at law where liability is that of a partner. § 3415.
 - when legal and equitable remedies concurrent. § 3416.
 - right of individual creditors to proceed at law ousted by a general winding-up proceeding. § 3417.
 - when the remedy exists at law. § 3418.
 - receiver, assignee, or trustee may sue at law for assessments. § 3419.
 - creditor's bill, when not practicable. § 3420.
 - bill in equity by receiver of a corporation against its stockholders. § 3421.
 - in case of a foreign corporation. § 3422.
 - continued: distinction between a contractual and a statutory liability. § 3423.
 - continued, with illustrative holdings. § 3424.
- 28. *Theories and statutes under which the remedy is in equity.*
 - grounds of stockholders' liability in equity: holding assets of the corporation. § 3428.
 - as where they have not paid up their share subscriptions. § 3429.
 - or where the assets have been improperly divided among the stockholders. § 3430.
 - in case of a statutory individual liability. § 3431.
 - reasons of the doctrine that the equity forum is exclusive. § 3432.
 - where the proceeding is to enforce contracts made in behalf of the corporation prior to its organization. § 3433.
 - remedy in equity where statute liability is to creditors as a class. § 3434.
 - or where the statute creates a common fund for creditors. § 3435.
 - inapplicability of the doctrine that equity will not relieve one who has a remedy at law. § 3436.
 - grounds on which concurrent jurisdiction in equity supported. § 3437.
 - on the ground of discovery. § 3438.
 - bill by a foreign corporation to discover domestic stockholders. § 3439.
 - where the liability is in proportion to the stock held. § 3440.

Stockholders—(Continued).

- in case of deceased shareholders. § 3441.
- when court will not restrain proceedings at law. § 3442.
- 29. *Where the creditor is also a stockholder.*
 - remedy exclusively in equity. § 3446.
 - rule not applicable where creditor stockholder has satisfied his own liability. § 3447.
 - whether assignee of a stockholder may sue at law. § 3448.
 - cases disaffirming or qualifying the rules. § 3449.
 - circumstances estopping the stockholder from maintaining any kind of action. § 3450.
- 30. *Rules in particular jurisdictions.*
 - rule in the United States courts. § 3453.
 - Alabama. § 3454.
 - California. § 3455.
 - Colorado. § 3456.
 - Connecticut. § 3457.
 - Florida. § 3458.
 - Georgia. § 3459.
 - Illinois. § 3460.
 - Indiana. § 3461.
 - Iowa. § 3462.
 - Kansas. § 3463.
 - Maine. § 3464.
 - Maryland. § 3465.
 - Massachusetts. § 3466.
 - Minnesota. § 3467.
 - Missouri. § 3468.
 - New York. § 3469.
 - Ohio. § 3470.
 - Oregon. § 3471.
 - Pennsylvania. § 3472.
 - Rhode Island. § 3473.
 - South Carolina. § 3474.
 - Washington, § 3475.
 - Wisconsin. § 3476.
- 31. *Parties — creditors as parties plaintiff.* See PARTIES.
 - two theories as to the scope of equitable relief. § 3481.
 - reconciling these theories. § 3482.
 - theory that suit in equity must be on behalf of all creditors. § 3483.
 - other creditors let in because entitled to share ratably. § 3484.
 - amending bill or petition so as to make it the suit of all creditors. § 3485.
 - when not necessary to join all creditors. § 3486.
 - equity rule embodied in the codes of procedure. § 3487.
 - dormant partners: *cestui que trust*. § 3488.
 - creditors proceed separately at law. § 3489.
- 32. *Stockholders as parties defendant.* See PARTIES.
 - two courses open to the creditor. § 3492.
 - theory that all shareholders within jurisdiction are necessary parties to creditor's bill. § 3493.

Stockholders—(Continued).

- contrary theory that it is not necessary to join all the stockholders. § 3494.
 stockholders out of the jurisdiction need not be joined. § 3495.
 all stockholders proper parties. § 3496.
 not necessary to make shareholders defendants in order to secure appointments of receiver. § 3497.
 joint action by a single creditor against all the stockholders. § 3498.
 recent theory that stockholders are not necessary parties to a winding-up bill § 3499.
 stockholders must be sued separately at law. § 3500.
 except where they are liable as simple partners. § 3501.
 separate actions to enforce limited liability: joint actions to enforce unlimited liability. § 3502.
 rules in particular jurisdictions. § 3502 a.
 summoning the stockholder with the corporation. § 3503.
 whether stockholder so summoned can contest the merits. § 3504.
 where stock is held by partnership firm. § 3505.
33. *Corporation as party defendant.*
 when the corporation must be joined. § 3509.
 corporation a necessary party to suit to sequester unpaid subscriptions. § 3510.
 judgment against corporation and subsequent action against stockholder. § 3511.
 whether the corporation a necessary party to enforce a statutory individual liability. § 3512.
 corporation when a proper party in an action to enforce an individual liability. § 3513.
 right of corporation to appeal from order assessing stockholders. § 3514.
 conclusion: in equity all creditors, all shareholders, all adverse claimants, and the corporation should be joined. § 3515.
34. *Proceedings in equity — creditor's bill.*
 nature of a creditor's bill in such cases. § 3518.
 this distinction under the statutes of New York and Wisconsin. § 3519.
 auxiliary relief by injunction. § 3520.
 necessity of a judgment at law. § 3521.
 creditors need not first endeavor to induce corporation to sue. § 3522.
35. *Questions of pleading and procedure.*
 questions of pleading in such creditors' bills. § 3526.
 multifariousness. § 3527.
 issues not determined by original complaint. § 3528.
 not necessary to give stockholders fresh notice of claims of creditors subsequently coming in, in order to support judgments by default. § 3529.
 averments to excuse the bringing in of insolvents and non-residents. § 3530.
 objection for want of parties when waived. § 3531.
 joining an action to enforce unpaid subscriptions with an action to enforce individual liability. § 3532.
 stockholders not permitted to sever in their defenses. § 3533.
36. *The relief granted.*
 form of relief. § 3536.
 ordering an assessment upon the stock. § 3537.
 order of assessment not granted until general assets exhausted. § 3538.

Stockholders—(Continued).

assessments and contributions to be ratable. § 3539.
 assessing solvent stockholders to make up deficiencies. § 3540.
 to what extent resident stockholders assessed where some are non-residents.
 § 3541.

making additional assessments where prior ones prove insufficient. § 3542.
 form and substance of the decree. § 3543.
 entering a decree as to the rights of those before the court. § 3544.
 distribution where the plaintiff is himself a stockholder. § 3545.

37. *Right of action in receiver, assignee, etc.*

in general. § 3549.
 the general rule stated. § 3550.
 general rule that right of action for unpaid subscriptions passes to receiver,
 assignee, trustee, etc. § 3551.
 right of action in assignee in bankruptcy. § 3552.
 right of action in assignee for creditors under State assignment law. § 3553.
 right of action in transferee of stock subscriptions. § 3554.
 right of action in purchaser of assets at receiver's sale. § 3555.
 right of action in indorsee of note of corporation. § 3556.
 when the corporation may sue notwithstanding the appointment of a receiver or
 an assignment in trust. § 3557.
 when creditors may ignore the receiver and sue personally. § 3558.
 whether receivership of foreign corporation ousts creditors' right of action
 against domestic stockholders. § 3559.
 general rule that right of action to enforce individual liability does not pass to
 receiver, assignee, trustee, etc. § 3560.
 exceptions to this rule. § 3561.
 whether receiver, etc., succeeds to a higher right of action than that of the cor-
 poration. § 3562.
 doctrine that he does not. § 3563.
 further of this subject. § 3564.
 continued. § 3565.
 statute of New York, under which such right of action does not pass to the re-
 ceiver. § 3566.
 action by receivers against individual stockholders. § 3567.
 the doctrine illustrated by the Glenn cases. § 3568.
 when receiver or assignee may sue in equity. § 3569.
 common-law action brought in name of corporation to use of receiver, assignee,
 etc. § 3570.
 judgment of Federal court within the State will furnish foundation for creditors'
 bill. § 3571.

38. *Proceedings by garnishment.*

when debt due shareholder for his shares is attachable. § 3576.
 when subject to garnishment under execution against corporation. § 3577.
 an assessment must have been made and not paid. § 3578.
 a subscription must have been payable without an assessment. § 3579.
 and (subject to exceptions) the corporation must continue solvent. § 3580.
 whether a superadded statutory individual liability can be reached by garnish-
 ment. § 3581.

Stockholders—(Continued).

- defenses available to the garnishee. § 3582.
- Alabama. § 3583.
- Illinois. § 3584.
- Louisiana. § 3585.
- Mississippi. § 3586.
- Missouri. § 3587.
- 39. *Executions against stockholder—generally.*
 - execution against the shareholders a creature of statute. § 3591.
 - the writ of *scire facias*. § 3592.
 - registry of judgment against corporation not a lien against shareholder's property. § 3593.
 - English statutes providing for registry of shareholders and giving creditors a right to inspect the register. § 3594.
 - enjoining the creditor from executing his judgment against shareholders. § 3595.
 - summoning the stockholder in an action against the corporation. § 3596.
 - execution against corporation with clause for levy upon property of members. § 3597.
 - motion under Kansas statute. § 3598.
 - execution against stockholder under Massachusetts statutes. § 3599.
- 40. *Under the Missouri statute.*
 - remedy by motion under Missouri statute. § 3602.
 - the statute a substitute for a bill in equity. § 3603.
 - is a proceeding in the same court which rendered the judgment. § 3604.
 - motion against each stockholder is a separate proceeding. § 3605.
 - service outside the State does not confer jurisdiction. § 3606.
 - judgment rendered after legal dissolution of corporation will not support proceeding. § 3607.
 - liability fixed by return of execution *nulla bona*. § 3608.
 - evidence of corporate insolvency; return of *nulla bona*. § 3609.
 - what if execution against corporation returned before return day. § 3610.
 - return not presumed to be premature because not dated. § 3611.
 - informalities waived by appearance. § 3612.
 - no jury trial. § 3613.
 - appellate court will review the evidence. § 3614.
 - whether the motion should be preserved in the bill of exceptions. § 3615.
 - not necessary to take and save exception to the order disposing of the motion. § 3616.
 - proceeding does not abate on death of stockholder pending appeal. § 3617.
 - motion not maintainable against administrator of deceased stockholder. § 3618.
 - burden of proof. § 3619.
 - motion not maintainable after general assignment for creditors. § 3620.
 - second motion, if dismissed, not fatal to recovery on first motion. § 3621.
- 41. *Questions of pleading, evidence, and procedure.*
 - joinder of different causes of action against stockholder. § 3625.
 - necessity of pleading the statute creating the liability. § 3626.
 - averment of the facts on which the statute predicates the liability. § 3627.
 - manner of alleging indebtedness of corporation. § 3628.
 - averments as to time when debt contracted. § 3629.

Stockholders—(Continued).

- plaintiff's allegations where the liability is for unpaid shares. § 3630.
- allegations of exhausting legal remedies against corporation. § 3631.
- avermment of insolvency or dissolution. § 3632.
- avermment of the amount of stock held by defendant. § 3633.
- avermment of the power of the corporation to issue the shares. § 3634.
- allegation that the shares are assessable. § 3635.
- not necessary to aver want of knowledge that the shares were not paid for.
§ 3636.
- avermment of a call. § 3637.
- the same, in statutory action by sheriff in lieu of garnishment. § 3638.
- not necessary to aver issue and delivery of certificate. § 3639.
- not necessary to aver that all the stock was not subscribed. § 3640.
- not necessary to aver how the defendant became a stockholder. § 3641.
- sufficiency of averment in actions by receiver against individual shareholders.
§ 3642.
- when not necessary to declare against the stockholders as partners. § 3643.
- the prayer for relief. § 3644.
- common-law action brought by stockholder in name of corporation. § 3645.
- questions of fact in actions to charge stockholders. § 3650.
- necessity of proving existence of the corporation. § 3651.
- manner of proving the existence of the corporation. § 3652.
- evidentiary effect of certificate of organization. § 3653.
- certificate of corporate officer that capital has been paid in. § 3654.
- effect of failing to prove that the defendant is a stockholder. § 3655.
- manner of proving this fact. § 3656.
- corporate records as evidence against the stockholder. § 3657.
- further of this subject. § 3658.
- continued. § 3659.
- what judicial records admissible, and what not. § 3660.
- evidence to establish the debt. § 3661.
- declarations made by the defendant to other creditors. § 3662.
- evidence to charge the members on ground of fraud. § 3663.
- evidence of the insolvency of other stockholders. § 3664.
- evidence of fraudulent overvaluation of property transferred in payment of
shares. § 3665.
- questions of *res judicata*. § 3669.
- right of trial by jury. § 3670.
- reference to a master or referee. § 3671.
- appeal and writs of error. § 3672.
- conclusiveness of the finding on questions of fact where the trial is at law. § 3673.
- stockholders not entitled to separate trials. § 3674.
- filing notice of *lis pendens* to purchaser. § 3675.
- other points of practice. § 3676.

42. *Defenses.* See title DEFENSES.

- in general. §§ 3679–3681.
- defenses affecting the corporation and its management. §§ 3683–3688.
- defenses affecting the *status* and liability of the defendant as a shareholder.
§§ 3691–3707.

Stockholders—(Continued).

- defenses affecting the discharge and release of the defendant as a shareholder. §§ 3711-3725.
- defenses affecting the plaintiff's demand. §§ 3729-3737.
- defenses relating to the conduct of the creditor affecting his demand. §§ 3740-3748.
- defenses relating to the conduct of the proceeding to charge the stockholder. §§ 3751-3755.
- other defenses. §§ 3758-3763.
- 43. *Rights and remedies of stockholders generally considered.*
 - when stockholder has no right of counterclaim, on account of mismanagement of the directors. § 4441.
 - rights of a shareholder to an accounting where the scheme of incorporation has been radically changed. § 4442.
 - right of minority stockholder to have the business carried on: right of majority to have it wound up. § 4443.
 - bill in equity by one holding stock as a trustee to obtain the direction of the court. § 4444.
 - action to recover the plaintiff's undivided interest in the assets of the company. § 4445.
 - power of a corporation to sell all its property; dissent of a single stockholder. § 4446.
 - validity of agreement of majority of stockholders to elect the directors and control the corporation. § 4447.
 - mandamus* against corporate officers at the relation of a member. § 4448.
 - bill in equity by one stockholder to control the vote of another stockholder. § 4449.
 - remedies of the stockholders of a corporation whose property is leased to another corporation. § 4450.
 - using the name of the corporation to redress individual grievances. § 4451.
 - rights of stockholders who have not paid for their shares. § 4452.
 - right of shareholder to surplus on winding up after judicial forfeiture. § 4453.
 - rights of the beneficiary in the estate of the deceased partner where the partnership is turned into a corporation. § 4454.
 - what knowledge of corporate matters imputable to stockholders. § 4455.
 - rights of stockholders to benefits which accrue from breaches of trusts of directors. § 4456.
 - rights in the distribution of shares. § 4457.
 - subscriber to shares suing corporation for refusing certificate. § 4458.
 - rights of shareholders as creditors. § 4459.
 - right of stockholder to deal with corporation as a stranger. § 4460.
 - shareholder entitled to vote at a meeting to ratify a contract with himself. § 4461.
 - his right of action against corporation to redress wrongs personal to himself. § 4462.
 - courts will not protect interest of stockholder in illegal corporation. § 4463.
 - action at law against directors for breach of agreement to purchase shares for the shareholders. § 4464.
 - various rights and remedies already considered. § 4465.

Stockholders—(Continued).

recovering money paid for shares which plaintiff is unable to obtain. § 4466.

44. Remedies of stockholders in equity.

shareholders cannot sue to redress injuries to the corporation. § 4471.

no action at law by shareholders for official misdemeanors. § 4472.

illustrations of this doctrine. § 4473.

exceptions to this doctrine. § 4474.

shareholder may have an action at law when a stranger would have one. § 4475.

general rule that shareholders cannot sue or defend for the corporation. § 4476.

general rule that shareholders cannot sue for the corporation in equity. § 4477.

nor defend for the corporation in equity. § 4478.

but may sue where the corporation will not. § 4479.

when this right of action arises. § 4480.

cases to which the jurisdiction extends. § 4481.

not necessary that the wrong should require a winding-up. § 4482.

what circumstances of fraud, oppression, want of power, etc., necessary to invoke the jurisdiction. § 4483.

one corporation owning and wrecking another. § 4484.

instances where relief refused on the pleadings and evidence. § 4485.

distinction between redressing breaches of trust and influencing corporate action. § 4486.

equity will not interfere on questions of corporate management or policy. § 4487.

actions by stockholders against third parties for wrongs to the corporation. § 4488.

where the action is to redress a *tort simpliciter* committed against the corporation. § 4489.

when relief had against third parties and when not. § 4490.

nature and extent of the relief. § 4491.

conduct must work substantial injury. § 4492.

when necessary to allege and prove bad faith. § 4493.

what laches will deprive shareholders of relief. § 4494.

instances of such laches. § 4495.

corporation estopped by a ratification by its shareholders. § 4496.

conduct estopping the shareholder from asserting rights in the corporation. § 4497.

what persons have the standing of shareholders to invoke this relief. § 4498.

shareholder must first exhaust his remedy within the corporation. § 4499.

failure of the corporation to sue, a condition precedent. § 4500.

the doctrine of the Federal courts on this subject. § 4501.

the principle how embodied in the Ninety-fourth Equity Rule of United States courts. § 4502.

what is sufficient request to the directors under the general rule of equity procedure. § 4503.

circumstances which excuse the making of such a request. § 4504.

what request to bring suit where corporation has been abandoned or dissolved. § 4505.

requesting the receiver, etc., to sue after insolvency. § 4506.

cases to which the rule does not extend. § 4507.

refusal of corporation to sue must be averred and proved. § 4508.

Stockholders—(Continued).

- what allegations have been held sufficient under this rule. § 4509.
- what insufficient. § 4510.
- willingness of the corporation to sue, a good defense. § 4511.
- 45. *Injunction in aid of such remedies.* See INJUNCTIONS.
- 46. *When such remedies extend to winding up and when not.*
 - general rule that equity has no jurisdiction to dissolve a corporation. § 4538.
 - and that a stockholder cannot maintain a bill to wind up. § 4539.
 - statutory exceptions to this rule. § 4540.
 - provisions of the New York Code of Civil Procedure. § 4541.
 - dissolving an incorporated merchants' exchange under the New York Code of Civil Procedure. § 4542.
 - provisions and construction of the statute of New Jersey. § 4543.
 - alleging insolvency under such statutes. § 4544.
 - appointing a receiver to wind up. § 4545.
 - further of this subject. § 4546.
 - doctrine that equity has inherent jurisdiction to wind up a corporation where its operations must eventually be ruinous. § 4547.
 - right of minority of the stockholders to a distribution on winding up. § 4548.
- 47. *Further as to the form of relief.*
 - character of the relief granted. § 4552.
 - enjoining the directors and appointing a receiver. § 4553.
 - removing the directors. § 4554.
 - decreeing a sale of stock taken by one corporation in another. § 4555.
 - canceling a deed which is a cloud upon the title of the corporation. § 4556.
 - compelling the directors to account. § 4557.
 - right of tontine policy holder to an account. § 4558.
 - compelling third persons to specifically perform a contract with the corporation. § 4559.
 - restoring to the stockholders what they have lost. § 4560.
- 48. *Parties to such actions.* See PARTIES.
- 49. *Pleadings in such actions.* See PLEADINGS.
- 50. *Various matters of practice in such actions.* See PRACTICE.
- 51. *Limitation of actions by or on behalf of creditors.* See LIMITATIONS, STATUTE OF.
 - general principles. §§ 3766-3775.
 - when such statutes begin to run. §§ 3779-3782.
- 52. *Set-off.* See title SET-OFF.
 - in general. §§ 3785-3804.
 - under particular statutes. §§ 3809-3813.
- 53. *Contribution among stockholders.* See CONTRIBUTION.
- 54. *Priorities among creditors.* See PRIORITIES.
- Stock notes.**
 - nature of. § 5752.
- Straddles.**
 - See SHARES, subd. 15.
- Street railways.**
 - State and municipal regulation of. § 5516.
- Strikes.**
 - injunctions against. § 7782.

Subrogation.

See CONTRIBUTION.

Subscriptions.

See CAPITAL STOCK; SHAREHOLDERS.

1. *Theories as to nature and formation of the contract.*

- relation of stockholders to the corporation rests in contract. § 1136.
- governing statute forms part of the contract. § 1137.
- general views as to what constitutes one a stockholder. § 1138.
- subscription constitutes one a member. § 1139.
- certificate not necessary. § 1140.
- circumstances under which necessary. § 1141.
- contract of subscription when not necessary. § 1142.
- if no certificate issued, written agreement necessary. § 1143.
- view that a contract of subscription necessary in some form. § 1144.
- such contracts not created by recitals in a bond. § 1145.
- view that a contract of subscription must be in writing. § 1146.
- a writing not in strictness necessary. § 1147.
- oral promise to subscribe for shares, and note given therefor. § 1148.
- subscription not varied by parol evidence. § 1149.
- when explainable by parol. § 1150.
- form of the subscription. § 1151.
- in what kind of book — on what kind of paper. § 1152.
- signing in blank. § 1153.
- effect of erasure. § 1154.
- explanatory memorandum annexed. § 1155.
- receipt on margin of subscription book. § 1156.
- rule which requires a subscription to the articles of association. § 1157.
- reasons which support this rule. § 1158.
- consequence of this rule: no contract if subscriber dies before corporation formed. § 1159.
- other consequences of this rule. § 1160.
- doctrine that subscription not binding unless regularly made. § 1161.
- view that a subscription to the shares of a corporation not formed creates no liability. § 1162.
- further of this view: reasoning of Chief Justice Black. § 1163.
- distinction between a subscription and an agreement to subscribe. § 1164.
- the infirmity of this distinction. § 1165.
- unsoundness of the view that the proposal is bad unless made in strict compliance with the statute. § 1166.
- difficulty avoided by subsequent ratification. § 1167.
- subscription and payment of deposit. § 1168.
- another road out of this difficulty. § 1169.
- rule that subscriptions made before organization are good. § 1170.
- reasons in support of this rule. § 1171.
- nature of such an offer before acceptance. § 1172.
- instance under this rule. § 1173.
- rights and liabilities of subscribers to a common fund for a common purpose. § 1174.
- subscription must be accepted or acted upon. § 1175.

Subscriptions—(Continued).

- action against one member of building committee by the other members. § 1176.
- acceptance necessary if corporation in existence. § 1177.
- manner in which acceptance manifested. § 1178.
- distinction between cases where the proposition comes from the company and where it is made to the company. § 1179.
- revocation of offer before acceptance. § 1180.
- whether presumable in the case of a subscription to a future corporation. § 1181.
- a case in illustration. § 1182.
- locus penitentie* where subscription illegal. § 1183.
- other instances of subscription. § 1184.
- subscriptions enforceable by action without an express promise to pay. § 1185.
- illustrations of the foregoing. § 1186.
- doctrine that an express promise to pay is necessary. § 1187.
- the absurdity and immorality of this doctrine. § 1188.
- when contract to take shares complete under the English statute. § 1189.
- what facts amount to a contract to pay shares. § 1190.
- continued. § 1191.
- continued. § 1192.
- continued. § 1193.
- continued. § 1194.
- 2. *Theories as to the consideration.*
 - theories as to the consideration of the contract. § 1200.
 - rights and interests acquired by the subscriber. § 1201.
 - obligation of the company to issue the shares. § 1202.
 - franchises granted by the charter. § 1203.
 - failure of the commissioners to reject the subscription. § 1204.
 - mutuality of promise as among subscribers. § 1205.
 - labor or money expended on the faith of the promise. § 1206.
 - illustrations of this principle. § 1207.
 - contrary view that money not deemed expended on the faith of the subscription: formation of corporation not authorized thereby. § 1208.
 - consideration where the corporation is in existence. § 1209.
 - effect of the words "value received." § 1210.
 - subscription a good consideration for other undertakings. § 1211.
 - subsequent failure of consideration. § 1212.
 - no consideration where the company, and not the subscriber, gets the shares. § 1213.
- 3. *Theories as to the necessity of paying the statutory deposit.*
 - view that payment of cash deposit is necessary to the validity of the subscription. § 1216.
 - reasons given in support of this view. § 1217.
 - rule that payment of deposit must be made in specie or its equivalent. § 1218.
 - statute not complied with by giving a note. § 1219.
 - a contrary view. § 1220.
 - whether payment by bank check sufficient. § 1221.
 - simulated payments by giving checks which are not collected. § 1222.
 - further as to the matter of payment. § 1223.
 - view that the payment of such a deposit is not necessary. § 1224.

Subscriptions—(Continued).

a similar view in England. § 1225.

subscription valid through payment at a subsequent time. § 1226.

invalidity of secret agreement that the check shall not be paid. § 1227.

subscription void for non-payment of deposit made good by estoppel. § 1228.

where subscription made after the organization. § 1229.

what if the question arises under a by-law merely. § 1230.

illustration in case of surrender and reissue of shares. § 1231.

effect of statutes requiring a certain amount to be paid in before commencing business. § 1232.

4. *Theory that the full amount of the capital must be subscribed.*

shareholder not liable until full amount subscribed. § 1235.

illustration: subscription on condition that "sufficient is subscribed for the purpose. § 1236.

instance of a faulty instruction submitting this question to the jury. § 1237.

subscriptions by insolvents, persons not *sui juris*, etc. § 1238.

subsequent declaration of subscriber inadmissible. § 1239.

view that the judgment of the commissioners is conclusive. § 1240.

taking subscription in property at excessive valuation. § 1241.

waiver of right to object on this ground. § 1242.

5. *Other theories and holdings.*

what agents can receive subscriptions. § 1245.

nature of the authority of commissioners. § 1246.

apportionment of stock by the commissioners. § 1247.

proportion allowed to the commissioners themselves. § 1248.

remedy of the subscriber for refusal to issue shares. § 1249.

apportionment upon incorporating a mining property. § 1250.

subscriptions void after all stock taken. § 1251.

instances of insufficient subscriptions. § 1252.

subscriptions delivered as on escrow. § 1253.

distinction between subscriptions and purchases of shares. § 1254.

promise to take and pay for stock in unincorporated company actionable. § 1255.

each subscription several, not joint. § 1256.

subscription by a partnership name. § 1257.

subscriptions construed by the court. § 1258.

construed according to what law. § 1259.

taking shares to qualify as directors. § 1260.

continued. § 1261.

limit of option to take shares on reorganization. § 1262.

6. *Alteration of the contract of subscription.*

preliminary. § 1267.

breach by the corporation of its contract with the subscriber. § 1268.

alteration of the subscription paper. § 1269.

making radical changes in the purposes of the corporation. § 1270.

directors departing from the charter. 1271.

abandonment of the enterprise. § 1272.

discharged by legislative alteration of the contract. § 1273.

change must be material, fundamental, or radical. § 1274.

Subscriptions—(Continued).

- increasing capital stock. § 1275.
- reducing capital stock. § 1276.
- increasing the number of shares. § 1277.
- enlarging powers and privileges, and adding new responsibilities. § 1278.
- illustrations: authorizing extension of road — building of branch. § 1279.
- illustrations continued: empowering a slackwater company to extend its dams and incur additional expense. § 1280.
- changing the nature of the enterprise. § 1281.
- view that change sanctioned by majority binds minority. § 1282.
- changing the name. § 1283.
- changing the *termini* of a railroad. § 1284.
- material change of a location or route will release subscriber. § 1285.
- reasons of the rule. § 1286.
- what changes of route or location do not release subscriber. § 1287.
- what change of route by directors will release the subscriber. § 1288.
- how the defendant must plead the change. § 1289.
- consolidation with another corporation. § 1290.
- changes authorized by existing statutes. § 1291.
- alteration material to the particular subscriber. § 1292.
- changes affecting the payment of stock subscriptions. § 1293.
- other changes in the internal arrangements of the corporation. § 1294.
- selling out. § 1295.
- extending time for completing the enterprise. § 1296.
- elements of estoppel. § 1297.
- burden of showing dissent. § 1298.
- when validity of amendment submitted to jury. § 1299.
- 7. *Validity of conditional subscriptions.*
 - conditions imposed by the charter. § 1305.
 - view that conditional subscriptions are void. § 1306.
 - because not concurrent and hence not obligatory on each at the same time. § 1307.
 - effect of illegal conditions: whether the whole contract void, or the condition merely. § 1308.
 - condition discharged when a fraud on the law, and contract absolute. § 1309.
 - explanation of this principle. § 1310.
 - parol conditions void. § 1311.
 - parol agreements among subscribers. § 1312.
 - subscriptions made for collateral purposes. § 1313.
 - illustrations of such subscriptions. § 1314.
 - contemporaneous parol declarations. § 1315.
 - collateral agreements with third persons. § 1316.
 - views that conditions in subscriptions not contrary to public policy. § 1317.
 - illustrations of good conditional subscriptions. § 1318.
 - other American cases where conditional subscriptions have been upheld. § 1319.
 - illustrative English cases. § 1320.
 - distinction in respect of conditional subscriptions made before and after organization. § 1321.
 - condition that all the stock shall be subscribed. § 1322.

Subscriptions—(Continued).

waiver of this condition. § 1323.
 impossible conditions. § 1324.
 conditions as to assessability of shares. § 1325.
 stipulation for the payment of interest on stock subscription. § 1326.
 validity of conditions as affected by the statute of frauds. § 1327.
 what amounts to an acceptance by the corporation of a subscription upon condition. § 1328.

8. *Effect of conditions in subscriptions.*

no contract until valid conditions complied with. § 1332.
 subscribers' right to notice of the performance of the condition. § 1333.
 illustrations of the foregoing. § 1334.
 subscription becomes absolute when condition performed. § 1335.
 waiver of the condition. § 1336.
 by acting as a stockholder. § 1337.
 other grounds of estoppel. § 1338.
 no waiver if note obtained by fraudulent representation that condition has been complied with. § 1339.
 recovery of payment made before condition complied with. § 1340.
 failure to carry out advertised projects. § 1341.
 condition as to completion of corporate enterprise. § 1342.
 effect of change of location. § 1343.
 validity of condition that railway be located on a certain route. § 1344.
 this condition complied with by "locating" without "constructing." § 1345.

9. *Interpretation of particular conditions.*

that a certain sum be subscribed. § 1349.
 as to the construction of the company's road or works. § 1350.
 as to assessments. § 1351.
 as to the establishment of depots at certain places. § 1352.
 that a prescribed route be taken. § 1353.
 conditions held not to be conditions precedent. § 1354.
 actions of committee: judgment of stockholders. § 1355.
 penalty for non-payment. § 1356.

10. *Effect of fraud on stock subscriptions—general principles.*

generally considered. § 1360.
 general rule as to the liability of a corporation for the frauds of its agent in procuring subscriptions to its stock. § 1361.
 former doctrine in the English courts. § 1362.
 continued: doctrine of *Oakes v. Turquand*. § 1363.
 general observations as to the limitations of this rule. § 1364.
 contracts induced by fraud not void, but only voidable. § 1365.
 not voidable unless the relation of principal and agent existed between the corporation and the person making the representation. § 1366.
 authority of the agent to commit the fraud. § 1367.
 rule in case of subscriptions obtained by public commissioners. § 1368.
 American decisions denying right of rescission for fraud. § 1369.
 effect of ignorance of the subscriber. § 1370.
 rule of law that stockholder must have been diligent in discovering the fraud.
 § 1371.

Subscriptions—(Continued).

duty of purchaser to make inquiries before subscribing. § 1372.

illustrations of this rule. § 1373.

rule not applicable where statements ambiguous. § 1374.

subscriber owes duty of inquiry to innocent third persons. § 1375.

waiver of the fraud by subscriber. § 1376.

acts of ratification or estoppel. § 1377.

rule where subscription is settled by negotiable instrument. § 1378.

subscriptions given in consequence of mistake. § 1379.

11. *What frauds will and will not avoid the contract.*

statement of the general rule by Lord Romilly, M. R. § 1382.

fraud may consist either in misrepresentation or suppression of the truth. § 1383.

must be a material inducement to the contract. § 1384.

further in illustration of this principle. § 1385.

illustrations continued. § 1386.

purposes of the misrepresentations. § 1387.

fraud need not have been willful. § 1388.

except where the action is for deceit against the persons committing the fraud.
§ 1389.

distinction between fraud and failure of consideration. § 1390.

further of this distinction. § 1391.

puffing and exaggeration. § 1392.

fraudulent promise of something unlawful. § 1393.

statements as to matters of opinion, belief, and motive. § 1394.

parol representations varying written contract. § 1395.

further of this subject. § 1396.

ambiguous statements. § 1397.

misstatements as to the names of directors. § 1398.

fraud in which the subscriber seeking relief participated. § 1399.

such as secret agreements with shareholders prejudicial to the corporation.
§ 1400.

illustrations of the foregoing. § 1401.

but such agreements good between shareholders. § 1402.

application of this rule in case of registered companies. § 1403.

fraudulent agreements with previous subscribers. § 1404.

no defense unless subscriber was misled by such fraud. § 1405.

subsequent fraudulent alteration of subscription paper. § 1406.

charter fraudulently procured: corporation illegally organized. § 1407.

instances under the foregoing rule: shareholders released. § 1408.

continued. § 1409.

continued. § 1410.

continued. § 1411.

continued. § 1412.

continued. § 1413.

instances under the foregoing rule; shareholders not released. § 1414.

continued. § 1415.

continued. § 1416.

continued. § 1417.

continued. § 1418.

Subscriptions—(Continued).

12. *Remedies of the defrauded shareholders.*
 - in general. § 1424.
 - scope of the remedy in equity. § 1425.
 - necessary allegations in the bill. § 1426.
 - no relief to one who was a party to the fraud. § 1427.
 - frame of the bill: blending prayers for different kinds of relief: multifariously. § 1428.
 - cancellation of subscription where misrepresentation is unknown to subscriber. § 1429.
 - whether necessary to plead fraud specially. § 1430.
 - necessary elements of the plea of fraud. § 1431.
 - manner of pleading fraud in particular jurisdictions. § 1432.
 - instructing a jury in such a case. § 1433.
 - evidence in support of the defense of fraud. § 1434.
13. *Time within which to claim rescission.*
 - Diligence required of the subscriber in disaffirming. § 1438.
 - general doctrine in England. § 1439.
 - must be claimed while the company continues a "going concern." § 1440.
 - doctrine of *Oakes v. Turquand* considered. § 1441.
 - doctrine of *Henderson v. Royal British Bank*. § 1442.
 - illustrations of the foregoing. § 1443.
 - further illustrations: variance between prospectus and memorandum. § 1444.
 - notice of such variance. § 1445.
 - rectification of register. § 1446.
 - restitutio in integrum*. § 1447.
 - no rescission after the commencement of winding-up proceedings. § 1448.
 - rule in this country. § 1449.
 - no rescission after bankruptcy or insolvency. § 1450.
 - further of this subject. § 1451.
 - rescission must be claimed before liability is incurred. § 1452.
 - rule where there are no creditors. § 1453.
 - laches with circumstances showing acquiescence after knowledge. § 1454.
 - acquiescence by unreasonable delay. § 1455.
 - corporation estopped by acquiescence in *ultra vires* rescission. § 1456.
14. *Remedies against persons guilty of the fraud.*
 - action at law for deceit. § 1460.
 - limitation of such actions. § 1461.
 - directors' liability. § 1462.
 - not liable for false representations made under a reasonable and well-grounded belief of their truth. § 1463.
 - illustration: the case of *Peek v. Derry*. § 1464.
 - comments on this decision. § 1465.
 - this rule repealed in Great Britain by statute. § 1466.
 - the rule opposed to earlier decisions in the English Court of Chancery. § 1467.
 - decisions in support of this view. § 1468.
 - validity of stock which subsequently becomes worthless. § 1469.
 - such actions distinguishable from actions for rescission. § 1470.

Subscriptions—(Continued).

English doctrine that the plaintiff must have been an immediate purchaser from the company. § 1471.

American doctrine otherwise. § 1472.

illustrations of the foregoing. § 1473.

liability of the co-adventurers for each other's frauds. § 1474.

liability of the co-adventurers for the frauds of the agent employed by them. § 1475.

the fraudulent representation must have been a material inducement to the contract. § 1476.

views of Vice-Chancellor Wood. § 1477.

if the purchaser relied on the misrepresentations, immaterial that he made other inquiries. § 1478.

opinions mingling with fraudulent misrepresentations of facts. § 1479.

right of purchaser to rely upon the representations. § 1480.

analogy of the rule applied in actions for rescission. § 1481.

company with wider powers than those named in the prospectus. § 1482.

jurisdiction of law and equity concurrent. § 1483.

advantage of resorting to equity. § 1484.

view that grounds of relief are the same at law and in equity. § 1485.

American opinion on the subject. § 1486.

action against both directors and managers. § 1487.

15. *Fraudulent issues and overissues.*

constitutional provisions. § 1490.

gratuitous donees of fictitious stock not shareholders. § 1491.

neither are subscribers to fraudulent overissues. § 1492.

but *bona fide* subscriber or purchaser of shares may sue corporation for reimbursement. § 1493.

reason of the rule. § 1494.

how liable for fraudulent issues which are not overissues. § 1495.

no right to have such certificate canceled. § 1496.

but overissued shares canceled and dividends enjoined. § 1497.

distinction between fraudulent overissues made by an agent for his own benefit and those made by him while acting for the corporation. § 1498.

illustrations of this distinction: loss falling on the share-taker. § 1499.

doctrine that fraudulent certificates are not misrepresentations to the general public. § 1500.

comments on the *Mechanics' Bank case*. § 1501.

purchaser not innocent where circumstances put him on inquiry. § 1502.

may have an action against the officer guilty of the fraud. § 1503.

the same subject. § 1504.

plaintiff must have acted on the faith of the representation. § 1505.

remedy of the corporation against its agents for the damages thereby sustained by it. § 1506.

Suits.

See ACTIONS; EQUITY.

Summons.

See PROCESS.

Superintendent.

See MANAGING AGENT.

Surety.

See GUARANTY.

Surplus earnings.

See DIVIDENDS.

Suspension.

See OFFICERS; DISSOLUTION.

Surrender.

of shares. See CAPITAL STOCK, subd. 3.

of franchises. See DISSOLUTION, subd. 5.

Taxation.

1. *Of stock shares, in general.*

generally considered. § 2803.

shares taxable under the designation of "property." § 2804.

taxability of stockholders in distillery companies under United States internal revenue law. § 2805.

when joint-stock companies taxable as corporations. § 2806.

taxation of unauthorized overissue of shares. § 2807.

2. *Double taxation in respect of shares.*

distinction between capital and shares. § 2810.

taxation of shares not a taxation of capital and *vice versa*. § 2811.

view that taxation of both shares and capital is not double taxation. § 2812.

contrary view that the taxation of both capital and shares is double taxation. § 2813.

an intent to impose a double tax not imputable to the legislature. § 2814.

taxing the difference between the value of the tangible property and the value of the shares. § 2815.

the same subject continued. § 2816.

when a tax upon shares is deemed a tax against the corporation. § 2817.

further of this subject. § 2818.

rule how affected by default of corporation or shareholders. § 2819.

3. *Exemptions from taxation.*

no presumption in favor of exemption from taxation. § 2823.

no exemption from taxation under general words in statutes. § 2824.

nor because of the uniform practice of taxing officers. § 2825.

exemption of shares protected under United States Constitution. § 2826.

whether an exemption granted to a corporation extends to the shares in the hands of the shareholders. § 2827.

an exemption, expressed or implied, of corporate capital is an exemption of the shares. § 2828.

illustrations. § 2829.

effect of statutes vesting the corporate property in the shareholders according to their respective shares. § 2830.

tangible property of corporations exempt where the tax is laid upon the shares. § 2831.

contrary view that an exemption of the shares does not necessarily exempt the corporation. § 2832.

Taxation—(Continued).

whether preferred stock exempt from taxation as shares or taxable as a credit. § 2833.

earnings invested in preferred stock of another corporation lose their exemption. § 2834.

not entitled to reduction in respect of preferred stock of another corporation, under the head of "credit." § 2835.

sinking fund deductible as a credit. § 2836.

deduction on account of real estate held in other States. § 2837.

exemption of corporation exempts dividends of shareholders. § 2838.

an exemption in favor of stock attaches to a lawful increase of stock. § 2839.

shareholder not entitled to exemption because corporate funds invested in non-taxable securities. § 2840.

4. *Situs of shares for purpose of taxation.*

jurisdiction either of person or property sufficient to support the right of taxation. § 2846.

corporate shares taxable at the residence of their owners. § 2847.

rule applicable to shares held by residents in foreign corporations. § 2848.

legislature may change this *situs* and tax shares at residence of corporation. § 2849.

even in the case of national bank shares held by residents. § 2850.

subject to qualifications. § 2851.

5. *Taxation of shares in national banks.*

States and municipalities have no power to tax national banks. § 2854.

right of the States to tax national bank shares derived wholly from act of Congress. § 2855.

text of the Federal statute. § 2856.

capital not taxable *in solido*. § 2857.

personal property of such banks not taxable. § 2858.

taxing their circulating notes. § 2859.

taxing their surplus, profits, etc. § 2860.

taxing a State bank reorganizing as a national bank. § 2861.

State taxation after insolvency. § 2862.

shares and not capital taxable. § 2863.

what is a tax on capital and what on shares. § 2864.

municipal taxation of such shares. § 2865.

place of assessment and taxation. § 2866.

what is meant by "moneyed capital." § 2867.

what constitutes unlawful discrimination in such taxation. § 2868.

unlawful discrimination as between national banks and State moneyed institutions other than banks. § 2869.

unlawful discrimination in making the assessments. § 2870.

assessing shares at their actual value. § 2871.

deduction for debts. § 2872.

deductions for real estate. § 2873.

what exemptions constitute unlawful discrimination. § 2874.

discrimination in rate of taxation. § 2875.

bank compelled to furnish list of shareholders. § 2876.

compelling the corporation to pay the tax. § 2877.

Taxation—(Continued).

- legislative correction of assessments. § 2878.
- when taxation of shares works an exemption of corporate property. § 2879.
- taxing an increase of shares. § 2880.
- deducting value of real estate. § 2881.
- action to recover back. § 2882.
- remedy by injunction. § 2883.
- construction of various State statutes. § 2884

6. *Taxation of dividends.*

- policy of laying taxes on dividends. § 2890.
- the standard by which to determine what is a dividend under such statutes. § 2891.
- distinction between a tax on dividends and a tax on capital. § 2892.
- distinction between a tax on dividends and a license tax. § 2893.
- franchise tax admeasured upon dividends. § 2894.
- taxing prospective dividends to the corporation. § 2895.
- taxing the corporations on dividends already declared and paid. § 2896.
- taxing dividends paid in reduction of capital. § 2897.
- taxing dividends arising from damages for condemnation of the property of the corporation. § 2898.
- taxing the dividends. § 2899.
- taxing the dividends of foreign corporations. § 2900.
- dividing the dividend payable within any year so as to defeat taxation. § 2901.
- illustration. § 2902.
- corporation estopped by its own declaration of dividends. § 2903.
- taxation of dividends declared through mistake. § 2904.
- taxation of stock dividends. § 2905.
- but not when founded on a mere formal increase of capital. § 2906.
- when tax measured by dividend on paid-up capital. § 2907.
- taxation of corporate property represented by interest-bearing stock certificates. § 2908.

7. *Questions relating to assessment and collection.*

- certainty of description in assessment: "mining stock" — bank stock. § 2913.
- assessing upon corporation a tax against shareholders. § 2914.
- statute under which this mode of taxation not applied. § 2915.
- corporations may contest such a tax. § 2916.
- taxation of shares held under mortgage or pledge. § 2917.
- lien of taxes upon shares. § 2918.
- some questions of procedure. § 2919.

8. *Of foreign corporations.*

- general power of States to tax foreign corporations. § 8087.
- whether protected from unequal taxation by the Fourteenth Amendment. § 8088.
- further of this subject. § 8089.
- doctrine that States cannot tax foreign corporations differently from domestic corporations. § 8090.
- application of provisions in State constitutions requiring all taxation to be uniform. § 8091.

Taxation—(Continued).

States cannot tax foreign corporations which are agencies of the United States. § 8092.

State taxation of property invested in securities of the United States. § 8093.
taxing power of the property of foreign corporations as affected by the *situs* of their property. § 8094.

situs of interstate property for the purposes of taxation. § 8095.

situs of ships at sea. § 8096.

situs of the rolling stock of interstate railway companies. § 8097.

taxing the capital of foreign corporations. § 8098.

further of this subject. § 8099.

taxing the capital employed by foreign corporations within the State. § 8100.

taxing foreign corporations having agencies within the State. § 8101.

taxing foreign corporations "doing business in this State." § 8102.

taxing capital of foreign corporations domiciled within the State, but doing business without the State. § 8103.

interpretation of words and phrases in statutes laying taxes upon foreign corporations. § 8104.

taxation of foreign corporations when engaged in interstate commerce. § 8105.

taxation of domestic corporations engaged in interstate or foreign commerce. § 8106.

State licenses or privilege taxes upon foreign corporations engaged in interstate commerce. § 8107.

further of this subject. § 8108.

license taxes distinguished from licenses of occupations. § 8109.

taxes upon the receipts of transportation companies derived from interstate commerce. § 8110.

taxation of goods in interstate transit. § 8111.

taxation of goods in transit through the State. § 8112.

immaterial how the tax is laid. § 8113.

when interstate transit commences so as to exempt property from State taxation. § 8114.

taxing sales made within the State by non-resident corporations. § 8115.

taxation of gross receipts. § 8116.

the question how judicially settled. § 8117.

a further explanation of these decisions. § 8118.

the present doctrine restated. § 8119.

validity of a tax upon the franchise of foreign corporations. § 8120.

franchise taxes upon domestic corporations doing business wholly in foreign countries. § 8121.

taxation of telegraph companies. § 8122.

taxation of foreign telephone companies having domestic companies as licensees. § 8123.

taxation of express companies. § 8124.

taxation of sleeping-car companies. § 8125.

taxation of ferry companies incorporated in other States. § 8126.

taxation of foreign railroad companies operating domestic railroads under a lease. § 8127.

taxation of interstate bridge companies. § 8128.

Taxation—(Continued).

methods of assessment of interstate bridges. § 8129.

taxation of property of railroads consolidated with foreign railroad companies.
§ 8130.

exemption of foreign corporations from taxation. § 8131.

retaliatory taxation of foreign corporations. § 8132 a.

taxes or tolls for the use of improved facilities of navigation. § 8133.

excise taxes upon foreign corporations in Massachusetts. § 8134.

actions by foreign corporations to recover back taxes. § 8135.

9. Miscellaneous.

taxation of bonded indebtedness. § 6101.

exemptions of corporate property from. See FRANCHISES, subd. 8.

Telegraph companies.

See NEGLIGENCE.

taxation of. § 8122.

Teller of bank.

See BANKS.

1. In general.

the powers of this officer limited and special. § 4832.

whether binds the bank by his representations. § 4833.

his powers enlarged by usage. § 4834.

paying teller cannot bind bank by usurping functions of receiving teller. § 4835.

whether bank bound where deposits made in a manner contrary to custom.
§ 4836.

his powers touching the certification of checks. § 4837.

observations upon the impolicy of admitting this power. § 4838.

when bank bound by his fraudulent certification. § 4839.

his mistakes in entering deposits. § 4840.

liability of the bank for his frauds. § 4841.

his civil liability for embezzlements by other officers. § 4842.

Telephone companies.

foreign, taxation of. § 8123.

Title.

acquisition of by adverse possession. § 7837.

of receiver, nature of. See RECEIVERS, subd. 6.

to office of director. §§ 3883, 3884.

of laws, restraints as to. See CONSTITUTIONAL RESTRAINTS, subd. 3.

Tobacco warehouses.

organization of. § 184.

Toll roads.

See TOLLS.

organization of toll-road company. § 185.

Tolls.

See FREIGHTS.

Legislative power to regulate.

power to regulate charges of employments affected with a public interest.
§ 5530.

limitations upon this power: rates must not be confiscatory. § 5531.

fixing such charges according to certain classifications. § 5532.

Tolls—(Continued).

- whether the question what is a reasonable charge is a legislative or a judicial question. § 5533.
- grounds on which this power of regulation rests. § 5534.
- where the charter is subject to legislative alteration or repeal. § 5535.
- legislature may surrender this power. § 5536.
- what language not deemed such a surrender. § 5537.
- as to the uniform operation of such laws. § 5538.
- operation of such laws on the exclusive power of Congress over interstate commerce. § 5539.
- power to regulate such charges by means of commissions. 5540
- this legislative power not restrained by compacts between the corporation and third parties. § 5541.
- status* of contracts abrogated by interstate commerce law. § 5542.
- application of this power to railway companies. § 5543.
- application of this power to street railway companies. § 5544.
- application of this power to reorganized corporations. § 5545.
- regulation of charges for railway "switching." § 5546.
- statutes prohibiting unjust discrimination. § 5547.
- what is and what is not unjust discrimination. § 5548.
- the same subject continued. § 5549.
- recovery of excessive rates. § 5550.
- limitation of actions for penalties under such statutes. § 5551.
- right of turnpike company to charge and collect. §§ 5925-5932.

Torts.

See AGENTS; DIRECTORS; NEGLIGENCE; CASHIER OF BANK, subd. 5.

1. *Civil liability of corporations for torts — in general.*
 - general rule. § 6275.
 - application of the rule of *respondet superior* to private corporations. § 6276.
 - act must have been done within the scope of the employment or agency. § 6277.
 - not liable for torts of independent contractors. § 6278.
 - liable for *ultra vires* torts. § 6279.
 - further of this doctrine. § 6280.
 - illustrations of the doctrine. § 6281.
 - liable for torts *ultra vires* in the sense of being gratuitous. § 6282.
 - no defense that the tort was *ultra vires* the agent. § 6283.
 - liability of private corporations for a nuisance. § 6284.
 - corporations not included in general statutes giving penalties. § 6285.
 - statutory liability, when cumulative. § 6286.
 - corporations may become liable by ratification. § 6287.
 - when corporation may be sued jointly with agent. § 6288.
 - circumstances under which they cannot be joined. § 6289.
 - rule where the common-law system of pleading prevails. § 6290.
 - action for non-performance of public duties on Sunday. § 6291.
 - liability as between trustees in possession and purchasers under a mortgage. § 6292.
 - liability of a lessor railroad company for torts of its lessee. § 6293.
2. *Liability for trespasses and malicious injuries.*
 - liable for malicious torts of agents and servants. § 6298.

Torts—(Continued).

the true test suggested. § 6399.

difficulties in applying this test. § 6300.

untenable decisions on this question. § 6301.

ancient doctrine that a corporation could not commit a trespass except by deed.
§ 6302.

modern law that a corporation can commit a trespass like a natural person.
§ 6303.

rule extends to trespasses upon the person. § 6304.

corporations liable in common-law actions of trespass, trover, etc. § 6305.

liable for damages for assault and battery. § 6306.

illustration in the case of assaults upon passengers by the servants of incorporated carriers. § 6307.

further of this subject. § 6308.

instances under this head. § 6309.

liable for a malicious libel. § 6310.

not so liable where agent not acting in the course of duty. § 6311.

liable for malicious prosecution. § 6312.

liable for false imprisonment. § 6313

liable for malicious prosecution of civil actions. § 6314.

liable for damages caused by a conspiracy. § 6315.

liable for vexatiously and maliciously interfering with the business of another.
§ 6316.

3. *Liability for frauds.* See FRAUDS.

4. *Liability for negligence.* See NEGLIGENCE.

5. *Rules of damages—consequential and special.*

consequential damages for injuries to land: doctrine that damages not recoverable where work authorized by statute. § 6370.

doctrine that damages recoverable although work authorized by legislature.
§ 6371.

when such damages recoverable upon either theory. § 6372.

special damages. § 6373.

further of this subject. § 6374.

6. *Exemplary damages.*

grounds on which exemplary damages awarded. § 6377.

when such damages given for negligence. § 6378.

whether given in case of indictable offenses. § 6379.

whether evidence warrants such damages a preliminary question for the court.
§ 6380.

acting under a mistaken sense of duty. § 6381.

positive proof of malice or oppression not necessary. § 6382.

when corporations liable for exemplary damages. § 6383.

difference of opinion as to circumstances under which such damages awarded
against corporations. § 6384.

comments upon these different theories. § 6385.

further comments. § 6386.

view that exemplary damages may be awarded against corporations where they
would be awarded against an individual principal for the tort of his
agent. § 6387.

Torts—(Continued).

view that exemplary damages may be awarded against corporations where they would be awarded against an individual if acting for himself. § 6388.
the Federal doctrine on this question. § 6389.
such damages given against carriers for the wanton expulsion of passengers. § 6390.

cases not within the principle. § 6391.

cases where such damages have been awarded on the principle of direct authorization or subsequent ratification. § 6392.

statutes giving such damages. § 6393.

such damages given in the case of malicious libel published by corporations. § 6394.
some illustrative cases where such damages have been affirmed. § 6395.

7. Unlawful trusts and combinations for control of corporations.

power of corporations to make contracts diminishing competition. § 6399.

general statement in respect of the formation and growth of "trusts." § 6400.
all such combinations illegal. § 6401.

validity of statutes prohibiting such combinations. § 6402.

such combinations void, as unlawful attempts to create partnerships among corporations. § 6403.

invalidity of agreements by which stockholders surrender their voting power. § 6404.

illegality of corporations organized to purchase the shares of other corporations for the purpose of controlling their management. § 6405.

invalidity of corporations organized for the mere purpose of stifling competition. and engrossing a particular manufacture. § 6406.

such combinations void at common law as being in restraint of trade. § 6407.

no recovery upon contracts in furtherance of such combinations. § 6408.

whether the draughtsman of the trust agreement can recover compensation for his service. § 6409.

right of members of such combinations to rescind and withdraw. § 6410.

corporations may be dissolved for entering into such combinations. § 6411.

although the combination takes the form of a combination among the stockholders merely. § 6412.

power of the "trustees" to sell the shares deposited with them. § 6413.

status of "trust certificates." § 6414.

relation of manufacturing "trusts" to interstate commerce. § 6415.

8. Miscellaneous.

of receivers, remedies for. See RECEIVERS, subd. 16.

of bank cashier, liability. §§ 4824-4829.

Trades unions.

expulsion of members from. § 874.

Tramp corporations.

right of removal of actions extends to. § 8465.

Tramways, elevated.

organization of company for constructing. § 187.

Transfers of shares.

See SHARES; SHAREHOLDERS; SUBSCRIPTIONS.

1. Right of alienation.

general right of alienation of shares. § 2300.

Transfers of shares—(Continued).

right of directors to transfer shares. § 2301.
right of state to transfer its shares. § 2302.
purpose of transfer. § 2303.
transfers in fraud of the creditors of the transferor. § 2304.
temporary transfers to convey incidental benefits. § 2305.
contract of future sale of stock by subscriber to proposed company. § 2306.
transfer by minor. § 2307.
transfer after dissolution. § 2308.
transferability of shares in an unincorporated joint-stock company. § 2309.
general rule that a corporation has no power to restrain transfers of its shares.
§ 2310.

except in case of unanimous agreement, saving rights of third persons. § 2311.
transfer offices required to be kept. § 2312.
incidental rights not following transfers. § 2313.

2. *Lien of corporation on its shares.*

corporation has no implied lien on shares of stock. § 2317.
rule as to dividends. § 2318.
national banks have no lien. § 2319.
lien created by charter or statute. § 2320.
creation of lien by by-laws. § 2321.
equitable lien arising from language of certificate. § 2322.
construction of language creating the lien: "registered holder." § 2323.
company's power to lend to stockholders not enlarged. § 2324.
enforcing the lien: marshaling securities. § 2325.
foreclosure under decree: day of grace. § 2326.
indebtedness to support the lien. § 2327.
continued: debts of equitable owners of shares. § 2328.
continued: debt of nominal owner of shares held in trust. § 2329.
continued: invalid demand. § 2330.
time of ascertaining the fact of indebtedness. § 2331.
effect of the lien. § 2332.
notice of lien when created by general law. § 2333.
notice of lien when created by by-law or contract. § 2334.
lien for unpaid purchase money follows shares. § 2335.
effect of statute of limitations upon lien. § 2336.
waiver of this lien. § 2337.
circumstances amounting to a waiver. § 2338.
giving further credit after notice of conflicting liens. § 2339.
may waive formal assent of the directors. § 2340.
settlement with depositor by mistake no waiver. § 2341.
personal liability of directors for improperly approving transfers. § 2342.
corporation acting in abuse of its power. § 2343.
validity of statutes creating such liens. § 2344.

3. *Nature of share certificates.*

nature of share certificates. § 2345.
certificates not in the nature of letters of credit. § 2349.
are a continuing affirmation by the corporation of the title and interest of the
shareholder. § 2350.

Transfers of shares—(Continued).

liability of the corporation for fraudulent certificates. § 2351.
 an illustration. § 2352.
 share certificates not negotiable. § 2353.
 are subject to limitations and burdens created by general laws. § 2354.
 conditional share certificates. § 2355.
 validity of share certificates. § 2356.
 right to a certificate. § 2357.
 liability of officers for false certificates. § 2358.
 what constitutes an issuing. § 2359.
 certificate a vested right. § 2360.
 effect of issuing certificates to the wrong person: improper division of the shares
 among the co-adventurers. § 2361.
 interest-bearing certificate. § 2362.
 when right to certificate not determined by laches. § 2363.

4. Formalities; registration.

in general: according to charter, or by-laws, or usage, or certificate. § 2365.
 continued: consent of directors. § 2366.
 by-law requiring stock to be first offered to other shareholders. § 2367.
 blank assignment and power of attorney. § 2368.
 attestation: two witnesses. § 2369.
 assignment need not be under seal. § 2370.
 when transfer made by officer of the corporation and not by assignor. § 2371.
 what officer. § 2372.
 shares in names of executors: joint transfer. § 2373.
 transfer made on what book; stock ledger, subscription list. § 2374.
 transfer book or stock ledger as evidence. § 2375.
 what is a sufficient register. § 2376.
 issue of new certificates unnecessary but usual. § 2377.
 surrender of the old certificate not strictly necessary. § 2378.
 old certificate must be properly indorsed. § 2379.
 change of title when "received for record." § 2380.
 national banks: transfer on the books necessary. § 2381.
 transfer under a general assignment for creditors. § 2382.
 [Kentucky] record not constructive notice. § 2383.
 when the transfer must be by deed. § 2384.

5. Unregistered transfers.

corporation looks only to its books. § 2387.
 but may recognize the holders of unregistered certificates. § 2388.
 unregistered transfers good as between the parties to them. § 2389.
 sufficient to execute a gift. § 2390.
 and pass both the legal and equitable title. § 2391.
 theory that only an equitable title passes. § 2392.
 meaning of this expression. § 2393.
 contract to sell: assignment of certificate. § 2394.
 unregistered transfers estop the transferor. § 2395.
 and his privies, as his assignee in bankruptcy. § 2396.
 unregistered transfers not valid against third parties without notice. § 2397.
 danger of failing to obtain a transfer. § 2398.

Transfers of shares—(Continued).

illustration. § 2399.

not good against subsequent purchaser in good faith without notice. § 2400.

otherwise as to purchaser at judicial sale with notice. § 2401.

transfer in blank is a symbolical delivery. § 2402.

sale of shares and subsequent sale of interest due thereon. § 2403.

decisions under particular statutes. § 2404.

decisions on special transactions. § 2405.

6. *Priorities as between attaching creditors and unrecorded transferees.*

unregistered transfers not good as against creditors of the assignor. § 2409.

unless the attaching creditor has actual notice of the transfer. § 2410.

reasons in support of this view. § 2411.

view that unrecorded transfers prevail over subsequent attaching or execution creditors of the transferor. § 2412.

some holdings under this view. § 2413.

rights of attaching creditor paramount to those of subsequent purchaser without notice. § 2414.

distinction between statute and by-law provision requiring transfer on corporate books. § 2415.

notice to corporation immaterial. § 2416.

how in respect of shares in national banks. § 2417.

reasonable time allowed for transfer on the books. § 2418.

assignment after a levy by one creditor and before a levy by another. § 2419.

levying execution after transfer on the books. § 2420.

statutes making transfer void as against *bona fide* creditors or subsequent purchasers without notice. § 2421.

7. *Compelling transfers in equity.*

equity will compel transfers. § 2425.

illustrations. § 2426.

equity will decree transfer and payment of dividends. § 2427.

will compel transfer to an assignee in bankruptcy. § 2428.

where a second certificate has been wrongly issued in lieu of one reported lost. § 2429.

illustration: other cases where transfer on corporate books was compelled in equity. § 2430.

not compelled in the face of superior opposing equities. § 2431.

not compelled where there has been laches. § 2432.

conclusiveness of transfer under a decree. § 2433.

transfer of *ultra vires* stock not compelled. § 2434.

contract to sell not specifically performed. § 2435.

equity will not execute gift by compelling transfer by corporation. § 2436.

demand not ordinarily necessary. § 2437.

an illustration of this principle. § 2438.

ratification of the unauthorized act of the corporation. § 2439.

parties to such actions. § 2440.

no jury. § 2441.

8. *Mandamus to compel transfers.*

whether *mandamus* will lie to compel transfers. § 2445.

9. *Action at law for refusal to register.*

Transfers of shares—(Continued).

- refusal to register a valid transfer is a conversion. § 2447.
- so, also, a wrongful transfer to one without right. § 2448.
- no direct remedy against the officers. § 2449.
- doctrine that trover lies for the conversion of shares. § 2450.
- view that there is no sensible distinction between a conversion of the certificate and a conversion of the shares. § 2451.
- view that a conversion of the certificate is a conversion of the shares. § 2452.
- the same view under the codes. § 2453.
- there may be a conversion of the certificate though not of the shares. § 2454.
- trover lies for the conversion of stock certificates. § 2455.
- view that trover lies only for the certificate — not for the shares. 2456.
- right of action of member of voluntary association against subsequent corporation for refusing certificates of shares. § 2457.
- not necessary to show interest by formal ascertainment. § 2458.
- plaintiff must have right of immediate possession. § 2459.
- demand and refusal. § 2460.
- must tender amount of company's lien. § 2461.
- doctrine that *assumpsit* lies against the corporation. § 2462.
- special action on the case. § 2463.
- parties. § 2464.
- not necessary to plead consideration. § 2465.
- evidence in such actions: presumption of title in the case of a transfer in blank. § 2466.
- not necessary to show authority of president to permit transfers. § 2467.
- not necessary to prove fraud or collusion: negligence sufficient. § 2468.
- 10. *Measure of damages for refusing.*
 - measure of damages: value, dividends, interest. § 2471.
 - price of such shares in the market. § 2472.
 - highest market value between time when delivery was due and date of trial. § 2473.
 - amount sold for in excess of par value. § 2474.
 - lost dividends. § 2475.
 - for the conversion of a stock certificate. § 2476.
 - continued: actual damages, and not value of shares recoverable. § 2477.
 - for wrongful sale of shares by pledgee. § 2478.
 - measure of damages for conversion of stock by broker. § 2479.
 - in case of failure of broker to deliver. § 2480.
 - where the broker neglects to close a "straddle" for his principal. § 2481.
 - corporations not liable for subsequent depreciation. § 2482.
 - nominal damages for a technical conversion. § 2483.
- 11. *Fiduciary relation between company and stockholder.*
 - corporation a trustee for its shareholders for the protection of their title. § 2486.
 - duty of corporation as trustee for its shareholders. § 2487.
 - responsibility assumed by the corporation in discharging this trust. § 2488.
 - liability for permitting wrongful transfers. § 2489.
 - liable for restricting rightful transfers. § 2490.
- 12. *Its liability for wrongful transfers.*
 - liability of corporation for transferring on a power by one *non sui juris*. § 2493.

Transfers of shares—(Continued).

motives for transferring, when not examinable. § 2494.

transfers to effect collateral purposes. § 2495.

whether blank transferee must satisfy corporation that he is a genuine purchaser.
§ 2496.

corporation not a guarantor of shareholder's title. § 2497.

"certification" of shares. § 2498.

right of corporation to refuse substitution of assignee until subscription paid.
§ 2499.

costs given for unreasonably refusing to register. § 2500.

corporation should refuse transfer unless certificate surrendered. § 2501.

illustrations. § 2502.

new certificate issued without taking up original ones, invalid. § 2503.

certificate need not be presented in order to draw a dividend. § 2504.

transfers in pursuance of a general power of attorney but without the indorsement of the owner. § 2505.

validity of a by-law restraining transfers, except upon surrender of certificate, etc. § 2506.

illustration of the rule that a transferee demanding recognition must present his certificate. § 2507.

transfer under a decree of confiscation. § 2508.

effect of transfer by order of court to purchaser at sheriff's sale. § 2509.

transferring a fractional part of a share. § 2510.

previous transfer to purchaser under execution. § 2511.

injunction restraining transfer. § 2512.

transfers ordered by probate court. § 2513.

13. *Its duties and responsibilities where certificates are lost or stolen.*

rights of owner superior to those of *bona fide* purchaser of lost or stolen shares.
§ 2516.

corporation issues new certificate at its peril. § 2517.

and refuses transfers to the rightful owner at its peril. § 2518.

in such a case vendor of *bona fide* shareholder may be liable together with corporation. § 2519.

company may demand bond of indemnity before issuing new certificate. § 2520.

doctrine that company cannot refuse to issue certificates on bond of indemnity being given. § 2521.

protecting the company by allowing the cause to stand on the docket. § 2522.

statute of New York giving remedy for procuring duplicate certificate in case of loss of original. § 2523.

the constitutionality of this statute doubtful. § 2524.

construction of this statute. § 2525.

14. *Transfers of shares held in trust.*

issuing stock to third persons "in trust." § 2527.

effect of notice of the trust on the books of the corporation: duty of the corporation to protect the rights of the *cestui que trust*. § 2528.

different classes of fiduciaries; administrators, guardians, and assignees. § 2529.

[Indiana] administrator's sale under order of court. § 2530.

executors. § 2531.

when the executor is also trustee. § 2532.

Transfers of shares—(Continued).

shares held by "guardian." § 2533.

the case of trustees. § 2534.

lapse of time will not affect the notice of the trust. § 2535.

not necessary that the beneficiary should be named on the books. § 2536.

when shares are registered as held "in trust." § 2537.

other circumstances under which corporation chargeable with notice. § 2538.

illustration: corporation liable for assisting in unauthorized sale of shares held in trust. § 2539.

continued: advice of counsel does not exonerate corporation. § 2540.

liability for issuing new certificate where a trustee transfers in breach of his trust. § 2541.

trustee with discretion to sell. § 2542.

company not liable unless registration of transfer contributes to plaintiff's loss. § 2543.

bona fide purchasers of such shares protected. § 2544.

illustration: *bona fide* purchase of shares affected with a trust. § 2545.

assignee in insolvency not a *bona fide* purchaser. § 2546.

irregular transfer by the trustee to the *cestui que trust*. § 2547.

several trustees, all must join in the transfer. § 2548.

right of *cestui que trust* to demand a transfer. § 2549.

when trustee not a purchaser and not liable for unpaid balances. § 2550.

[Massachusetts] effect of a sale by the *cestui que trust*. § 2551.

15. *Liability for transferring on forged powers of attorney.*

generally considered. § 2555.

corporation liable to shareholder for recognizing a forged indorsement. § 2556.

qualification that the original shareholder not negligent. § 2557.

such negligence may consist in receiving dividends on the reduced number of shares. § 2558.

doctrine that shareholder's right of action not concluded by allowing the escape of the forger. § 2559.

continued: reasons for concluding that to allow the forger to escape does not bar shareholder's right of action against corporation. § 2560.

theory of liability where certificates are fraudulently transferred by holder's agent. § 2561.

not negligence for the shareholder to afford an opportunity for a forgery. § 2562.

an illustration of the English doctrine. § 2563.

another illustration of the English doctrine. § 2564.

English rule where blank transfers are lodged with a broker who fraudulently fills them up. § 2565.

alteration of an assignment of a part of the shares named in the certificate, so as to make it an assignment of all. § 2566.

original shareholder has a remedy in equity against corporation. § 2567.

original shareholder no remedy as against subsequent purchaser. § 2568.

notice to shareholder of application to register not an estoppel. § 2569.

foundation of the rule which holds the corporation thus liable. § 2572.

further of the doctrine. § 2573.

illustration of this principle. § 2574.

another illustration. § 2575.

Transfers of shares—Trust fund INDEX.

Transfers of shares—(Continued).

liability of corporation for fraudulent issue of shares. § 2577.

grounds of this liability: *respondeat superior* — negligence — estoppel — ratification. § 2578.

principle illustrated: certificates issued through a forgery by the president. § 2579.
forged transfer of name of a co-executor. § 2580.

the first taker of the original certificate has no right of action against the company. § 2581.

but the company has a right of action against him. § 2582.

rule as to forged commercial paper declared by the English Court of Appeal in the case of the Vagliano acceptances. § 2583.

16. *Divestitures of liability by transferring shares.* See STOCKHOLDERS, subd. 15.

Treasurer.

See OFFICERS.

1. *In general.*

his appointment and tenure. § 4714.

his *status* and duties. § 4715.

no powers as contracting agent. § 4716.

no discretion to settle debts, release claims, or allow offsets. § 4717.

nor to assign a mortgage held by the corporation. § 4718.

treasurer of ideal corporation no power to make or accept negotiable paper.

such power presumed in the treasurer of a trading corporation. § 4720.

decisions denying this power to the treasurer of a business corporation. § 4721.

whether he has power to indorse. § 4722.

no power to make, accept, or indorse for accommodation under a general power to indorse. § 4723.

rights of *bona fide* holders of such paper. § 4724.

whether an action in such cases for money had and received. § 4725.

may bring suit to recover corporate debts. § 4726.

no power to confess judgments. § 4727.

when notice to him affects the corporation. § 4728.

holding out as evidence of his authority. § 4729.

purchasing the property of the corporation. § 4730.

accounting to the corporation. § 4731.

his liability to third persons. § 4732.

miscellaneous holdings touching the civil liability of treasurers, cashiers, and other ministerial officers of corporations. § 4733.

liability of corporation for his torts: *respondeat superior*. § 4734.

Trespasses.

of corporations, liability for. See TORTS, subd. 2.

Trover.

See CONVERSION.

Trust certificates.

status of. § 6414.

Trust companies.

organization of. § 188.

Trust fund.

See STOCKHOLDERS.

capital stock regarded as. § 2951.

Trust funds.

restoration of by receiver. See RECEIVERS, subd. 13.

Trusts.

for control of corporations. See TORTS, subd. 7.

incidental powers and duties of receiver in administering. §§ 6993-7017.

Turnpike corporations.

powers of, generally. See CORPORATE POWERS, subd. 10.

Ultra vires.

See CORPORATE POWERS.

1. Nature and extent of doctrine.

presumption that corporations act within their powers. § 5967.

general statement of the doctrine of *ultra vires*. § 5968.

how the doctrine of *ultra vires* started and was misapplied in growing. § 5969.

judicial statements of the reasons on which the doctrine of *ultra vires* rests. § 5970.

comments on these statements of doctrine. § 5971.

ultra vires acts of corporations deemed "unlawful." § 5972.

doctrine that persons dealing with corporations are bound to take notice of their powers. § 5973.

persons dealing with corporations bound to take notice of the powers of their agents. § 5974.

distinction between contracts wholly outside of the power of the corporation and those outside of it in a given particular, or through some undisclosed circumstance. § 5975.

illustrations of this doctrine. § 5976.

further illustrations. § 5977.

distinction between a want of power, and a want of the necessary formality in executing a power. § 5978.

right of subrogation in respect of *ultra vires* debts. § 5979.

ultra vires contracts between two corporations. § 5980.

contracts void in part and good in part. § 5981.

exercise of power which has been exhausted. § 5982.

money paid on *ultra vires* contract may be recovered back. § 5983.

further of this subject. § 5984.

where the illegality is known to both parties. § 5985.

contracts prohibited by the by-laws of the corporation. § 5986.

effect of by-laws on contracts with members of corporation. § 5987.

what by-laws the corporation may enact affecting the rights of members. § 5988.

by-laws overrule discretion of directors. § 5989.

by-laws evidence against the company. § 5990.

by-laws in excess of the powers embraced in the powers of association. § 5991.

distinction between tortious and contractual liability for *ultra vires* acts. § 5992.

torts committed in the prosecution of an *ultra vires* business. § 5993.

constitutional prohibition against *ultra vires* acts. § 5994.

obligations imposed in favor of third parties by the charter. § 5995.

assuming power by claiming it in articles of association. § 5996.

power exercised by majority of stockholders. § 5997.

contracts by which corporations abnegate their public duties. § 5998.

right to disaffirm after part performance. § 5999.

Ultra vires—(Continued).

especially in the case of contracts transferring public duties. § 6000.
 or those otherwise opposed to public policy. § 6001.
 or which otherwise involve a continuing violation of law. § 6002.
 right of disaffirmance predicated upon doing justice to the other party. § 6003.
 right of the other party to recover what he has lost after disaffirmance. § 6004.
 illustration in the case of invalid municipal bonds. § 6005.
ultra vires contract not allowed to stand as security for damages for refusal of
 further performance. § 6006.
 doctrine that the corporation is not estopped by receiving the benefits of the
 contract. § 6007.
 doctrine that the individual is not estopped in such cases. § 6008.
 no estoppel where the other contracting party knows that the contract is *ultra*
vires. § 6009.

2. Theories under which the application of the doctrine is denied.

estoppel to plead *ultra vires*. § 6015.
 corporation estopped when it has received the benefit. § 6016.
 or where the other party has acted to his disadvantage. § 6017.
 illustrations of this doctrine. § 6018.
 further illustrations. § 6019.
 estoppel extends to privies of corporation. § 6020.
 the other party estopped when he has received the benefit. § 6021.
 or where the corporation has acted to its disadvantage. § 6022.
 rule where the contract is fully executed on both sides. § 6023.
 rule where the contract has been fully executed on either side. § 6024.
 rule where the contract has been executed by the party contracting with the
 corporation. § 6025.
 rule where the contract has been executed by the corporation. § 6026.
 estoppel in favor of the *bona fide* holder of commercial paper. § 6027.
 doctrine that violation of charter or want of power cannot be set up collater-
 ally. § 6028.
 cases where this doctrine has been applied. § 6029.
 who not set up such violations or want of power. § 6030.
 illustrations of the foregoing. § 6031.
 when stockholders may and may not. § 6032.
 doctrine that the question whether a corporation has acted *ultra vires* can only
 be raised by State. § 6033.
 limitations of this doctrine and exceptions to it. § 6034.
 expressions and applications of this principle. § 6035.
 whether it can be harmonized with the doctrine of *ultra vires*. § 6036.
 further applications of this principle. § 6037.
 further applications of it. § 6038.
 further applications. § 6039.
 borrowers cannot keep the money and plead *ultra vires*. § 6040.
 persons advancing money to corporations not bound to see to its proper appli-
 cation. § 6041.
 other cases in which the courts have refused to admit the defense. § 6042.

Unlawful trusts.

See *TORTS*, subd. 7.

Usages.

- of brokers in stock dealings. § 2700.
- of stock exchange, how far controlling. § 2701.

User.

- See CORPORATE EXISTENCE, subd. 3.

Usury.

- indictment of corporation for. § 6431.

Variance.

- See PLEADINGS.

Vendibility.

- of franchises. See FRANCHISES, subd. 3.

Venue.

- See JURISDICTION.
- of actions by and against corporations. §§ 7421-7440.

Verification.

- of pleadings by corporation. § 7632

Vice-President.

- See PRESIDENT.

1. In general.

- nature of this office. § 4687.
- powers of this officer. § 4688.
- his personal liability. § 4689.

Visitation.

- See MANDAMUS; QUO WARRANTO.

Voluntary associations.

- See ASSOCIATIONS, UNINCORPORATED.

Voluntary dissolution.

- See DISSOLUTION, subd. 5.

Voting.

- See ELECTIONS.
- right to vote before shares are paid for. § 1692.
- in respect of shares held by executors or trustees. § 3871.
- manner of. § 3866.
- by proxy. § 3876.

Waiver.

- See JURISDICTION, subd. 6.
- of jurisdiction over person by voluntary appearance. § 7552.
- of forfeiture, for non-payment of premium. § 1776.
- of notice of meeting by appearance. § 712.

Warrant of arrest.

- See PROCESS.

Warranty.

- See SHARES.
- in sale of stock shares. §§ 2737-2742.

Water-works.

- organization of water-works company. § 190.

Whaling companies.

- powers of, generally. § 5959.

Winding up.

See DISSOLUTION, § 5203.

1. *At suit of stockholders.*

under statutes of New York. § 6692.

order to show cause against the application. § 6693.

whether a majority can wind up. § 6694.

decisions relating to the number and value of stockholders whose concurrence is necessary to support the proceeding. § 6695.

when not dissolved at the suit of a single stockholder. § 6696.

doctrine that equity will decree a dissolution where the company has collapsed. § 6697.

right of a shareholder to have the corporation wound up where it has embarked in an *ultra vires* business. § 6698.

various matters of procedure. § 6699.

notice of the application for dissolution. § 6700.

notice to the Attorney-General. § 6701.

intervention of creditors. § 6702.

powers of courts of equity in dissolving and winding up corporations. § 6703.

what deemed acts of insolvency. § 6704.

ordering the election of directors. § 6705.

enjoining the prosecution of other suits. § 6706.

proceedings for the winding up of insurance companies. § 6707.

insolvency proceedings against railway companies. § 6708.

insolvent building associations wound up according to the principles of equity. § 6709.

distribution in the voluntary winding up of savings banks. § 6710.

proceedings by bank commissioners. § 6711.

dissolution by unanimous resolution of the stockholders. § 6712.

when unanimous consent required to wind up an unincorporated association. § 6713.

2. *Miscellaneous.*

winding up, application of statutory remedies. §§ 4538-4548.

jurisdiction in equity as to. § 4538-4548.

of national banks, fees and expenses. § 7313.

